

(2005) 09 MAD CK 0028

In the Madras High Court

Case No : H.C.P. (MD) No's. 171, 188, 198 and 220 of 2005

K. Thirupathi

APPELLANT

Vs

District Magistrate and District Collector and Another

RESPONDENT

Date of Decision : 09-09-2005

Acts Referred:

Constitution of India, 1950 — Article 22, 226
Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders,
Goondas, Immoral Traffic Offenders and Slum-Grabbers, Act, 1982 — Section 3

Citation : (2005) CriLJ 4389 : (2005) 4 RCR(Criminal) 825

Hon'ble Judges : S. Sardar Zackria Hussain, J;P. Sathasivam, J;C. Nagappan, J

Bench : Full Bench

Advocate : B. Sriramulu, as Amicus Curie, M. Patturajan, in H.C.P. No. 171 of 2005, R. Ramasamy, in H.C.P. No. 188 of 2005, K. Porkodikannan and R. Rajagopal, in H.C.P. No. 198 of 2005, A.K. Azhagarsami and S. Mahendrapathy, in H.C.P. No. 220 of 2005, for the Appellant; Abudukumar Rajarathinam, Government Advocate, for the Respondent

Judgement

P. Sathasivam, J.—These batch of Habeas Corpus Petitions came before this Bench by way of Reference by a Division Bench of this Court

dated 11.8.2005. The order of Reference is as follows:

(a) In preventive detention cases, one of the essential requirements as recognised in a series of rulings is that in the event of the detenu being

already in custody as a remand prisoner, the detaining authority should record his satisfaction in a proper manner that there was a possibility of the

detenu filing a petition for bail and likelihood of coming out on bail. This has been repeatedly emphasized in several judgments of the Supreme

Court and the High Courts. But in many of the recent cases, an important issue which had arisen for consideration is as to whether it is necessary

that the word ""imminent"" should be used in the context of the possibility of the

detenu coming out on bail.

(b). Learned Additional Public Prosecutor refers to the judgment of the Supreme Court in Rivadeneyta Ricardo Agustin v. Government of Delhi,

1994 SCC (Cri.) 354, and contends that it is sufficient that the detaining authority records his satisfaction indicating that the release was likely or

that there was a real possibility of his being released. Specific reference is made to the observations in Paragraphs 8 to 10 of the judgment which

read as follows:

(8). The above statement merely speaks of a ""possibility"" of the detenu's release in case he moves a bail petition. It neither says that such release

was likely or that it was imminent. Evidently, the statement falls short of the requirement enunciated by this Court in Kamarunnissa. Even in the

return filed in this petition, the authority has not stated (in response to Ground "B" of the writ petition) that there was material before him upon

which he was satisfied that the petitioner was likely to be released or that such release was imminent. In Ground "B" of the writ petition, the

petitioner had alleged:

That the respondent knew perfectly well that a complaint has already been filed in Court against the petitioner. He also knew that his two

applications for bail were rejected by the Court. Between June and August, the petitioner had made no attempt whatsoever to secure any bail

either from the trial Court or from any superior Court. Without any application of mind to this aspect of the matter, the respondent acted perversely

in coming to the conclusion that the petitioner was ever likely to indulge in any offence of smuggling, to prevent which the respondent found it

necessary to pass the order Annexure "A" hereto.

(9). In response thereto, the following statement is made in para 9-B of the return:

As regards contents of ground B, I say that the petitioner moved applications for bail which were rejected by the concerned Courts and the

release of the petitioner on bail on subsequent application could not be ruled out. The fact that the petitioner was in judicial custody was within the

knowledge of the detaining authority and having full knowledge of the facts, the detaining authority considered it necessary to detain the petitioner.

The subjective satisfaction was arrived at having full knowledge of the

facts."" (emphasis supplied)

10. The learned Additional Solicitor-General placed before us the relevant file but he could not bring to our notice any material indicating that the release of the petitioner was likely or that there was a real possibility of his being released and/or that the authority was satisfied about the said aspect.

(c) On the basis of the above extract, learned Additional Public Prosecutor contends that the usage of the word ""imminent"" was only one of the alternate expressions which can be appropriately used and that it was not mandatory to use the word ""imminent"".

(d). But the fact remains that in recent times, several judgments have been rendered by this Court holding that in the absence of the usage of the word ""imminent"", the order of detention was liable to be set aside. The following are only some of the several judgments which have been rendered and are given here as instances of orders by several Benches including of this Bench:

(i) Thirumavalavan v. Government of Tamil Nadu, 1995 MLJ (Crl.) 228; (ii) Meganathan v. District Collector, Karur and Anr., Order in H.C.P.

No. 33 of 2005 dated 16.4.2005; and (iii) Uthandi Vs. The District Magistrate and District Collector and Another, .

(e) But in view of the submission of the learned Additional Public Prosecutor and the materials placed before us, we are inclined to feel that such

strict insistence of the usage of the word ""imminent"" may not be necessary. Apart from Paragraphs 8 to 10 in Rivadeneyta Ricardo Agustin v.

Government of Delhi, 1994 SCC (Crl.) 354, as extracted above, in Amirthalal and Ors. v. Union Government, 2001 (1) SCC 341: 2000 (7)

Supreme 584, also, the Supreme Court had made observations disclosing that it would be sufficient to observe ""likelihood of the petitioners being released on bail"".

(f) However, inasmuch as in recent times the argument on behalf of the petitioners that the usage of the word ""imminent"" is a must had been gaining acceptance by all Benches of our High Court, we feel that an authoritative pronouncement by a larger Bench would enable a definite statement of the legal position. We feel that the word ""imminent"" is only one of the acceptable or required expressions to reflect the satisfaction of the detaining

authority but not the only expression and that the failure to use the said word need not end in invalidating the order. Even in the absence of the usage of the word ""imminent"", detention orders could be held to be valid if the authority, uses convincing expressions reflecting the ""likelihood", possibility", ""very likely"" or ""most likely"", etc. ""In the said background, in view of the submission of the petitioner in these cases that on failure to use the word ""imminent"" the detention order would be liable to be set aside, we are inclined to refer the same for decision by a larger Bench"".

2. As the question raised by way of Reference is a limited one, there is no need to traverse the facts of each case here. However, all the detenus in the above cases are detained under Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 (Act 14/1982). The said detention orders are under challenge on various grounds in the above Habeas Corpus Petitions either by the detenus themselves or by their relatives. It is further seen that among the grounds raised, invariably in all the petitions, a ground has been taken stating that the detaining authority neither possessed with required materials nor considered the relevant fact, namely, ""imminent possibility"" of coming out on bail when the detenu was in custody by a valid order of remand. As rightly stated in the order of reference, the question relating to ""imminent"" possibility of coming out on bail has been interpreted and expressed in many decisions of the High Courts and the Supreme Court. Hence, the short question to be considered here is whether the failure to use the word ""imminent"" in the order of detention would make the order invalid; and equally whether the detaining authority could be justified in using other convincing expressions.

3. We heard the arguments of Messrs M. Patturajan, R. Ramasamy, K. Porkodikannan, A.K. Azhagarsami, learned counsel for the petitioners and all the counsel reiterated the dictum laid down in *Rivadeneyta Ricardo Agustin v. Government of Delhi*, 1994 SCC (CrL.) 354, and placed their submissions that in the absence of ""imminent possibility"" of coming out on bail, the detention order cannot stand. Inasmuch as the question raised occurs in almost all the preventive detention orders that are being challenged before the High Court and considering the importance of the question, we appointed Mr. B. Sriramulu, learned Senior Counsel, as amicus curie. Mr. Abudukumar Rajarathinam, learned Government

Advocated represented the State.

4. Mr. B. Sriramulu, learned Senior Counsel, placed before us the following decisions:

(i) Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, ; (ii) N. Meera Rani Vs. Government of Tamil Nadu and Another, ; (iii)

Birendra Kumar Rai alias Virendra Kumar Rai Vs. Union of India (UOI) and Others, ; (iv) Amritlal v. Union Government, through Secretary,

Ministry of Finance, 2001 (1) SCC 341: 2000 (7) Supreme 584 : 2001 1 SCC 341; (v) T.P. Moideen Koya Vs. Government of Kerala and

Others, ; (vi) Velumurugan @ Velu Vs. The Commissioner of Police and Another, ; (vii) Kallumai alias Selvam v. State of Tamil Nadu, 2005

MLJ(Cri.)261.

5. In the first decision, namely, Binod Singh's case 1986 SCC (Cri.) 490, the contention raised before the Supreme Court was that the order of

preventive detention could only be justified against a person in detention if the detaining authority was satisfied that his release from detention was

imminent and the order of detention was necessary for putting him back in jail. After an elaborate consideration, Their Lordships arrived at the

following conclusion: (Para 7)

7. It is well settled in our constitutional framework that the power of directing preventive detention given to the appropriate authorities must be

exercised in exceptional cases as contemplated by the various provisions of the different statutes dealing with preventive detention and should be

used with great deal of circumspection. There must be awareness of the facts necessitating preventive custody of a person for social defence. If a

man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the

instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the

question that the said detenu might be released or that there was such a possibility of his release was taken into consideration by the detaining

authority properly and seriously before the service of the order. A bald statement is merely an ipse dixit of the officer. If there were cogent

materials for thinking that the detenu might be released then these should have been made apparent. Eternal vigilance on the part of the authority

charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens. In the affidavits on behalf of the detaining authority though there are indications that transfer of the detenu from one prison to another was considered but the need to serve the detention order while he was in custody was not properly considered by the detaining authority in the light of the relevant factors. At least the records of the case do not indicate that. If that is the position, then however disreputable the antecedents of a person might have been, without consideration of all the aforesaid relevant factors, the detenu could not have been put into preventive custody. Therefore, though the order of preventive detention when it was passed was not invalid and on relevant considerations, the service of the order was not on proper consideration"".

6. In the next case, namely, N. Meera Rani's case, 1989 Cri LJ 2190, the Supreme Court after referring to almost all the earlier case laws, summarized the principle as under: (Para 22)

22. We may summarise and reiterate the settled principle. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention and the decision must depend on the facts of the particular case; preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order etc., ordinarily it is not needed when the detenu is already in custody; the detaining authority must show its awareness to the facts of subsisting custody of the detenu and take that factor into account while making the order; but, even so, if the detaining authority is reasonably satisfied on cogent material that there is likelihood of his release and in view of his antecedent activities which are proximate in point of time he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made even in anticipation to operate on his release. This appears to us to be the correct legal position.

7. In Birendra Kumar Rai alias Virendra Kumar Rai Vs. Union of India (UOI) and Others, , the following conclusion is relevant: (Para 9)

9. It was contended on behalf of the petitioner that there was no possibility of the petitioner being released on bail and as such there was no ground or justification for the detaining authority to hold that there was a

compelling necessity for the detention of the petitioner. We find no force in this contention. The detaining authority was aware that a bail application had already been filed by the petitioner and the same was to come up for hearing on 7.12.1990 and in these circumstances the detaining authority was justified in recording the satisfaction of compelling necessity of issuing the detention order as it could not have been predicted with certainty that the petitioner would not be released on bail..

8. In the next case, namely, *Amritlal's case*, 2001 (1) SCC 341: 2000 (7) Supreme 584, it was held: (Paras 6 and 7)

6. The requirement as noticed above in *Binod Singh's case* (supra) that there is "likelihood of the petitioner being released on bail" that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the "likelihood of his moving an application for bail" which is different from "likelihood to be released on bail". This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in *Binod Singh's case*, (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that, satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order.

9. In *T.P. Moideen Koya Vs. Government of Kerala and Others*, , the statement of law made in Para 21 is relevant: (Para 21)

21. In *Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others*, , there were several criminal cases against the detenu including a murder case in which investigation was in progress. At the time when the detention order was passed, the detenu had surrendered in respect of the criminal charge. The detention order was served soon after he surrendered in the murder case. The Court then held that from the affidavit of the District Magistrate it did not appear that either the prospect of the immediate release of the detenu or other factors which could justify the detention of a person already in custody, were properly considered in the light of the principles laid down in *Rameshwar Shaw Vs. District Magistrate, Burdwan* and *Another*, and *Ramesh Yadav Vs. District Magistrate, Etah and Others*, . The

principle is that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the authority passing the detention order for inferring that the detenu was likely to be released on bail. In *Kamarunnissa and Others Vs. Union of India* and another, , after review of all the earlier decisions, the law on the point was enunciated as under in Para 13 of the Report: (SCC pp. 140-41)

13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly

be passed--

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he has reason to believe on the basis of reliable material placed before him --

(a) that there is a real possibility of his being released on bail, and

(b) that on being so released he would in all probability indulge in prejudicial activity, and

(3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such

an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding

such opposition to question it before a higher Court. What this Court stated in the case of *Ramesh Yadav Vs. District Magistrate, Etah and*

Others, , was that ordinarily a detention order should not be passed merely to preempt or circumvent enlargement on bail in cases which are

essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in

custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention.

10. Mr. B. Sriramulu, learned Senior Counsel, has contended that expressions used to record satisfaction in different form is immaterial and relied

on a decision of the Supreme Court in *Kirit Kumar Chaman Lal Kundaliya Vs. Union of India (UOI) and Others*, . The following statement in Para

12 is pressed into service: (Para 12)

12.....There is no particular charm in the expressions "relied on", "referred to" or

"based on" because ultimately all these expressions signify one

thing, namely, that the subjective satisfaction of the detaining authority has been arrived at on the documents mentioned in the grounds of

detention.....

11. In *Velumurugan @ Velu Vs. The Commissioner of Police and Another*, a Division Bench of our Court after referring to a decisions in

Kamarunnissa and Others Vs. Union of India and another, ; and *Rivadeneyta Recardo Aguatin v. Govt. of Delhi*, 1994 Supp.(I) SCC 597 : 1994

SCC (Cri.) 354, held that unless there is a clear expression by the detaining authority in the grounds of detention with reference to the imminent

possibility of the detenu being released on bail by filing bail application, the detaining authority would not choose to pass the detention order. They

further held that in order to prevent the detenu from committing the acts, which would be disturbance to public order and public health, the

detaining authority shall consider the materials and on the basis of subjective satisfaction that there is imminent possibility of the detenu coming out

on bail or likelihood of the detenu being released on bail, the detaining authority may pass such an order under Tamil Nadu Act 14 of 1982. They

finally concluded that when such an essential requirement, namely, the imminent possibility of the detenu coming out on bail, is absent, it has to be

held that the order of detention is vitiated. After finding out that there is a mere reference of the possibility of the detenu coming out on bail, and the

expression, in explicit terms about the imminent possibility of the detenu coming out on bail, is absent, the Division Bench quashed the order of

detention.

12. In *Kallumai alias Selvam v. State of Tamil Nadu*, 2005 MLJ CrL 261, another Division Bench of our High Court has also considered the

relevancy of "imminent possibility" while detaining a person under Act 14/1982.

13. Now we shall consider the decisions relied on by Mr. Abudukumar Rajarathinam, learned Government Advocate. He relied on the following

decisions:

(i) *State of Gujarat v. Ismail Juma*, AIR 1982 SC 683 ; (ii) *Alijan Mian Vs. District Magistrate, Dhanbad and Others*, ; (iii) *Dharmendra*

Suganchand Chelawat and another Vs. Union of India and others, ; (iv) *Abdul Sathar Ibrahim Manik v. Union of India*, 1991 CrL LJ 3291 ; (v)

Kamarunnissa and Others Vs. Union of India and another, ; (vi) Noor Salman Makani v. Union of India, 1994 SCC (Crl) 521; (vii) Rivadeneyta

Ricordo Agustin v. Govt. of National Capital Territory of Delhi, 1994 SCC (Crl.) 354; (viii) Veeramani v. State of Tamil Nadu, 1994 SCC (Cri.)

482; (ix) Phulwari Jagdambaprasad Pathak v. R.H. Medonca, 2000 SCC (Crl.) 1263; (x) Union of India v. Paul Manickam, 2004 SCC (Crl)

239.

14. The exercise of jurisdiction under Article 226 of the Constitution of India by the High Courts has been explained in State of Gujarat v. Ismail

Junta, AIR 1982 SC 683 : (Para 4)

4....The High Court in its writ jurisdiction under Article 226 of the Constitution is to see whether the order of detention has been passed on the

materials before it. If it is found that the order has been based by the detaining authority on materials on record, then the court cannot go further

and examine whether the material was adequate or not which is the function of an appellate authority or Court. It can examine the material on

record only for the purpose of seeing whether the order of detention has been based on no material. The satisfaction mentioned in Section 3 of the

Act is the satisfaction of the detaining authority and not of the Court. The reason is that the satisfaction of the detaining authority is subjective.

15. In Alijan Mian Vs. District Magistrate, Dhanbad and Others, , the observation made in Para 9 is relevant:

9. It may be pointed out at the very outset that the detaining authority was alive to the fact that the petitioners were in jail custody on the date of

the passing of the detention orders as will be clear from the following statement in the grounds of detention:

The subject is in jail and is likely to be released on bail....In the circumstances I am satisfied that if he is allowed to remain at large, he will indulge

in activities prejudicial to the maintenance of public order.

The position would have been entirely different if the petitioners were in jail and had to remain in jail, for a pretty long time. In such a situation there

could be no apprehension of breach of "public order" from the petitioners. But the detaining authority was satisfied that if the petitioners were

enlarged on bail, of which there was every likelihood, it was necessary to prevent them from acting in a manner prejudicial to public order.

16. In *D.S. Chelawat v. Union of India*, 1991(1) SCC 746, the following conclusion is pressed into service: (Para 21)

21. The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for

that purpose it is necessary that the grounds of detention must show that--

(i) the detaining authority was aware of the fact that the detenu is already in detention; and

(ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention. The expression ""compelling

reasons"" in the context of making an order for detention of a person already in custody implies that there must be cogent material before the

detaining authority on the basis of which it may be satisfied that--

(a) the detenu is likely to be released from custody in the near future, and

(b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in

prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities.

17. In *Abdul Sathar Ibrahim Manik Vs. Union of India and others*, , the relevant passage is as follows: (Para 4)

4. We see no force in the first submission namely that there was no compelling necessity for passing the detention order. It is true that when the

detention order was passed on 7.11.1990 the detenu was in jail and his bail application also was rejected and his passport also was seized. But

the detaining authority has mentioned in the grounds that--

I am aware that you are under judicial custody and possibility of your release on bail in the near future cannot be ruled out. Also nothing prevents

you from moving bail application in the jurisdictional Court and getting released on bail"".

Therefore it cannot be said that the detaining authority did not apply his mind to this appeal. It is entirely within his subjective satisfaction whether

there are such compelling circumstances or not. He has noted that though the detenu was in jail there is likelihood of his being released and

therefore it is clear that he has applied his mind to this aspect also.

18. In *Kamarunnissa and Others Vs. Union of India and another*, , the Supreme Court has referred to the statement made by the detaining

authority, namely, (Para 9)

9. Though you are in judicial custody but can be released on bail any time as the offence with which you have been charged is bailable in which

case you may indulge in similar prejudicial activities.

After analysing the various decisions, the Supreme Court has concluded thus: (Para 13)

13. From the catena of decisions referred to above it seems clear to us that even in the case of a person in custody a detention order can validly

be passed--

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he has reason to believe on the basis of reliable material placed before him--

(a) that there is a real possibility of his being released on bail, and

(b) that on being so released he would in all probability indulge in prejudicial activity and

(3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in this behalf, such

an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding

such opposition, to question it before a higher Court. What this Court stated in the case of Ramesh Yadav Vs. District Magistrate, Etah and

Others, , was that ordinarily a detention order should not be passed merely to preempt or circumvent enlargement on bail in cases which are

essentially criminal in nature and can be dealt with under the ordinary law. It seems to us well settled that even in a case where a person is in

custody, if the facts and circumstances of the case so demand, resort can be had to the law of preventive detention.....

19. In Noor Salman Makani v. Union of India, 1994 SCC (Cri) 521, the following statement made in paragraph 5 is relevant:

5. The next submission is regarding non-application of mind by the detaining authority with regard to the circumstance that the detenu was in jail

and a mere bald statement that the possibility that the detenu was likely to be released on bail cannot be ruled out is not enough and it only shows

that there was no proper application of mind. In this context, the learned counsel

relied on the judgment of this Court in Binod Singh Vs. District

Magistrate, Dhanbad, Bihar and Others, . We see no force in this submission. We do not think that anything more could have been said by the

detaining authority in this context....

20. In Rivadeneyta Recardo Agustin v. Government of Delhi, 1994 SCC (Cri.) 354, an argument was advanced that there was no material before

the detaining authority to believe that there was a real possibility of petitioner being enlarged on bail or being released and that it is necessary to

detain him to prevent him from engaging in prejudicial activity. In order to ascertain for the said question, the Supreme Court, while discussing the

case laws in brief, concluded that: (Para 4)

4....In Vijay Narain Singh-[Vijay Narain Singh v. State of Bihar, 1984 SCC (Cri) 361] this Court stated that the law of preventive detention being

a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution

would suffice. So also in Ramesh Yadav v. District Magistrate, Etah, 1985 SCC (Cri) 514, this Court stated that ordinarily a detention order

should not be passed merely on the ground that the detenu who was, carrying on smuggling activities was likely to be enlarged on bail. In such

cases the proper course would be to oppose the bail application and if granted, challenge the order in the higher forum but not circumvent it by

passing an order of detention merely to supersede the bail order. In Suraj Pal Sahu v. State of Maharashtra, 1986 SCC (Cri) 452, the same

principle was reiterated. In Binod Singh v. District Magistrate, Dhanbad, 1986 SCC (Cri) 490, it was held that if a person is in custody and there

is no imminent possibility of his being released there from, the power of detention should not ordinarily be exercised. There must be cogent material

before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from

material on record and must not be the ipse dixit of the officer passing the detention order. Eternal vigilance on the part of the authority charged

with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental

freedoms of the citizens. This Court, therefore, emphasised that before passing a detention order in respect of the person who is in jail the

concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the

detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained.

The Supreme Court after recording the fact that the Additional Solicitor General placed before them the relevant file, and not brought to their

notice any material indicating that the release of the petitioner was likely or that there was a real possibility of his being released and/or that the

authority was satisfied about the said aspect, by applying the principle enunciated in Kamarunnissa 's case, quashed the order of detention.

21. In Veeramani v. State of Tamil Nadu, 1994 SCC (Cri) 482, Paras 7 and 8 are relevant:

7. Learned counsel, however, submitted that by making a sweeping statement that the petitioner is likely to be released on bail, the detaining

authority cannot pass a detention order and when there is no likelihood of his being released on bail from custody, the order of detention is illegal

inasmuch as there is no proper application of mind. In this context the learned counsel also submitted that since the detenu was in actual custody in

connection with the murder case, no reasonable person can arrive at the conclusion that he was likely to be released on bail and that the statement

of the detaining authority in the grounds that the detenu is likely to file a bail application and come out on bail and that he was aware that bail is

usually granted by the Courts in such cases, is illogical and unsound. In this context, the learned counsel relied on an unreported judgment of this

Court in Rivadeneyta Ricardo Agustin v. Government of the National Capital Territory of Delhi, (subsequently reported in 1994 SCC (Cri) 354).

In that case in the grounds it was only mentioned that there was a "possibility" of the detenu being released in case he moves a bail application.

This Court observed that since the grounds did not indicate that such release was likely or that it was imminent and that on a mere possibility the

detention order could not have been passed. The Bench also examined the relevant file and observed that there was no material indicating that the

release of the petitioner was likely.

8. But in the instant case what we have to mainly see is whether there was awareness in the mind of the detaining authority that the detenu is in

custody and that he had reason to believe that he is likely to be released. The grounds do disclose that the detaining authority was aware that the

detenu is in custody and it is further mentioned that he was also aware that bail is usually granted by the courts in such cases and it is further

emphasised that there is "imminent possibility" of the detenu coming out on bail....

22. In *Phulwari Jagdambaprasad Pathak v. R.H. Mendonca*, 2000 SCC (Cri) 1263, the Supreme Court observed thus. (Para 16)

16. It is neither possible nor advisable catalogue the types of materials which can form the basis of a detention order under the Act. That will

depend on the facts and situation of a case. Presumably, that is why Parliament did not make any provision in the Act in that regard and left the

matter to the discretion of the detaining authority. However, the facts stated in the materials relied upon should be true and should have a

reasonable nexus with the purpose for which the order is passed.

23. In *Union of India v. Paul Manickam*, 2004 SCC (Cri) 239, a contention was raised that the detenu was already in custody and on presumption

and surmises that she may be released on bail the order of detention was passed without proper application of mind regarding her incarceration in

custody. After analysing the earlier case laws, the Supreme Court has concluded thus: (Para 14)

14....The detaining authority must show its awareness to the fact of subsisting custody of the detenu and take that factor into account while making

the order. If the detaining authority is reasonably satisfied with cogent materials that there is likelihood of his release and in view of his antecedent

activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention

order can be validly made. Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be

released on bail, the order would be vitiated. See *N. Meera Rani v. Govt. of T.N.*, 1989 SCC (Cri) 732 and *Dharmendra Suganchand Chelawat*

v. Union of India, 1990 SCC (Cri) 249. The point was gone into detail in *Kamarunnissa v. Union of India*, 1991 SCC (Cri) 88. The principles

were set out as follows: even in the case of a person in custody, a detention order can be validly passed:

(1) if the authority passing the order is aware of the fact that he is actually in custody;

(2) if he has a reason to believe on the basis of reliable material placed before him--

(a) that there is a real possibility of his release on bail, and

(b) that on being released, he would in all probability indulge in prejudicial activities; and

(3) if it is felt essential to detain him to prevent him from so doing. If an order is passed after recording satisfaction in that regard, the order would

be valid. In the case at hand the order of detention and grounds of detention show an awareness of custody and/or a possibility of release on bail.

24. The detaining authority is required to follow strictly and scrupulously the forms and rules of law prescribed in that behalf or by the statutory

provision under which the order of detention is being made after arriving at a subjective satisfaction. In the event of any deviation or violation of the

statutory provisions or infraction of constitutional guarantees, the Courts will not hesitate to quash the orders of detention. Whatever be the

jurisdiction to detain and the slightest infraction of the constitutional guarantee would lead to the detenu being set at liberty.

25. It is by now well settled that in all detention laws, the orders of detention and its continuance of detention should be in conformity with Article

22 of the Constitution of India and slightest infraction of the Constitutional protection enshrined therein would be a valid ground to set the detenu

at liberty.

26. There must be cogent material before the Authority passing the detention order for inferring that the detenu was likely to be released on bail.

This inference must be drawn from material on record and must not be the ipse dixit of the Authority passing the detention order.

27. In the case of a person in custody a detention order can validly be passed if the authority passing the order is aware of the fact that he is

actually in custody; if he has reason to believe on the basis of reliable material placed before him--

(a) that there is a real possibility of his being released on bail, and

(b) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording its satisfaction in this behalf, such

an order cannot be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question it before a higher Court.

28. It is neither possible nor advisable catalogue the types of materials which can form the basis of a detention order under the Act. That will

depend on the facts and situation of a case. That is why there is no provision in the Act in that regard and the matter is left to the discretion of the

detaining authority. However, the facts stated in the materials relied upon should be true and should have a reasonable nexus with the purpose for

which the order is passed.

29. In view of the above, we hold that strict insistence of the usage of the word ""imminent"" is not necessary and the other convincing expressions

like ""real possibility"", ""very likely"" or ""most likely"" can be used by the detaining authority to reflect its satisfaction with regard to immediate release

of the detenu on bail. We answer the Reference accordingly.

30. We place on record our appreciation for the valuable assistance rendered by Mr. B. Sriramulu, learned Senior Counsel, as amicus curiae.

31. Post all the H.C.Ps. before the Division Bench to hear on merits.