
(1989) 02 GUJ CK 0001

In the Gujarat High Court

Case No : Special Criminal Application No. 718 of 1988

Laxmansinh Vir Bahadursingh Gurkha

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 16-02-1989

Acts Referred:

Bombay Police Act, 1951 — Section 10(2), 107, 110, 55, 56
Constitution of India, 1950 — Article 22(5), 226

Citation : (1990) CriLJ 279

Hon'ble Judges : P.R. Gokulakrishnan, C.J.; P.M. Chauhan, J

Bench : Division Bench

Advocate : Anil S. Dave, for the Appellant; G.D. Bhatt, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.M. Chauhan, J.—Petitioner by this petition under Article 226 of the Constitution of India, has challenged the externment order No. 19/88 dated March 29, 1988, by the Deputy Commissioner of Police, Ahmedabad City, passed u/s 56, Bombay Police Act, 1951, duly confirmed in Appeal by the State Government.

2. The Deputy Commissioner of Police, Crime Branch, Ahmedabad City, Mr. V.V. Rabari, under the order of the Commissioner of Police, under Sub-section (2) of Section 10 of the Bombay Police Act, exercises and performs the powers and duties conferred on the Commissioner of Police u/s 56, Bombay Police Act, and accordingly exercised the power u/s 56 of the Act. The Superintendent of Police, (GA) Division, Ahmedabad City served the notice dated July 4, 1986, u/s 59 of the Bombay Police Act to the petitioner containing the general nature of the material allegations against the petitioner and affording petitioner opportunity of tendering the explanation regarding the charges against him. The charges against the petitioner as specified in the notice are that the petitioner is a dangerous and violent person and commits the acts of force and violence in the area of New Cotton Char-rasta, Bhilwada char-rasta, near Swastik factory, near

Amraiwadi Talawdinear Amraiwadi Azad-chowk Urinal, near Gulabnagar Char-rasta, Opp. Amraiwadi Post Office and on the road from Silver-Mill to New Cotton Mills, which fall under the jurisdiction of Amraiwadi Police Station and Gomtipur Police Station, since Jan. 1985. The specific charges in the notice are that the petitioner extorts money from the people residing in the localities specified in the notice and from innocent persons passing through the said areas, by pointing out deadly weapons like knife and razor and putting them to threats of murder and that the petitioner caused physical injury to the residents of the said localities or passers by from the said locality threatening them to kill on the suspicion that they informed the police of the illegal activities about liquor and "charas" and that the petitioner even though purchases eatables and other articles from the vendors carrying on business of hotelier, Pan-bidi and eatables, but does not pay the prices of such articles and on demand the petitioner threatened them to commit murder. It is further stated in the notice that in spite of the petitioner committing such offences, the witnesses were not willing to come forward to give evidence in public against him as they were afraid of the safety of their person and property. By the Notice it was proposed to extern the petitioner for the period of two years from territory falling within the jurisdiction of Commissioner of Police, Ahmedabad City and its contiguous area of Ahmedabad Rural, Gandhinagar, Kheda and Mehsana districts, and that if the petitioner is not externed from the said area, it was apprehended that he would continue illegal and violent activities through the companions and agents in the above referred areas.

3. The petitioner appeared and submitted written statement; tendered the explanation and examined his witnesses. The papers were then submitted to the Deputy Commissioner of Police, who, on considering the charges against the petitioner and the explanation and evidence produced by the petitioner, was subjectively satisfied that the petitioner is a dangerous and violent person and indulges in the commission of the offence involving force and violence since Jan. 1985 in the above referred localities and that the witnesses were not willing to come forward to give evidence in public against the petitioner by reason of the apprehension on their part as regards the safety of their person and property. The Deputy Commissioner of Police accordingly in exercise of the power conferred u/s 56, Bombay Police Act, by order dated March 28, 1988 directed the petitioner to leave within two days the area within the jurisdiction of the Commissioner of Police, Ahmedabad City and its contiguous area of Ahmedabad Rural, Gandhinagar, Kheda and Mehsana Districts, and not to enter or return to the said territory for the period of two years without the written permission of the authorised officer. For externing the petitioner from the contiguous area, the Commissioner of Police recorded reason that in case he is not externed from the contiguous Districts, the petitioner would continue his such activities through companions and agents from the surrounding district. The petitioner preferred appeal to the State Government in Home Department, which was rejected by the Government on May 16, 1988 and the externment order is executed on the

petitioner.

4. As provided in Section 56, Bombay Police Act, whenever it shall appear to the Commissioner of Police or the District Magistrate or the Sub-Divisional Magistrate empowered by the State Government in that behalf, that there are reasonable grounds for believing that a person is engaged or is about to be engaged in the commission of an offence involving force or violence, or an offence punishable under Chapter XII, XVI or XVII of the Penal Code or in the abetment of any such offence and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property, the said Officer by an order in writing duly served on such person or by beat of drum or otherwise direct such person so as to conduct himself as shall seem necessary in order to prevent violence and alarm or to remove such person outside the area within the local limits of jurisdiction of such officer or such area and any district or districts, or any part thereof, contiguous thereto, by such route and within such time as the said Officer may prescribe and not to enter or return to the said area from which he was directed to remove himself. The procedure for such externment proceedings is provided in Section 59 of the Bombay Police Act. Before the externment order is passed, the Officer acting u/s 56 or any officer above the rank of an Inspector authorised by that Officer should inform such person in writing of the general nature of the material allegations against such person and give him a reasonable opportunity of tendering an explanation regarding them. In case such a person makes an application for the examination of any witness produced by him, the authority or officer concerned is required to grant such application and examine such witnesses, unless for reasons to be recorded in writing, the concerned Officer is of the opinion that such application is made for the purpose of vexation or delay. The written statement put in by such person is to be filed with the record of the case. The representation by the Advocate or Attorney for the purpose of tendering his explanation and examining the witnesses is also permissible under that section. The maximum period of prohibiting the entry in the area is two years from the date of the directions u/s 56 of the Act, but it may be less than that period as may be specified in the order. The appeal u/s 60 of the Act is provided to the State Government.

5. The law on the point about the particulars and the nature of allegations to be specified in the notice u/s 59, Bombay Police Act, and the defence available to the externnee in externment proceedings is now well settled by various judgments of the Supreme Court and this Court. The Supreme Court in the case of *State of Gujarat and Another etc. Vs. Mehboob Khan Usman Khan etc.*, while agreeing with the view expressed by the Supreme Court in the case of *Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another*, and in the case of *Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Others*, , extracted the relevant observations made in the case of *Hari Khemu (supra)* repelling the contention that as only general nature of the material allegations have to be given in the notice issued under Sec. 59 and as it did not

further provide for particulars to be supplied to such a person, it would be very difficult for a party to urge, in appeal before the State Government u/s 60, that there was no material before the authority concerned, upon which it could have based its order, as under (Para 10 of Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another, :

"But in the very nature of things it could not have been otherwise. The grounds available to an externee had necessarily to be very limited in their scope because if evidence were available which could be adduced in public, such a person could deal with under the preventive sections of the Code of Criminal Procedure, for example, u/s 107 or Section 110. But the special provisions now under examination proceed on the basis that the person dealt with under any of the Section 55, 56 or 57 is of such a character as not to permit the ordinary laws of the land being out in motion in the ordinary way, namely, of examining witnesses in open Court who should be cross-examined by the party against whom they were deposing. The provisions we are now examining are plainly intended to be used in special cases requiring special treatment, that is, cases which cannot be dealt with under the preventive sections of the Code of Criminal Procedure."

The Supreme Court also expressed the view that while considering as to whether the notice issued u/s 59 of the Act suffers from any infirmity, the above observations in the case of Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another, should be borne in mind. During the course of the arguments the judgment of this Court in the case of Jawahar Panalal Vs. Sub Divisional Magistrate and Another, , was referred, but the Supreme Court did not advert to that decision in view of the observations and the judgments referred to by the Supreme Court about the explanation which can be tendered by the person proposed to be externed and the defence against such proposed action. The Supreme Court in the case of State of Gujarat and Another etc. Vs. Mehboob Khan Usman Khan etc., observed that considering it from the point of view of the party against whom an order of externment is proposed to be passed, it must be emphasized that when he has to tender an explanation to a notice, under Sec. 59, he can only give an explanation which can be of a general nature. It may be open to him to take a defence of the action being taken, due to mala fides, malice or mistaken identity or he may be able to tender proof of his general good conduct or alibi, during the period covered by the notice and the like. The allegations made in the notice, issued u/s 59, as against the respective respondents, contain the general nature of the material allegations made against each of them, in respect of which the respondents had been " given a reasonable opportunity of tendering an explanation regarding them. Therefore, it follows that the view of the Gujarat High Court that the notices u/s 59, and the orders of externment, passed u/s 56, are invalid cannot be sustained.

6. This Court in the case of Kathi Harsur Rukhad Vs. State of Gujarat and Others, , relying on the observations in the case of State of Gujarat and Another etc. Vs. Mehboob Khan Usman Khan etc., observed that even though the notice u/

s 59 of the Act has to refer to the allegations of the general nature containing the material particulars, at least such allegations in order to meet the requirement of the law, must indicate the area or locality where such alleged activities were said to have been committed by the proposed externee and the allegations should also indicate as to within what period the proposed externee did it so that his defence about alibi, if at all, can be reasonably put forward for consideration of the externing authority. In the case of Vijaybir @ Abbal Dada Devisinh Rajput v. K. S. Shethi, Police Supdt. Ahmedabad 1986 Guj LH 605 this Court after referring to the judgment of the Supreme Court in the case of Mehbubkhan (supra) and the judgment of this Court in the case of Sarjubhaiya Mathurbhaiya Kahar Vs. Deputy Commissioner of Police and Another, and also the relevant provisions of the Bombay Police Act, 1931, repelled the contention about the jurisdiction of the Superintendent of Police to issue notice, power of the Deputy Commissioner of Police to authorise the Superintendent of Police to issue notice, particulars regarding the actual time of the alleged offensive activities, not giving reasons by the externing authority for disbelieving the evidence of the witnesses examined by the externee, non-consideration of the alternative remedy of directing to execute bond, non-speaking order by the appellate authority and delay in passing the externment order. The scope and ambit of provisions of Section 56, Bombay Police Act, 1951, are examined by Division Bench of this Court in the case of Dayabhai Prembhai v. Commissioner of Police, Surat (1988) 2 Guj LH 36, observing that Section 56 Bombay Police Act, nowhere states that there must be registration of the case in respect of the allegations mentioned in the show cause notice before such allegations are made in the show cause notice.

7. In view of the settled legal position, two contentions advanced by Mr. Dave, learned Counsel for the petitioner, viz. (i) that inordinate delay was caused by the proposing and the externing authorities in passing the order which vitiated the externment order and (2) the charges levelled against the petitioner are of vague and general nature and are false and established the non-application of mind on the part of the externing authority, be considered.

8. The contention of the petitioner is that the impugned notice dated July 4, 1986 was served to the petitioner and the Superintendent of Police submitted the record to the Deputy Commissioner of Police on December 12, 1987 and the Deputy Commissioner of Police passed the externment order on March 29, 1988 and if at all the allegations against the petitioner would have been true or had some substance, such inordinate delay would not have been caused i by the concerned authorities. Mr. Bhatt also j submitted that inordinate delay caused in passing the externment order establishes that the allegations are stale and non-existent. This submission of Mr. Bhatt, learned Counsel for the petitioner, cannot be accepted as, after the service of the notice much of the time was taken by the petitioner in examining the witnesses and submitting the written-statement and also before the externing authority in filing the written statement. Mr. J. K. Gohil, Superintendent of Police "C" Division, Ahmedabad, at the relevant time, who served the notice and examined the witnesses, as well as Mr. V.V. Rabari, Deputy

Commissioner of Police, Ahmedabad City, in their respective affidavit, after referring to the proceedings of the case, have stated in detail the various stages of the case and the reasons for passing the orders . on the respective dates. It is clear from the affidavit of Mr. Gohil that the show cause notice dated July 4, 1986 was served to the petitioner on July 11, 1986 and the petitioner gave a preliminary statement on Aug. 7, 1986. The case was then fixed on Aug. 14, 1986 at the request of the petitioner. The Advocate of the petitioner then requested for some time and after that 35 witnesses were examined by the petitioner and ultimately the petitioner submitted the written statement on November 21, 1987. It is, therefore, apparent that much of the time was taken by the petitioner in examining the witnesses and in submitting the statement. The petitioner was informed that the report will be submitted to the externing authority and he would be duly informed of the date fixed for hearing by the Deputy Commissioner of Police, Mr. Gohil has explained that he was required to prepare along with attending to other matters of urgent nature, the summing up of the case wherein 35 witnesses were examined and he ultimately prepared the same on February 2, 1988 and transmitted the papers of the proceeding to the office of the P.C.B. which had received the same on February 4, 1988. Mr. Gohil has also stated that during the period from November 21, 1987 to February 2, 1988, he had remained busy in discharging various urgent unavoidable duties as Superintendent of Police as detailed in Annexure I produced on the record. According to him, as such no delay was caused in submitting the report. It is apparent that about 35 witnesses were examined by the petitioner and written explanation was also tendered and that Mr. J. K. Gohil was busy with his other urgent and unavoidable duties as specified by him in Annex. I. Therefore, it cannot be said that inordinate delay was caused and that by itself would vitiate proceedings. The externing authority Mr. V.V. Rabari, Deputy Commissioner of Police, Ahmedabad City, in his affidavit states that papers were transmitted to the Officer of the Prevention of Crime Branch on February 4, 1988. Even though the petitioner was directed to remain present on that day, he did not remain present in his office on that day, but the petitioner and his Advocate appeared before him on February 8, 1988 and prayed for adjournment which was granted and after that on February 12, 1988 written submissions were filed by the Advocate. From February 13, 1988 till the date of passing of the externment order i.e. March 29, 1988 he was required to attend the work of supervising law and order situation in the City of Ahmedabad, attending to Bandobast on account of visits of dignitaries like the Prime Ministers in the city of Ahmedabad and on other various public festival days and he was also holding special charge as Deputy Commissioner, Crime and Deputy Commissioner (North) and was also required to attend to other urgent work as specified by him in Annexure D produced on the record. He had also to pass externment order in other case. Therefore, it cannot be stated that much delay was caused in passing the order by the externing authority. The explanation tendered by Mr. Rabari deserved to be accepted. It is also required to be considered as to in what circumstances the delay in passing the order should be considered to vitiate the externment order.

There is no statutory provision u/s 59 or any other provisions under the Bombay Police Act, 1951 directing to pass the externment order within a particular prescribed period. No stage like Article 22(5) of the Constitution or statutory provisions under various Acts are specified under the Bombay Police Act. If the statutory provisions are made and the time bound programme is prescribed infraction of such statutory provision would vitiate the final order. In other cases the order may be vitiated only in the case of finding that the grounds are stale or illusory or there is no real nexus between the grounds and the impugned order of detention. The Supreme Court in the case of *Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others*, , even while considering the drastic provisions under the Gujarat Prevention Of Anti-Social Activities Act and Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 observed that even though there was no explanation for delay it could not give rise to the legitimate inference that the subjective satisfaction arrived at by the competent authority was not genuine or that grounds were stale or illusory or that there was no rational connection between the grounds and the impugned order of detention. There is a catena of decisions of the Supreme Court as to the unexplained delay in taking action, and in view of the Supreme Court, no mechanical test by counting the months or the interval was sound and it depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. The Court has to investigate whether the casual connection has been broken in the circumstances of each. case. Referring to the decision in the case of *Malwa Shaw Vs. The State of West Bengal*, , in which the decision of the detaining authority was reached after about five months, the contention of delay was repelled observing it as a mere "reed of straw" and it was held, that the time-lag between the dates of the alleged incidents and the making of the order of detention was not so large that it could be said that no reasonable person could possibly have arrived at the satisfaction which the District Magistrate did on the alleged incidents. The Supreme Court categorically observed that the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention.

9. In *Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others*, , the Supreme Court reiterated the same view discussed above, observing that (Para 7)--

"...the delay cannot by itself vitiate the decision to detain a person and this is fully demonstrated by the cases of *Rajendra Prashad Vs. State of Uttar Pradesh* and *Another*, , wherein the order was passed after seven months; *Smt. Hemlata Kantilal Shah Vs. State of Maharashtra* and *another*, and *Malwa Shaw Vs. The State of West Bengal*, , wherein the orders of detention were passed five months later."

10. Applying the general test laid down by the Supreme Court even in more drastic action of detention, it may be conveniently observed that in the externment proceedings in which the notice is served and the time is taken by the proposed externnee in examining the witnesses; in submitting the explanation and also in submitting the written or oral arguments by the Advocate of the proposed externnee, it is required to be excluded in considering the delay. Apart from the fact that the notice is served and the case passes through the various stages maintaining the continuity of the proceedings till the date of passing of the externment order, clearly establishes that the concerned authority had not given up the proceedings of externment. It may be that due to various reasons some delay might be caused in passing the final order, but till it is established that the allegations are stale or no live-link exists between the allegations made in the notice and the final order, or that the allegations are illusory or that there is no real nexus between the grounds and the impugned order, the order cannot be set aside on the ground of delay, specially when no statutory time bound programme is fixed under the provisions of the Act. The Court should consider the explanation tendered by the concerned authorities and if reasonable explanation is tendered, establishing the live-link and not stale as discussed above, the order cannot be held to be vitiated only on the ground of delay. The submission of Mr. Bhatt, learned Counsel for the petitioner, therefore, deserves to be repelled.

11. The next contention of Mr. Dave, learned Counsel for the petitioner, that the charges levelled against the petitioner are false and the externing authority has failed to apply mind and that would vitiate the externment order, also deserves to be rejected as it is clear from the notice and the externment order that the allegation about the extorting money or causing hurt to the people and not paying for the eatables and that the witnesses do not come forward in public to give evidence against the petitioner are clearly stated in the notice and considered in the externment order. It is not necessary to mention specific charges in the notice against the petitioner. The Deputy Commissioner of Police in the order after extracting the charges levelled against the petitioner and after considering the explanation tendered by the petitioner has observed that he is convinced that the petitioner is a dangerous and violent person and indulges in the act of force and violence and commits such acts and the detailed description of the offending activities is given in the show cause notice, since January 1985 in the localities specified in the order and that the witnesses of the incidents are not willing to come forward to give evidence in public against the petitioner by reason of apprehension on their part as regards the safety of their person and property. It is also observed by the Deputy Commissioner of Police that if the petitioner is not externed from the contiguous Districts, he would carry on such offensive activities through the companions and the agents. It, therefore, cannot be accepted that the Deputy Commissioner did not apply his mind to the-facts and the allegations against the petitioner. So far as the general nature of the material allegations is concerned, the law as laid down by the Supreme Court in

the case of State of Gujarat and Another etc. Vs. Mehboob Khan Usman Khan etc., , followed by this Court in subsequent judgments, is well settled and it is not necessary that specific instances should be cited in the notice and should be held to be proved before the externment order can be passed. No other contention is raised on behalf of the petitioner.

12. In the result, this petition is rejected. Rule is discharged. No order as to costs.