

(1981) 10 BOM CK 0002

In the Bombay High Court

Case No : Criminal Application No. 1514 of 1981

Magalin Gracious

APPELLANT

Vs

State of Maharashtra and two others

RESPONDENT

Date of Decision : 07-10-1981

Acts Referred:

Constitution of India, 1950 — Article 22, 22(1), 22(5), 22(5)
National Security Act, 1980 — Section 3(2)

Citation : (1982) MhLj 50

Hon'ble Judges : S.W. Puranik, J; C.S. Dharmadhikari, J

Bench : Division Bench

Advocate : M.G. Karmali with Ku. Y.D. Kale and C.P. Joshi, for the Appellant;
M.R. Kotwal for State, for the Respondent

Final Decision : Allowed

Judgement

1. This writ petition is filed by the detenu's wife challenging the order of detention dated 28th May 1981 issued by the Commissioner of Police, Greater Bombay, u/s 3 (2) of the National Security Act, 1980.

2. Detenu Shri Austin Marcos Gracious @ Kalya Austin is detained under the provisions of the National Security Act vide order dated 8th May 1981 as the Commissioner of Police came to the conclusion that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary to detain the detenu under the said Act. The grounds of detention together with other documents were also served on the detenu. This order of detention as well as his continued detention is challenged in this petition on various grounds.

3. Shri Karmali, the learned counsel appearing for the petitioner contended before us that the detention of the detenu is ab-initio void as the order of detention was not served upon the detenu in the language he understood i.e. marathi, nor the contents of the order of detention and committal order were ever explained to him in marathi. In support of this contention Shri Karmali has

placed reliance upon the decisions of the Supreme Court in *Smt. Raziya Umar Bakshi Vs. Union of India and Others*, , *Lallubhai Jogibhai Patel v. Union of India and others* AIR 1981 SC 758, *Surjeet Singh Vs. Union of India (UOI) and Others*, , and *Harikisan v. State of Maharashtra and others* AIR 1962 SC 211, as well as an unreported decision of the Supreme Court in *Nanjitsingh v. The Union of India and others* writ petition No. 3944-45 of 1981. Shri Karmali also contended that the continued detention of detenu is also illegal as representation made by him on 16th June 1981 is not considered by the Government till today. The learned counsel further contended that the detention is also illegal as none of the grounds referred to in the grounds of detention have any nexus with the maintenance of public order. He further contended that in any case grounds Nos. 4 to 8 are not only vague but are wholly fictitious. As no particulars have been supplied to the detenu about the said grounds, it was humanly impossible for him to exercise his right of making an effective representation, against the order of detention.

4. On the other hand it is contended by Shri Kotwal, the learned Public Prosecutor that the law does not enjoin any duty upon the detaining authority to serve the order of detention on the detenu. Therefore non-supply of the translation of the detention order cannot vitiate the detention. According to Shri Kotwal Article 22 (5) of the Constitution of India only contemplates communication of the grounds of detention and not the order of detention. The copies of the translation in Marathi of the grounds of detention and other documents were supplied to the detenu. He further contended that in any case while serving the order of detention, its contents were explained to the detenu in Marathi by the officer who served the detention order and therefore there is substantial compliance with the requirement of law. In support of this contention Shri Kotwal has placed reliance upon the decisions of the Allahabad High Court in *S.N. Tangri Vs. State of Uttar Pradesh*, , Jammu and Kashmir High Court in *S. Kesar Singh Vs. State of Jammu and Kashmir and Another*, and a decision of the Mysore High Court in *M.N. Ugrappa v. Government of Mysore and others* AIR 1966 Mys. 207. Shri Kotwal also contended that the substance of the order of detention is also reproduced in the grounds of detention and a translated copy of the said grounds is duly supplied to the detenu. Therefore it cannot be said that there was any violation of the provisions of Article 22 (5) of the Constitution of India.

5. So far as other contentions are concerned, it is contended by Shri Kotwal that none of the grounds could be read in isolation and it is the cumulative view of all the grounds which will have to be taken into consideration for deciding the question as to whether they have any nexus with the question of maintenance of the public order. According to the public prosecutor the various activities of the detenu referred to in the grounds of detention clearly indicate that the peace loving citizens of the localities of Kharodi Malvani Colony and area adjoining thereto are experiencing a sense of insecurity and are living under a constant shadow of fear. So far as grounds Nos. 4 to 8 are concerned, it is contended by

Shri Kotwal that necessary particulars are disclosed in the grounds of detention. Further particulars as well as source of information was not disclosed in the public interest. Therefore according to the learned Public Prosecutor, the order passed by the detaining authority is perfectly legal and valid.

6. It is by now well settled that the grounds of detention should be served on the detenu in the language which he understands. In Smt. Raziya Umar Baksh's case it is held by the Supreme Court that the service of grounds of detention on the detenu is a very precious constitutional right and where the grounds are couched in a language which is not known to the detenu, then unless the contents of the grounds are fully explained and translated to the detenu, it will tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex-facie. Then in Lallubhai's case the Supreme Court has clarified this position by saying that Article 22 (5) required that the grounds of detention must be communicated to the detenu and communication is a strong word. It means that the sufficient knowledge of the basic facts constituting the grounds should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the grounds to the detenu is to enable him to make a purposeful and effective representation. If the grounds are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22 (5) is infringed. The same principle is reaffirmed by the Supreme Court in Surjeet Singh's case. However it is contended by Shri Kotwal that the law laid down by the Supreme Court in these cases will not apply to the order of detention itself, because neither the Article 22 (1) or 22 (5) enjoins a duty upon the detaining authority to serve or communicate the order of detention to the detenu. As already observed in support of this contention Shri Kotwal has placed reliance upon the aforesaid decisions of the Allahabad, Jammu and Kashmir and Mysore High Courts.

7. It is not possible for us to accept this contention of Shri Kotwal. Article 22 (1), (2) and (5) with which we are concerned in this petition read as under:

22 (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon

as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

8. Article 22 as a whole deals with the protection against arrest and detention in certain cases. Article 22(1) lays down that no person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest. However in view of the provisions of clause (3) of Article 22, nothing in clause (1) shall apply to a person who is detained under a law providing for preventive detention. Article 22(5) enjoins a duty upon the detaining authority to communicate to the detenu the grounds on which the order of detention has been made and to afford him the earliest opportunity of making a representation against the order of detention. The right vested in the detenu under Article 22(5) is not merely to take exception to the grounds and to show that the grounds are not tenable but also to take exception to the validity of the order of detention itself. If this is so then the detenu must possess the copy of the order. Representation contemplated by Article 22 (5) is also against the order of detention. Therefore it is implicit in Article 22 (5) that the detaining authority must serve the order of detention upon the detenu. Unless a copy of such an order of detention is served on the detenu it will not be possible for him to make an effective representation against the order of detention within the contemplation of Article 22(5) of the Constitution of India. Further the right to move the High Court or Supreme Court can be exercised by a person under detention not only after he has been served with a copy of the grounds of the order, but also during the period of the interregnum between the commencement of the detention and the date on which the grounds are served on him. In such a case it is open to the detenu to challenge the order of detention on the ground that it is ultra vires as it falls outside the provisions of the Act, or has been passed by the Officer or the authority without even an ostensible or purported statutory authority or on the ground of personal malice, or that it is a fabricated order etc. Similar view seems to have been taken by Travancore Cochin High Court in Thiruvadinath Pillai and another v. The District Magistrate AIR 1951 TC 130.

9. In our view this position is very clear from the bare reading of Article 22 itself. In this context a reference could also be made to the decision of the Supreme Court in G.M. Shah Vs. State of Jammu and Kashmir, . In that case in the order of detention it was stated that the said order was being made with a view to preventing the detenu from acting in any manner prejudicial to the maintenance of public order. However in the grounds of detention it was stated that the detenu's remaining at large will be prejudicial to the maintenance of public order as well as the security of the State. Therefore, after the combined reading of the order of detention and grounds furnished to the detenu the Supreme Court came to the conclusion that either District Magistrate had no material before him relevant to the security of the State or even if he had such an information he did not propose to act on it. Thus the matter was decided on the basis of combined

reading of the order of detention as well as grounds of detention. In *Kishori Mohan Bera Vs. The State of West Bengal*, , the order of detention was struck down by the Supreme Court because the order stated that the detaining authority was satisfied that it was necessary to detain the petitioner to prevent him from acting in any manner prejudicial to the maintenance of public order or security of the State. It was held therein that the satisfaction of the District Magistrate was on the disjunctive and not conjunctive grounds, which means that he was not certain whether he had reached his subjective satisfaction as to the necessity of exercising his power of detention on the ground of danger to the public order or danger to the security of the State. Similar view was taken in *Akshoy Konai Vs. State of West Bengal*, . Therefore apart from the fact that under Article 22(5) a detenu has a right to make a representation against the order of detention itself it is quite clear that the validity of the detention could be tested on the basis of the order of detention itself. If this is so, then in our opinion the Article 22(5) itself by necessary implication enjoins a duty upon the detaining authority to serve the order of detention upon the detenu in cases of preventive detention.

10. The Supreme Court had also an occasion to consider the ambit and scope of Article 22 (5) of the Constitution of India in *Harikishan's* case. In para 4 of the said decision initially a reference is made to the judgment of the High Court. It appears that the High Court had come to the conclusion that under the Constitution English continues to be the official language of the State of Maharashtra and therefore service of the order in English upon the detenu was a sufficient compliance with the requirements of clause (5) of Article 22 of the Constitution of India. The High Court therefore held that failure of the District Magistrate to supply the documents in Hindi did not affect or deprive the detenu of his right of making a representation to the authorities concerned. Then after making a reference to clause (5) of Article 22 of the Constitution, in para 7 of the judgment the Supreme Court observed as under:

To a person who is not conversant with the English language, service of the order and the grounds of detention in English with their oral translation or explanation by the police officer serving them, does not fulfil the requirements of law.

From these observations it is clear that the service of the order and the grounds of detention is a must so as to fulfil the requirement of law. Thus in substance the Supreme Court has held that clause (5) of Article 22 of the Constitution takes in its import, both the order of detention as well as the grounds of detention. The view taken in *Harikisan's* case is reaffirmed by the Supreme Court in *Raziya v. Union of India*. Therefore it is not possible for us to accept the broad proposition as put up by Shri Kotwal that in a case of preventive detention it is not necessary to serve the order of detention on the detenu. The decisions of the Allahabad, Jammu and Kashmir and Mysore High Courts, on which reliance is placed by Shri Kotwal are of little assistance in the present case. In none of those cases the concerned High Court has considered the scope and ambit of the Article 22 of the

Constitution of India.

11. So far as the Jammu and Kashmir High Court is concerned, Article 22 of the Constitution itself was not applicable to Jammu and Kashmir. In the case before the Mysore High Court the provisions of Article 22 were not considered by High Court because of the Presidential order in the field suspending the fundamental rights. The Allahabad High Court has also not considered the provisions of Article 22 of the Constitution and it also appears that it has not noticed its earlier decision in *Vimal Kishore Mehrotra Vs. State of Uttar Pradesh and Another*, . Further the view taken in these decisions runs counter to the decision of the Supreme Court in *Madhu Limaye's case* AIR 1969 SC 1014. Therefore we have no hesitation in coming to the conclusion that it is obligatory on the part of the detaining authority to serve the order of detention upon the detenu and if such an order is not served upon the detenu then a precious and valuable right conferred by Article 22 (5) of the Constitution is violated.

12. However, it was contended by Shri Kotwal that there is sufficient compliance with the requirements of Article 22 of the Constitution in this case because while serving the detention order upon the detenu, the contents of the order were explained to him in Marathi. In support of this argument Shri Kotwal has placed reliance upon the affidavit filed by the detaining authority wherein the Commissioner of Police has stated that the detention order and the committal order were explained to the detenu in Marathi at the time of service of these orders. He has also produced before us the relevant file showing an endorsement made by the police officer in this behalf. We have perused the file. The relevant endorsement is made by the police Officer in English and the detenu has only signed below it in Devnagari script. In the petition filed before us as well as during the course of argument, it is contended by the learned counsel that the contents of the detention order were not explained to the detenu in Marathi. The Police Officer, who has served the order and is stated to have explained the contents of the order in Marathi has not filed any affidavit before us. Though the detenu has signed in Devnagri below the endorsement, he has not stated anywhere that the contents of order were explained to him in Marathi. Further between the signature of the detenu and the endorsement made by the Police Officer some blank space is left out. It was contended by Shri Karmali that as per his instructions the said endorsement was not there, when the signature of the detenu was obtained. The detenu had only put his signature on the said paper in token of receipt of the copy of order and nothing else. We do not propose to enter into the said controversy as in *Hadibandhu Das Vs. District Magistrate and Another*, , it is held by the Supreme Court that mere oral explanation of the order without supplying the translation in the script and language which the detenu understood amount to denial of right of being communicated the grounds and being afforded the opportunity of making representation against the order. In the present case it is an admitted position that the translated copy of the order was not served on the detenu. Therefore in this case it will have to be held that there was no communication of the order of detention within the contemplation of

Article 22 (5) of the Constitution. The reproduction of the substance of the order in the grounds, cannot be equated with the service of the order.

13. So far as the merits of the controversy is concerned, grounds Nos. 4 to 8 of the grounds of detention are not only vague but are also suspicious. Regarding these grounds it is stated by the Commissioner of Police that in the public interest the source of information about the incidents incorporated in these grounds could not be disclosed to the detenu. It is an admitted position that no crime or offence was ever registered so far as these grounds are concerned. Shri Kotwal the learned Public Prosecutor in fairness conceded that the informants had not made any complaints to the police authorities about these incidents and information referred to in grounds Nos. 4 to 8 was collected later on. He also admitted that the said grounds are based solely on the statements made by the informants only. There is no other material on record in support of the said grounds. For our perusal he has produced before us the statements of these informants. From the perusal of the file we find that there is no endorsement on the statements as to when the said statements were recorded. It is also an admitted position that statements were recorded later on and in pursuance of these statements no investigation was carried out nor a crime was registered. The statements do not bear any date. Therefore this cannot be treated as contemporaneous record of the incidents. In the affidavit filed by the Commissioner of Police it is stated that the incidents referred to in the grounds Nos. 4 to 8 are of such nature that further particulars of it could not be furnished to the detenu. It is further alleged that the victims of these incidents were mortally afraid that if their names and other particulars are disclosed their lives and properties would be in danger at the hands of the detenu. Therefore be decided not to disclose the names of the victims and further particulars in respect of the incidents referred to in the grounds Nos. 4 to 8 in public interest. In para 16 of the affidavit the said position is reaffirmed and it is stated that the detaining authority bona fide decided in public interest not to disclose the names of the victims and further particulars in respect of the incidents referred to in grounds Nos. 4 to 8. The averments made in the affidavit will have to be read with the statement made in the grounds of detention namely "in public interest the source of information about the incidents at Sri Nos. 4 to 8 mentioned above could not be disclosed to you". If this statement is read with the statements made in the affidavit, then it is difficult for us to accept the statement of the detaining authority that he had bona fide decided in public interest not to disclose the "further particulars" also, in respect of these incidents. The decision which was initially taken by the detaining authority is reflected in the grounds of detention itself. At that stage the detaining authority had only decided not to disclose the source of information. From the affidavit filed by the detaining authority it is clear that apart from the source of information, on record there are further particulars which are admittedly not disclosed or communicated to the detenu. In ground No. 4 the names of the associates are not disclosed. Similar is the position about grounds Nos. 7 and 8. Ground No. 8 makes a reference to 7 or

8 associates. The date and time given in ground No. 8 is practically the same as mentioned in ground No. 2. Even the file produced before us does not disclose any material except the statements of the informants. As already observed it is not known as to when these statements were recorded. Therefore in our opinion Shri Karmali was quite justified in submitting that the said grounds are not only vague but are also suspicious. On the basis of such vague grounds the detenu could not have made any effective representation against the order of detention. Therefore the order of detention also suffers from the vice of vagueness and is liable to be declared as illegal on this ground also. In this context reference could usefully be made to the decision of Supreme Court in Bhut Nath Mete Vs. The State of West Bengal, , and particularly to the following observations in para 24 thereof:

24. What has to be underscored is the obligation to make a fair communication of the grounds and the particulars sufficient to enable the detainee to explain his innocence. Faceless informers flourish where confrontation by cross-examination is absent, and orders with the inscrutable face of a sphinx are not uncommon where subjective satisfaction is sufficient. All the more reason why there should be a meaningfully comprehensive furnishing of essential particulars so that the executive agencies may be rigorously held to the standards implied by the courts in Article 22 (5). Otherwise, in the language of Justice Frankfurter, "he that takes the procedural sword shall perish with that sword". Administrative absolutism is incongruous with our constitutional scheme. If control of liberty in an emergency--barbed-wire entanglements of freedom by the executive--is necessary, control of control is in some measure healthy because power in the minions of Government can be "of an encroaching nature". Reference was made at the bar in this context to Allen's "Law and Orders", and Markose's "Judicial Control of Administrative Action".

Therefore on this count also the continued detention of the detenu is liable to be declared as illegal. It is by now well settled that even if one of the grounds of detention is bad in law, the whole order is vitiated. The reason is, that it is not possible to assess in what manner and to what extent that ground operated on the mind of the appropriate authority and contributed to provide the necessary satisfaction.

14. In this view of the matter it is not necessary to consider other contentions raised and argued by Shri Karmali.

15. In the result, therefore, this writ petition will have to be allowed. Hence rule is made absolute. The detenu is directed to be released forthwith, if not required in any other case.

16. At this stage Shri Kotwal the learned Public Prosecutor makes a request that the operation of this order should be stayed for a period of 14 days to enable the State to approach the Supreme Court. Having held that the continued detention of the detenu is illegal, it will not be fair to stay the operation of this order.

However we direct that on release from the detention the detenu shall report to the Malvani Police Station Greater Bombay every day for a period of 14 days.