
(1990) 03 BOM CK 0069

In the Bombay High Court

Case No : Criminal Writ Petition No. 806 of 1989

Mboup Talla

APPELLANT

Vs

L. Hmingliana and Others

RESPONDENT

Date of Decision : 08-03-1990

Acts Referred:

Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 —
Section 3(1)

Citation : (1990) 2 BomCR 517

Hon'ble Judges : M.L. Pendse, J;D.J. Moharir, J

Bench : Division Bench

**Advocate : Kotwal, for the Appellant; N.M. Kachare, Public Prosecutor, for
respondent Nos. 1, 3, 4 and 5, for the Respondent**

Judgement

M.L. Pendse, J.—The Secretary (Prevention of Detention) to the Government of Maharashtra, Home Department and Detaining Authority by order dated February 27, 1989 passed in exercise of powers conferred under sub-section (1) of section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 directed the detention of the petitioner with a view to preventing him from engaging in export from India of Narcotic drugs. The grounds were furnished to the detenu on the same day.

The grounds, inter alia, recite that in the night of September 26/27, 1988, the detenu was intercepted by the Customs Intelligence Officers at Sahar Airport when he was attempting to board Ethiopian Airways Flight No. ET. 611. The baggage and person of the detenu was searched and the suit-case was found to have a false lining made of card board and when the same was ripped open, the Custom Officers recovered four plastic bags containing brown coloured powder weighing 36 Kilograms. The Heroin seized valued at Rs. 7,20,000/- at the illicit market.

2. The statement of the petitioner was recorded u/s 108 of the Customs Act, 1962 and the detenu admitted that he had visited India twice, first on August 3,

1988 and thereafter on September 23, 1988. The detenu is a foreign national and stated that he had arrived on both occasions to Bombay solely for the purpose of purchasing narcotic. On first visit, he could not find narcotic seller and, therefore, went back on August 9, 1988. After a month, he returned back and contacted one Abdul who gave him sample of heroine which was proposed to be supplied. The detenu claimed that he knew how to test heroine and found that the sample supplied was genuine and thereupon asked him to supply four kilograms of brown sugar at the United States Dollar 13 per gram and, accordingly, gave Abdul 12,000 U.S. Dollars. From this statement, the Detaining Authority came to the conclusion that the detenu was an experienced hand in narcotic business. The Detaining Authority further observed in the grounds that the detenu is still in judicial custody but in accordance with normal laws of the land, it is possible that he may be released on bail and placed in a position to peruse nefarious activities. The Detaining Authority was satisfied that the detenu is likely to indulge in activities in future and thereupon passed the order of detention which is under challenge.

3. Shri Kotwal, learned Counsel appearing on behalf of the detenu has raised four or five contentions to challenge the legality of the order. The first submission of the learned Counsel is that the order of detention is passed in mechanical fashion ignoring the fact that on the date of the passing of the order i.e. on February 27, 1989 the detenu was in custody and his two bail applications were rejected by the Magistrate. The learned Counsel urged that it was not proper to resort to the powers of preventive detention when the detenu was already in custody and bail was refused. The learned Counsel relied upon the decision *N. Meera Rani Vs. Government of Tamil Nadu and Another*, ; *Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others*, . In the first case, the Supreme Court observed that subsisting custody of the detenu by itself does not invalidate an order of preventive detention and the decision must be taken on the facts of the particular case. Ordinarily, it is not needed when the detenu is already in custody, 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; but, even so, if the Detaining Authority is reasonably satisfied on cogent material that there is likelihood of 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. In the other decision of the Supreme Court, it was observed that 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. It was further observed that if there are cogent materials for thinking that the detenu might be released, then the power can be resorted. The learned Counsel also invited our attention to the judgment of the Supreme Court dated February 9, 1990 in Criminal Appeals Nos. 11 and 12 of 1990. The Supreme Court, after reviewing the earlier decisions, observed in Paragraph 20 of the judgment. :

"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 was 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."

The earlier two decisions of the Supreme Court were considered by the Division Bench of this Court in Criminal Writ Petition No. 1051 of 1989, decided on January 25, 1990 and the Court held that it will have to be determined with reference to the facts of every case as to whether the order of detention is valid even when the detenu is in custody.

4. From the decisions relied upon, it is obvious that the fact that the detenue is already in custody is no bar to pass the order of detention, but it is necessary that the Detaining Authority should be conscious of the fact that the detenu is in custody. The Detaining Authority also must be reasonably satisfied on cogent material that there is likelihood of release and in view of antecedent activities, the detenu is likely to indulge in prejudicial activities. It is not in dispute in the present case that the detenu was in custody from the time of his interception at Sahar Airport. It is also not in dispute that the detenu applied before the Magistrate on October 25, 1988 and on December 12, 1988 for release on bail but both the applications were turned down. In the first application, the detenu claimed that he was suffering from sciatica and, therefore, should be released, while in second application, the release was sought on the ground that he was in jail for more than three months. The fact that the detenu was in custody was brought to the attention of the Detaining Authority and is reflected in the grounds of detention. The grounds further recite that the Detaining Authority is aware that under the normal laws of the land, it is possible that the detenu will be released on bail and placed in a position to pursue nefarious activities. Shri Kotwal seriously challenged this assumption on the part of the Detaining Authority claiming that on December 12, 1988, the detenu was committed to stand his trial before the Sessions Court and from that date onwards, the detenu has not filed any bail application. The mere fact that the detenu did not file bail application did not prevent him from doing so at any time before the trial is over. Shri Kotwal submitted that the accused was charged with a serious offence of smuggling heroine outside the country and there is hardly any possibility of detenu being released on bail. In answer to the petition, the Detaining Authority has filed return and in Paragraph 13 it is pointed out that detenu was in judicial custody at the time of passing of the detention order, and it was reasonably

inferred that the detenu would continue his effort for getting released on bail. In paragraph 15, it was pointed out that the material placed before the Detaining Authority discloses that the petitioner is deeply involved in drug trafficking and that he has thick connections with the gang involved in international drug trafficking. In paragraph 19 of the return, the Detaining Authority points out that it is a common experience of Customs authority, D.R.I. authorities as also the Narcotic Drug Control Bureau that foreign nationals involved in prejudicial activities, if released on bail, immediately jump bail and by any device they go out of India. The Detaining Authority claims that, therefore, it was not advisable to give such opportunity to the detenu. The claim of the Detaining Authority cannot be faulted with because our experience is not different, however, little it may be. There is no rule which prevents the Court from granting bail in cases where the offence is under Narcotic Drugs Act, and when such bail orders are granted in favour of foreign nationals, the accused managed to go out of India.

Shri Kotwal invited our attention to amendment to section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and which makes stringent provision in respect of grant of bail. Section 37(1)(b) of the Act provides that no person accused of an offence punishable for a term of imprisonment of five years or more shall be released on bail unless (i) the Public Prosecutor has been given an opportunity to oppose the application for such release and (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail. The reliance on this section is not accurate because the section is amended only in May 1989 and the provisions of the amended section were not available to the Detaining Authority at the time of passing of detention order in February 1989. The detenu in the present case made statement that he had come to the country on two occasions, i.e. in August 1988 and September 23, 1988 solely for the purpose of purchasing narcotic drugs. The first attempt did not succeed but in the second attempt the detenu desired to export heroine weighing 36 Kilograms. It hardly requires to be stated that the activities indulged in by the detenu are prejudicial not only to the citizens of this country but every citizen in world. In these circumstances, if the Detaining Authority felt that the detenu may be released on bail and, therefore, power of detention should be exercised, then it is impossible to accept the submission that the assumption of the Detaining Authority was not reasonable. In our judgment, on the facts and circumstances of the case, the material available to the Detaining Authority was cogent in nature and the reasonable satisfaction of the Detaining Authority cannot be faulted with. The first contention of the learned Counsel is, therefore, required to be turned down.

5. Shri Kotwal then submitted that the detenu had made two applications for grant of bail before the Metropolitan Magistrate on October 25, 1988 and December 12, 1988. The learned Counsel urged that the order passed by the Metropolitan Magistrate rejecting the bail applications were not placed before the Detaining Authority and failure to do so vitiates the order of detention. It was

contended that the fact that an application for bail was made was relevant circumstance and failure to bring the circumstance to the attention of the Detaining Authority is serious infirmity. We are unable to accede to the submission of the learned Counsel. Though, it is undoubtedly true that the bail applications and the order rejecting the prayer for bail were not placed before the Detaining Authority, still the fact that the detenu was in judicial custody till February 27, 1989 was known to the Detaining Authority and that fact is clearly reflected in the ground supplied to the detenu. In the present case, the Magistrate has turned down the bail applications and, therefore, failure to place the bail applications and the orders thereon before the Detaining Authority has no consequence whatsoever.

6. Shri Kotwal contended that in the bail application dated October 25, 1988, the detenu had retracted his statement made u/s 108 of the Customs Act and that fact was not brought to the attention of the Detaining Authority and, therefore, the order is invalid. Our attention was invited to the application dated October 25, 1988 and the detenu has stated :

"The accused has retracted his statement as, according to him, it was taken by subjecting to physical violence."

In our judgment, failure to place the application of bail which contains the retraction in a very vague manner cannot lead to the conclusion that the order is invalid because retraction of the statement in such manner is not a circumstance on the facts and circumstances of the case to be material.

7. Shri Kotwal then submitted that the detenu was produced before the Metropolitan Magistrate on September 27, 1988 and the Customs authorities sought remand of the detenu till October 11, 1988. The remand was granted by the Magistrate by passing the following order :

"Accused produced at 3 p.m. He is remanded to Judicial Custody till 11-10-1988 as others involved are to be traced. Passport of the accused be detained by the department."

Shri Kotwal contended that the copy of this order was not placed before the Detaining Authority and, therefore, the Detaining Authority did not take into consideration the fact that the passport of the detenu was retained by the Customs authorities and, therefore, even though the detenu may be released on bail, there was no likelihood of detenu leaving the country. Shri Kotwal submitted that in case the detenu is unable to leave the country, there could not be any apprehension that the detenu would indulge in prejudicial activities for which he was arrested. The submission is that the detenu is charged for trying to export heroine outside the country and in base the passport of the detenu is held by the Customs authorities, then the detenu was not in a position to leave the country. The submission is entirely misconceived. The grounds of detention unmistakably establish that the detenu had come to the country on two occasions within a period of about a month solely for the purpose of purchasing narcotics. On the

first occasion, the detenu did not succeed and therefore, returned back after about a month. The return filed by the detaining authority clearly indicates that the detenu is deeply involved in drug trafficking and that he has thick connections with the gang involved in international drug trafficking. If the detenu is foreign national having connections with international drug trafficking, even though the detenu may not be able to leave the country in absence of passport, there is every likelihood that the detenu would indulge in prejudicial activities in the country itself. The detenu can very well purchase heroine and pass it on to other members of the gang who would take it away. The possibility of detenu leaving the country in absence of passport also cannot be ruled out. The detaining authority very rightly pointed out that the common experience of the authorities is that the accused after release on bail, immediately jump bail and leave the country by any device. It is undoubtedly true that the order of detention is not to keep the detenu in the country but to prevent his indulging in prejudicial activities. In case, the detaining authority felt that the detenu would indulge in prejudicial activities in the country being a member of the international gang, we cannot find any infirmity in the reasoning. In our judgment on the facts and circumstances of the case, even though the fact that the passport of the detenu was retained by the Customs authorities in pursuance of the order passed by the Magistrate was not brought to the attention of the detaining authority, that would not invalidate the detention order. Shri Kotwal then invited our attention to the unreported decision of this Court where view has been taken that in case the passport is retained by the Customs authorities, then failure to bring that fact to the attention of the Detaining Authority is fatal to the order of detention. It was observed that the retention of the passport by the Customs authorities was a vital and material fact and non consideration of the same would render the order of detention illegal. It is not possible to accept the submission that in every case as soon as it is established that the fact that passport is retained by the Customs authorities is not brought to the attention of the Detaining Authority, then the order of detention is invalid. It would depend upon the facts and circumstances of every case where failure to invite attention of the Detaining Authority to the said fact is relevant or not and on the facts and circumstances of the present case, we do not think that it was relevant.

8. Finally, Shri Kotwal submitted that the order of detention is required to be quashed because the Detaining Authority has passed the order long after the sponsoring authority forwarded the proposal. The return filed by the authority indicates that the proposal in respect of the detention was forwarded by the Sponsoring authority on November 24, 1988 along with the documents and was received in the Home Department on November 25, 1988. The Home Department thereafter sought further information and the additional information was received on December 9, 1988. The Detaining Authority then claims that the proposal was considered and the documents were scrutinised and grounds of detention were prepared on December 12, 1988. The Detaining Authority claims that the proposal and the documents were re-considered and the detention order

was passed on February 27, 1989. Shri Kotwal complains that if the draft grounds of detention were forwarded on December 12, 1988, there is no reason why the order of detention, should have been postponed by the further 15 days. The learned Counsel complained that all along the detenu was in judicial custody and the order passed in February 1989 i.e. about three months from the date of arrest of the detenue suffers from serious laches. The contention is that if there was no apprehension in the mind of the Detaining Authority immediately on the arrest of the detenue, then it is difficult to appreciate how such apprehension came to the mind of the Detaining Authority after three months. We are not impressed by the submission of the learned Counsel. The return clearly indicates that the detenue was arrested on September 27, 1988 and within two months, the sponsoring authority forwarded proposal. The explanation given by the respondents in Paragraph 10 of the return is not unreasonable and we are not prepared to quash the detention order on the ground of delay in the facts and circumstances of the case. In our judgment, the order of detention does not suffer from any infirmity and the petition must fail.

9. Accordingly, rule is discharged.