

(1993) 09 BOM CK 0022

In the Bombay High Court

Case No : Criminal Writ Petition No. 756 of 1993

Mohamed Javed Abdul Aziz Shaikh

APPELLANT

Vs

D.K. Jain, Principal Secretary (Preventive Detention) to the
Government of Maharashtra, Home Department and Another

RESPONDENT

Date of Decision : 22-09-1993

Acts Referred:

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

Citation : (1994) 2 BomCR 98 : (1994) 96 BOMLR 798

Hon'ble Judges : S.H. Kapadia, J;H.H. Kantharia, J

Bench : Division Bench

Advocate : Vidya Kastle, for the Appellant; R.P. Desai, Assistant Public
Prosecutor, for respondent Nos. 1 to 4 and R.M. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

H.H. Kantharia, J.

1. By this petition under Article 226 of the Constitution of India, the petitioner-detenu takes exception to the detention order dated October 23, 1992 passed against him by the Principal Secretary (Preventive Detention) to the Government of Maharashtra, Home Department and the detaining authority (first respondent) under sub-section (1) of section 3 of the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 with a view to preventing him from engaging in illicit traffic of Narcotic Drugs.

2. The grounds of detention on which the detaining authority relied are, shortly stated, that on 2-7-1991 at about 6.00 a.m., information was received that four persons, including the petitioner, were likely to make a transaction on 2-7-1991 at about 8.45 a.m. to 9.45 a.m. in the vicinity of an open place situate between Saifee Masjeed and Wanjara Compound along M.E. Sarang Marg, Dongri, Bombay-400 009 about narcotic drugs. A trap was, therefore, arranged. At 9.15 a.m., it was alleged, the petitioner went from Sadakat Manzil situated on the

same M.E. Sarang Marg with a cloth bag containing some heavy material. After about 5 minutes three associates of the petitioner approached him. They had some discussion. Thereafter the petitioner took out three small polythene bags and handed over one each to three of his associates. It is at that point of time that police surrounded and apprehended them. The result of this raid revealed that the polythene bag contained in all 03.800 Kg. of Hashish and a personal search of the petitioner resulted into recovery of Rs. 12,000/-. A cash of Rs. 6,000/- was also found in the shirt pocket of the petitioner. The contraband and money were taken charge of under a panchanama. The three associates of the petitioner were also found in possession of 500 grams of charas and cash of Rs. 100/-, 50/- and Rs. 20/- respectively on their person. On further interrogation of the petitioner he made a voluntary statement that he had some more charas kept at Room No. 12, Zahid Manzil, M.E. Sarang Marg at Dongri and led the police there from where 30.400 Kgs. of hashish, weighing instruments and cash of Rs. 2,81,850/- were recovered. The petitioner was then brought to the Borivali unit of the Narcotic Cell and an offence punishable u/s 8(c) read with sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 was registered against him and his associates. Further contraband of 31.900 Kgs. of hashish valued at Rs. 3,82,000/- and a cash amount of Rs. 3,00,020/- were recovered with the arrest of the petitioner and his three associates. The petitioner's statement was recorded wherein he admitted that his father was conducting business in Narcotic Drugs viz. ganja and after his death he took over the business and for the last about 4-5 years he was conducting narcotic activities at the open place between Saifee Masjeed and Wanjara compound along M.E. Sarang Marg with the help of his associates. One Khurshid from Kashmir and another person by name Thakur were supplying the narcotic drugs.

3. The petitioner, in this writ petition, raised various contentions in order to challenge the detention order passed against him. However, Ms. Vidya Kasle, learned Counsel appearing on his behalf, urged before us only two grounds for quashing the detention order. Firstly she urged that there was inordinate delay in issuing the order of detention after the arrest of the petitioner which delay has not been explained and as such the live link between the alleged illegal activity and the detention order was snapped. Secondly she contended that there was once again unexplained inordinate delay in execution of the detention order. We find substance in both the arguments of Ms. Kasle.

4. Thus, admittedly the petitioner was arrested for his alleged illegal activities in dealing with Narcotic Drugs on July 2, 1991 but the impugned order came to be passed as late as on October 23, 1992. In the petition it is contended that the investigation in the case was completed on July 24, 1991. The charge-sheet was filed on September 2, 1991 and the petitioner was granted bail on October 28, 1991 and he availed of the bail order on October 30, 1991. Thus, there was delay of more than fifteen months in passing the detention order and more particularly 12 months after the petitioner was released on bail. Ms. Kasle vehemently urged that the detention order was belatedly issued and the

inordinate delay has not at all been explained which cannot be excused. According to the learned Counsel, the grounds of detention are thus stale and the action of detention amounts to punishment. Further submission of the learned Counsel is that the live link, if any, between the alleged illegal activities of the petitioner and his detention has been snapped. Her submission then is that nothing adverse was reported against the petitioner during the period between 2-7-1991 and the date of the order of detention viz. 23-10-1992 during which period the petitioner had regularly attended the narcotic cell and the Court, as per the Court's order. The detention order, according to the learned Counsel, was mala fide, illegal, unconstitutional and void. These contentions raised on behalf of the petitioner were dealt with by V.S. Kambli, Desk Officer, Home Department (Special) of the Government of Maharashtra in his affidavit dated September 21, 1993 which makes an interesting reading in para 4 as under :

"Additional Commissioner of Police (Crime), Greater Bombay submitted the proposal on 21-2-1992 in respect of detenu along with the documents mentioned in the list of documents from Serial No. 1 to 22 vide his letter, dated 9-1-1992 which was received in the Home Department on 21-2-1992. Then the Government had called for additional information on 20-3-1992 and the same was received on 30-3-1992. In the meantime the case was submitted to the detaining authority i.e. Shri D.B.S. Sohal, then Secretary (Preventive Detention) on 13-3-1992 but before he could finalise and issue the order, he was transferred. On his post, Shri P.J. Misar, Principal Secretary was appointed on 8-6-1992. Shri Misar, was also transferred and Shri P.M.A. Hakim was appointed on 6-7-1992 as Detaining Authority. However, Shri Hakim was also transferred and Shri D.K. Jain, Principal Secretary was appointed as detaining authority on 4-8-1992. Then the case was submitted to Shri D.K. Jain. He considered the proposal and scrutinised the documents and formulated the draft of the grounds of detention on 14-9-1992. The Detaining Authority again considered the proposal and documents and issued the detention order on 23-10-1992 and contemporaneously finalised the draft of the grounds of detention. There is no delay in issuing the detention order."

It is important to note that no explanation whatsoever is given in his affidavit as to what was done between the date of the arrest of the petitioner i.e. 2-7-1991 to 21-2-1992 when the proposal was submitted. There is then no explanation as to what actions were taken between 21-2-1992 and 20-3-1992 when additional information was called. The case was, in the meantime, submitted to the then detaining authority on 13-3-1992 but thereafter transfer of various officers are mentioned in the affidavit but it has not been clarified as to when the transfers were made so as to come in the way of passing the detention order in time. The detaining authority, D.K. Jain in his affidavit has averred that after he received the case he took prompt action. But it is important to note that he took long time to finalise the draft of the grounds of detention between 14-9-1992 and 23-10-1992. In other words, there is no explanation worth the name coming forward from the respondents as to the inordinate delay in issuing the detention

order so late. There is absolutely not even a whisper in the affidavits filed on behalf of the respondents as to what prevented the detention order being passed soon after the petitioner was released on bail on October 30, 1991. Under the circumstances we are left with no alternative but to hold that the live link between the alleged illegal activities of the petitioner and the detention order was snapped. In support of her contention, Ms. Kasle relied upon a judgment of the Supreme Court in case of T.A. Abdul Rahaman Vs. State of Kerala and others, in which it was held:

"The conspectus of the above decisions can be summarised thus : The question whether the prejudicial activities of a person necessitating to pass an order of detention is proximate to the time when the order is made or the live link between the prejudicial activities and the purpose of detention is snapped depends on the facts and circumstances of each case. No hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the causal connection has been broken in the circumstances of each case."

In the circumstances of this case, as enumerated above, we are more than satisfied that there is no explanation by the detaining authority as to the exceptionally long delay in passing the detention order after the alleged illegal activities of the petitioner were detected and, therefore, in our opinion, in this case the live link was snapped.

5. The other contention of Ms. Kasle is that there was once again unexplained delay in execution of the detention order. Admittedly, the detention order was passed on October 23, 1992 but the same was not executed till 8-4-1993. According to the petitioner, he attended the narcotic cell on 28th December, 1992 and 29th March, 1993. He also attended the Special Court on 15-12-1992 and as the learned Judge was on leave he left the Court. He also contended in the petition that he was throughout staying with his family at the address given to the police authorities and was available for service of the order of detention and no efforts were made for executing the order of detention till April 8, 1993. The subjective satisfaction of the detaining authority, urged the petitioner, was thus unreal and sham and the unexplained delay in execution of the order of detention renders the detention illegal, unconstitutional and void. This contention of the petitioner was sought to be dealt with by M.D. Pandey, Sub-Inspector of Police, attached to P.C.B. C.I.D. Bombay in his affidavit dated 21st September, 1993 contending that the order of detention was received in PCB office on the

same day i.e. 23rd October, 1992 when the staff of PCB CID visited the house of the petitioner-detenu at Dongri at 22.30 Hrs. The detenu was not present. His brother informed that the detenu had gone to Mumbra and he did not know the exact address. Then on 24-10-1992 the staff of PCB CID again visited the detenu's house at 12.30 Hrs. when his friend was present there. His friend Jan Mohamed informed that the detenu had gone to Mumbra but his exact address was not known. Thereafter on 26-10-1992 staff of PCB CID visited the detenu's residence and shop at Dongri. At the shop his brother stated that detenu had gone to Mumbra but his exact address was not known and at his residence his mother was present who stated that the detenu had gone to Mumbra about five days back and had not returned. On 2-11-1992, the staff of PCB CID visited the detenu's residence when his brother stated that the detenu had not returned from Mumbra. On 2-12-1992 PCB staff visited detenu's residence when his another brother Khalid informed that after the detenu was released on bail he was not staying there. On 8-12-1992 the detention order was returned unexecuted to the Home Department. On 23-12-1992 Sub-Inspector Pandey along with Sub-Inspector Patil and staff visited the detenu's residence at 15.45 Hrs. when a mob did not allow them to enter the house of the detenu. According to Sub-Inspector Pandey, since Bombay City and particularly sensitive areas which fell in the jurisdiction of Dongri Police Station were gripped in unprecedented communal riots, for fear of untoward incident, the police had to return without using even reasonable force to apprehend the detenu. On 5-3-1993 the staff of PCB CID visited the residence of the detenu when they were informed that the detenu may be in Mumbra or Sidhpur in Gujarat. Thereafter an averment was made in the affidavit of Sub-Inspector Pandey that on 8-4-1993 the order of detention was served when the detenu was apprehended by Narcotic Cell and brought to the office of PCB CID Bombay and in the passing Sub-Inspector Pandey averred that the detention order could not be served as he was absconding. We are not at all impressed by the lengthy and repeated averments made in the affidavit of Sub-Inspector Pandey that time and again the staff of the PCB CID visited the residence of the detenu and could not trace him there. Even if what is stated in the affidavit is true, one thing is clear that time and again the police were told that the detenu had gone to Mumbra and still no efforts absolutely were made to trace him at Mumbra. Once the Police were told that the detenu had gone to a place called Sidhpur in Gujarat. There is nothing in the affidavit to show that any effort was made to trace the detenu in Sidhpur. It is important to note that the detenu made averments in his petition that he was regularly attending the Court and the Narcotic Cell which have not been denied at all by either Sub-Inspector Pandey or anyone else on behalf of the executing authority. In view of the fact that the detenu was attending Court and the Narcotic Cell and still he was not served with the detention order, it cannot be said that he was absconding. In the circumstances the conclusion is inevitable that the detention order was not executed for quite a long time and for such delay there is absolutely no explanation on account of which it has to be inferred as was held by Their Lordships in the case of T.A. Abdul Rehman (supra)

that when there is unsatisfactory and unexplained delay between the date of order of detention and the date of securing the arrest of the detenu, such a delay would throw considerable doubt on the genuineness of the subjective satisfaction of the detaining authority leading to a legitimate inference that the detaining authority was not really and genuinely satisfied as regards the necessity for containing the detenu with a view to preventing him from acting in a prejudicial manner.

6. The petition thus succeeds on these two contentions raised on behalf of the petitioner-detenu and the same is allowed. The impugned detention order dated October 23, 1992 passed by the first respondent-detaining authority is quashed and set aside. The petitioner-detenu shall be set at liberty forthwith unless required in some other case.