

(1963) 10 AHC CK 0007
In the Allahabad High Court
Case No : Criminal Appeal No. 1532 of 1962

Mohammad Ali

APPELLANT

Vs

Sri Ram Swarup and Others

RESPONDENT

Date of Decision : 16-10-1963

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1898 (CrPC) — Section 151
Penal Code, 1860 (IPC) — Section 109, 153A, 342, 79
Police Act, 1861 — Section 23

Citation : AIR 1965 All 161 : (1965) CriLJ 413

Hon'ble Judges : Gyanendra Kumar, J

Bench : Single Bench

Advocate : M. Asif Ansari, Shanti Swarup Bhatnagar and S.N. Ali Khan, for the Appellant; B.S. Darbari and P.K. Bermon, for the Respondent

Final Decision : Allowed

Judgement

Gyanendra Kumar, J.—This is an appeal by the complainant against acquittal of the four respondents in a case u/s 342/109 I. P. C.

2. On the relevant date respondent No. 1 Ram Swamp was the Head Constable while the remaining three respondents were constables posted at the Police Station Kairana, district Muzaffarnagar. The complainant is a Homoeopath practising at Kairana. His case was that on 15-10-1961 at about 1 P. M. the respondents unlawfully put him under arrest and took him to the thana where he was detained till 7 A. M. the next day when he was sent to the District Jail, Muzaffarnagar, and was released on bail on the evening of 16-10-61. Proceedings u/s 107/117 Cr. P. C. were taken against him which remained pending till 8-12-61 when they were dropped for want of evidence. Twenty-three days later, the complainant lodged a complaint on 1-1-62 with the allegations that without any rhyme or reason he had been put under arrest and detained under unlawful custody. He, however, admitted that the accused persons had no previous enmity with or ill will against him. The complainant further admitted that his uncle had

gone to the thana that very day (15-10-61) at about 3 P. M., but he was turned away by a police constable. However, no explanation has been furnished as to why any telegram or information about his unlawful detention was not sent to the District Magistrate, the Superintendent of Police or to higher authorities.

3. All the accused persons admitted that they had effected the arrest of the complainant-appellant on 15-10-61. But they denied that the complainant was arrested at his shop. According to the defence, the complainant was arrested in the market place where he was found publicly inciting communal feelings on the ground that the Hindus of Aligarh and Baraut had committed acts of atrocity upon the members of the Muslim community. One of the accused-respondents, namely Ram Swarup Head Constable, stepped into the witness box as D.W. 2 in support of the defence version and stated that soon after effecting the arrest of the complainant he took him to the thana and lodged a report there, which is Ext. Kha. 1 on the record.

4. The complainant besides examining himself produced Jagdish Prasad, Rahim Bux, Raghunath Prasad (P. Ws. 2, 3 and 4), who all deposed that the complainant was arrested from his Matab. P. W. 1 Mohammad Ali did not give any satisfactory explanation as to why he had filed the complaint so late. He also admitted that he did not maintain any register of his patients. He further admitted that he had no enmity with or ill-will against the accused persons. It is, therefore, not believable that the accused persons would have arrested him without any rhyme or reason. In this connection it may be noted that P. Ws. Jagdish Prasad and Rahim Bax, were the patients of the complainant. P. W. Rahim Bax had also business dealings with P. W. Jagdish Prasad. On the other hand, P. W. Raghunath Prasad was mere chance witness, whose house lay one furlong away from the Matab of the complainant. Some time ago he had also taken medicine for his child from the complainant, It may further be mentioned that P. W. Jagdish Prasad who is said to be running a shop in the neighbourhood and from whose shop P. W. Raghunath Prasad was alleged to be making purchases of cloth, was not produced as a prosecution witness, The last P. W. Satya Prakash only states that he had seen the complainant being taken by the accused persons at about mid-day on 15-10-61. His evidence does not help the prosecution case

5. However, the fact remains that the complainant was admittedly arrested on 15-10-61 at about 1 P. M. As already stated above, Head Constable Ram Swarup accused actually had made an application u/s 342-A, Cr. P. C. for being allowed to appear as a witness for the defence, which was granted by the Magistrate. He accordingly appeared as defence witness No. 2. According to him, the complainant was shouting in the market of Kairana near Kathara Dharamshala that Hindus had killed Muslims in Aligarh and had burnt a mosque in Baraut town, yet the Muslims of Kairana were sitting quiet According to this witness, the outcries of the complainant created an excitement in the public with the result that there was an apprehension of breach of peace, likely to disturb the public

tranquillity. Many persons had collected on the spot. It was at that stage that H.C. Ram Swarup arrested the complainant u/s 151 Cr. P. C. and took him to the thana, where he lodged a report. In his cross-examination D.W. 2 Ram Swarup admitted that the persons, who had collected around him, were all Hindus, but none had come armed with lathis etc. He strongly repudiated the suggestion that the complainant was arrested from his dispensary, and reiterated that he was arrested in the market place as described above.

6. Ext. Kha 1 is the copy of the report lodged at the thana by Ram Swarup Head Constable regarding the arrest of the complainant. Its perusal shows that on hearing the outcries raised by the complainant the public had become enraged, as a result whereof there was imminent apprehension of the breach of public peace and tranquillity (Jis se ki fauri nuqse aman ka andesha ho raha tha). It was then that he put the complainant under arrest and brought him to the thana, because by the action of the complainant there was imminent danger of breach of peace in present and future. (Chunki is fel se fauri nuqse aman ka andesha hai aur ayenda bhi andesha nuqse aman hai). It is also significant to note that the report lodged by H.C. Ram Swarup was in the Form of a non-cognizable offence.

7. D.W. 1 Vijaipal Singh, who had scribed the report (Ext. Kha. 1) had stated that the accused-respondents had brought the complainant under arrest on 15-10-61 at 1.10 P. M. and that the report lodged by H.C. Ram Swarup was entered in the General Diary of non-cognizable offences. He further admitted that a report for necessary action against the complainant was submitted but the case was dismissed for want of evidence. There is also the unchallenged evidence of the complainant to the effect that the proceedings u/s 107/117 Cr. P. C. were taken against him, but the same were dropped on 8-12-61. From the narration of the above facts and evidence, it is abundantly clear that the complainant was alleged to have committed or was likely to commit only a non-cognizable offence.

8. The report lodged by H.C. Ram Swarup and his deposition as D.W. 2 shows that he had arrested the complainant under the provisions of Section 151 Cr. P. C. which runs as follows:

""A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented."

The perusal of Section 151 Cr. P. C. shows that before a police officer may arrest a person without a warrant or orders from a Magistrate it is necessary to fulfil the two pre-requisite conditions--(1) that the police officer concerned knew that the offender had a design to commit a cognizable offence, and (2) that it appeared to such officer that the commission of the cognizable offence could not be otherwise prevented. There is not the slightest suggestion in the statement of D.W. 2 H.C. Ram Swarup as to what cognizable offence was likely to be committed by the complainant. On the other hand, he clearly admitted that it

was Hindus, who had mustered round him on hearing the fanatic outcries of the complainant, but neither they nor anybody else were armed with lathis or other weapons. Even if the complainant was exclaiming the words attributed to him, viz, that the Hindus had killed many Muslims in Aligarh and a mosque had been burnt in Baraut, while the Muslims of Kairana were sitting quiet, they only make out a case u/s 163-A I. P. C. which runs as follows;

"Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise promotes or attempts to promote feelings of enmity or hatred between different classes of the Citizens of India, shall be punished with imprisonment, which may extend to two years, or with fine, or with both."

Section 158-A I. P. C. is not a cognizable offence and, therefore, the accused persons had no right or Jurisdiction to arrest and detain the complainant. Moreover, there is not the least suggestion in the deposition of D.W. 2 Ram Swarup Head Constable that the commission of the apprehended offence on the part of the complainant could not be otherwise prevented. On the other hand, what we find is that proceedings u/s 107/117 Cr. P. C. alone were taken against the complainant. The report which was lodged by Ram Swarup Head Constable soon after the arrest of the complainant as well as his deposition also show that the utterances of the complainant were likely to result in the breach of the peace and disturbance of the public tranquillity. There is no provision either in the Indian Penal Code or Cr. P. C. authorising a police officer to arrest without warrant a person likely to commit breach of the peace or disturb the public tranquillity. The evidence of D.W. 1 Vijaipal Singh and the complainant also shows that only proceedings u/s 107/117 Cr. P. C. were taken against him. The person likely to commit breach of the peace or disturb the public tranquillity cannot be said to be guilty of any offence, much less, a cognizable offence,

9. B. S. Darbari, learned counsel for the respondents, has vehemently argued that the utterances of the complainant were likely to result in a communal riot and, therefore, the accused persons had full justification to arrest the complainant-appellant. Unlawful assembly has been defined u/s 141 I. P. C. as an assembly of five or more persons if the common object of those persons is, inter alia, to commit any criminal trespass, mischief or other offence. There is no suggestion on behalf of the respondents that five or more persons had collected on the scene with the common object of committing mischief, criminal trespass or other offence. As already observed, D.W. Ram Swarup Head Constable, on the other hand, clearly admitted that the persons who had gathered round him were all members of the Hindu community and that neither they nor any one else had a lathi or other weapon and that there was no show of force or violence by any one present on the spot. Thus, it cannot be said that as a result of the utterances of the complainant there was any unlawful assembly or rioting on the part of any of the persons present on the spot. There is also no suggestion of any common object for committing any offence on the part of the members of the Hindu

Community who had collected on the spot. Thus it is abundantly clear that there was no design on the part of the complainant or any one else to commit a cognizable offence. The police officers had, therefore, no justification for arresting the complainant without warrant. Under the circumstances, the arrest and detention of the complainant appellant by the police officers concerned was evidently unlawful.

10. It was next contended by Mr. Darbari that it was a matter of subjective satisfaction of the police officers concerned who had effected arrest u/s 151 Cr. P. C. and it was not for file High Court to go into the question whether the police officers were indeed justified in coming to that conclusion. In support of this contention Sri Darbari has placed reliance upon the case of *In re Om Prakash Gupta* AIR 1949 Mad 744 wherein it was observed:

"Section 151 authorises a police officer to arrest if he had knowledge that the person sought to be arrested entertained a design to commit a cognizable offence. It must also further appear to file police officer that the commission of the offence could not be otherwise prevented, Both the "knowledge" and the "appearance" are those of the police officers concerned and are not capable of an independent investigation. It is not open to the High Court exercising its jurisdiction u/s 491 to go into the question whether, in fact, the police officer was justified in concluding that the person sought to be arrested was about to commit a cognizable offence and whether the police officer was equally justified in concluding that there were no other means by which the perpetration of the offence could have been prevented. The discretion is vested solely in the police officer and that discretion cannot be questioned or canvassed in a proceeding u/s 491. The object of the section is to prevent tile commission of an offence which a person designs or intends to commit. The facts would not be capable of investigation In order to find out whether, in fact, a cognizable offence was intended to be committed or not, as the offence would still be at the stage of an intention and not passed Into the region of facts. There would be nothing therefore on the face of the record to show that the arrest was illegal or improper within the meaning of Section 491(1), Clause (b)."

He also relied upon the Division Bench case of *A.K. Gopalan Vs. State of Kerala and Others*, . It was a case u/s 491 of the Cr. P. C. and had come up before the High Court in a writ petition under Article 226 of the Constitution. Therein Anna Chandy, J. observed as follows:

"It is the subjective satisfaction of the officer concerned that is envisaged in the section and it is not for the High Court in proceedings u/s 491 to go into the question whether the officer was Indeed justified in coming to his conclusions." Likewise Govinda Menon, J. observed as under:

"..... .the question whether the police officer had the requisite knowledge and whether the commission of the designed offence could have been prevented otherwise than by an immediate arrest arc matters essentially within the

discretion of the police officer and are not capable of an independent investigation and this court cannot substitute its own opinion as to whether the commission of the offence could have been prevented by some means other than the arrest of the person..... The discretion is mainly with the police officer and unless there is the clear evidence that it is a fraudulent exercise of the power vested in the officer, his discretion cannot be questioned in proceedings u/s 491 of the Cr. P. C."

11. With profoundest respect to the learned Judges who decided the above cases, I have no hesitation in accepting the broad proposition of law propounded in those cases, provided they are not supposed to have laid down an absolute dictum that under no circumstance could the High Court go into the question of the proper exercise of the discretion by a police officer in making an arrest u/s 151 Cr. P. C. But, on a careful reading of the observations of their Lordships of the Madras and Karala High Courts it appears to me that such was not the intention of those decisions. In *Om Prakash Gupta's case* AIR 1949 Mad 744 the Inspector of Police concerned had filed his own affidavit saying that he had arrested the petitioner of that case "after satisfying himself that the petitioner was designing to commit a cognizable offence". Moreover on the face of the proceedings of that case there was nothing to indicate that the detention or custody of the petitioner was illegal or improper. Likewise in *A.K. Gopalan Vs. State of Kerala and Others*, it was observed by Govinda Menon, J. that under the circumstances of that case the question whether the police officer had the requisite knowledge and whether the commission of the designed offence could have been prevented otherwise than by immediate arrest were matters which were not capable of an independent investigation and therefore the court could not substitute its own opinion as to whether the commission of the offence could have been otherwise prevented. It was further observed that the discretion was mainly with the police officer, and unless there was clear evidence that it was fraudulent exercise of the power vested in the officer, his discretion could not be questioned by the court. Thus, the jurisdiction of the court to go into the matter in a proper case had not been held to be barred altogether.

12. In the instant case, we get a clear inkling into the working of the mind of Head Constable Ram Swarup, who had dictated the First Information Report (Ex. Kha 1) immediately after the arrest. As already observed above, the Head Constable had stated in unequivocal terms that there was only an apprehension of the breach of the peace and disturbance of the public tranquillity which could not be said to be "a design to commit a cognizable offence." The fact that proceedings u/s 107/117 Cr. P. C. alone were launched against the complainant-appellant further indicates that he was suspected only of attempting to commit the breach of the peace and public tranquillity. Thus this Court is in a more advantageous position in the instant case to be able to appreciate the then existing state of mind of the police officers, who had effected the arrest of the appellant without a warrant or order from a Magistrate, in contravention of law.

13. It was next urged on behalf of the respondents that the scope of Section 23 of the Police Act was wider than that of Section 151 Cr. P. C. and that a police officer could arrest a person u/s 28 of the Police Act in order to prevent the commission of a non-cognizable offence even. In support of this contention Mr. Darbari has placed reliance on the cases of Emperor v. Nga Kala 35 Ind Cas 523: (AIR 1917 Low Bur 152) and AIR 1940 413 (Oudh) which followed the former case. The relevant portion of Section 28 of the Police Act runs as follows:

"It shall be the duty of every police officer promptly.....to prevent the commission of all offences and public nuisances and to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient ground exists."

14. It is true that it is the duty of a police officer to prevent the commission of all offences (cognizable or non-cognizable) and public nuisances, but that does not mean that the mode of such prevention to be employed by the police officer concerned would be only by apprehension or arrest of the persons concerned. A police officer can apprehend or arrest only those persons "whom: he is legally authorised to apprehend" and that; too on sufficient grounds. The legal authority to arrest is circumscribed by the provisions of Section 151 Cr. P. C. and can be exercised only in cases of cognizable offences, where their commission cannot be otherwise prevented. It is a well established principle of interpretation of statutes that as far as possible the various enactments have to be read in harmony with one another. Therefore the provisions of Section 151 Cr. P. C. and Section 23 of the Police Act have to be read together. With greatest respect to the learned Judges who decided the cases of Nga Kala 35 Ind Cas 523: (AIR 1917 Low Bur 152) & Thakuri, AIR 1940 413 (Oudh) it appears that they did not keep in view the above principle of law of interpretation of statutes, when they held that the Police derived their power of preventive arrest not only from the Code of Criminal Procedure but also from Section 23 of the Police Act.

15. At any rate, whatever may have been the state of law before, now all laws are subservient to the Constitution of India. After the commencement of the Constitution, the liberty of a citizen of India has to be jealously guarded and preserved. Article 21 of the Constitution of India enjoins "no person shall be deprived of his life or, personal liberty except according to procedure established by law." There is no arbitrary power in the executive or Police authority either to detain or punish a person except for violation of law. Once a person is arrested and detained, the executive has to justify its action in the sense that the detention is either for violation of some law or for preventive purpose, as prescribed by law. In both the cases, the justification for detention has to be only under the authority of law. It is an established principle that before a person is deprived of his liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected. In AIR 1931 248 (Privy Council) it was observed:

"In accordance with British jurisprudence no member of the executive can

interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of Justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

In *Christie v. Leachinsky* (1947) 1 All ER 567 at p. 576 "it was observed:

"..... The liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other..... .once more to proclaim that a man is not to be deprived of his liberty except in due course and process of law."

Strictly speaking, the appellant was unlawfully detained by the respondents and his liberty was deprived only for a period of about 36 hours till he was released on bail by the Magistrate at Muzaffarnagar. However, in the case of *Zahir Ahmad Vs. Ganga Prasad, A.S.D.M., Ballia and Another*, a Division Bench of this Court laid down:

"The fact that a person has been granted bail does not amount to his being set at liberty. It is true that after bail is granted, he is no longer in physical custody in the sense of being in a prison, but it is difficult to say that he has liberty of action or even complete liberty of movement."

Thus the appellant remained in unlawful physical custody for 1 1/2 days and in constructive custody upto 8-12-61 when the case against him u/s 107/117 Cr. P. C. was dropped.

16. It was lastly contended by Mr. Darbari that, in any case, the respondents were protected by the provisions of Section 79 of the I. P. C. which runs as below:

"Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be Justified by law, in doing it."

In the instant case, apart from giving their statements as accused, one of the accused persons Ram Swarup Head Constable had also appeared as a defence witness u/s 342-A Cr. P. C. The only justification pleaded by him and other accused persons is that they were justified by law in arresting the appellant; no mistake of fact or good faith has been pleaded or made out by them. Section 79 I. P. C. has, therefore, no application to the present case.

17. In view of the above discussion, I allow the appeal, set aside the order of acquittal of the respondents recorded by the Magistrate and convict them u/s 342/109 I. P. C. I sentence Ram Swarup Head Constable (the leader of the Police party) to pay a fine of Rs. 100/- and in default to undergo simple imprisonment for a period of one month. The other respondents Ali Abbas, Mamud Khan and Amar Nath Constables are, however, sentenced to pay a fine of Rs. 50/- each and in default to undergo simple imprisonment for a period of fifteen days.