

(2020) 03 J&K CK 0020
In the Jammu And Kashmir High Court
Case No : WP (Crl) No. 134 Of 2019

Mohammad Shafi Magray

APPELLANT

Vs

State Of J&K And Ors

RESPONDENT

Date of Decision : 13-03-2020

Acts Referred:

Jammu And Kashmir Public Safety Act, 1978 — Section 13

Citation : (2020) 03 J&K CK 0020

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : G.N Shaheen, Sajad Ashraf Mir

Final Decision : Allowed

Judgement

1. Through the instant petition, petitioner wife of detenu seeks quashment of detention order bearing no. 09-DMK/PSA of 2019 dated 01.03.2019,

whereby the detenu namely Muhammad Shafi Magray S/o Abdul Gaffar Magray R/o Kandi Khass District Kupwara, is under detention.

2. In the dossier it is alleged that the detenu came into contact with the militants operating in the Kupwara area namely Mudasir Ahamd of HM outfit

in the year 2006. It is alleged that the detenu became sympathizer of the said outfit organization whose aim and object is to accede the State of J&K

from the Union of India. It is submitted that the detenu is a constant threat to the security of the State. It is submitted that the detenu was arrested in

case FIR no. 306/2018 U/Sec. 13 ULAP Act, 7/25 A Act registered at Police Station Kupwara. Therefore, on these allegations he was slapped under

Public Safety Act, 1978.

3. The learned counsel for the petitioner-detenu has raised primarily three issues before the court questioning the validity of the detention. The first

point taken by the learned counsel for the petitioner is that the detention order was passed while the detenu was already in custody in respect of the

FIR No. 306/2018. In these circumstances, it was submitted by the learned counsel for the petitioner, the detaining authority ought to have satisfied

himself with the fact that there was imminent likelihood of release of the detenu in that case and that it was necessary to detain the detenu in order to

prevent him from indulging in prejudicial activities. According to the learned counsel for the petitioner, there is no such satisfaction recorded in the

grounds of detention. He placed reliance on the decision of the Supreme Court in the case of *Surya Prakash Sharma v. State of U.P. and others*: 1994

SCC (Cri) 1691 to submit that since the said satisfaction was not recorded, the detention order was vitiated.

4. The second point taken by the learned counsel for the petitioner was that non-supply of relevant material/ documents also vitiated the detention

order. In this context, it was the case of the petitioner that no documents at all were supplied to the petitioner/detenu. The non-supply of relevant

documents seriously undermines the capacity of a detenu to make an effective representation against the detention and that in itself would be a ground

to declare the detention order void. This right flows from the Constitution of India. In support, he referred to the decision of the Supreme Court in the

case of *Sophia Gulam Mohd. Bham v. State of Maharashtra*: AIR 1999 SC 3051.

5. The third point raised by the learned counsel for the petitioner was based on the provisions of Section 13 of the J&K Public Safety Act, 1978, which

require that the grounds of detention should have been communicated to the detenu in the language which was understandable to him and that he

should be afforded the earliest opportunity of making a representation against the order to the Government. According to him, the detenu only

understood Kashmiri language and the grounds of detention were in English language and no translated copies of the grounds of detention in Kashmiri

were provided to him. This seriously prejudiced his right to make an effective representation and on this ground also the detention order would be

vitiated.

6. On the other hand, Mr. Sajjad Ashraf Mir, GA, defended the impugned detention and he responded to each of the points. With regard to the first

point he submitted that there is a mention in the grounds of detention about the

arrest of the detenu with reference to the FIR No. 306/2018.

Therefore, according to him, the detaining authority was aware of the fact that the detenu was already in custody when the detention order was

passed. He, therefore, submitted that the point raised by the learned counsel for the petitioner on this score was untenable.

7. With regard to the plea of non-supply of material/ documents, Mr. Mir, placed before me the record pertaining to the detention. On going through

the same, I find that there is a signed document said to have been signed by the detenu, Muhammad Shafi Magray, in English. The said document is

titled "Receipt of Grounds of Detention".

8. Based upon the said receipt, Mr. Mir, submitted that the grounds of detention had been supplied along with other relevant documents, therefore, the

petitioner cannot make any grievance on this ground.

9. In so far as the point of supply of translated copies of grounds of detention in Kashmiri language is concerned, the learned GA, submitted that there

was no need to supply translated copies of grounds of detention in Kashmiri language as grounds of detention had been communicated in the language

understandable to the detenu. He submitted that it was clearly indicated in the receipt given that the grounds of detention were read over and

explained to him in Kashmiri language. Therefore, the requirement of the constitutional and statutory provisions was entirely met.

10. Heard learned counsel for the parties, perused the record and considered the matter.

11. I shall take up the first point with regard to the ground of satisfaction that has to be recorded by the detaining authority in case the detenu is

already in custody in connection with some other case. In this context we need to refer to the decision of the Supreme Court in *Surya Prakash*

Sharma (supra). The relevant paras are extracted herein below:

"The question as to whether and in what circumstances an order for preventive detention can be passed against a person who is already in

custody has had been engaging the attention of this Court since it first came up for consideration before a Constitution Bench in *Rameshwar Shaw v.*

District Magistrate, Burdwan. To eschew prolixity we refrain from detailing all those cases except that of *Dharmendra Suganchand Chelawat v.*

Union of India, wherein a three Judge Bench, after considering all the earlier

relevant decisions including Rameshwar Shaw answered the question in the following words:

“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 were 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.

When the above principles are applied to the facts of the instant case, there is no escape from the conclusion that the impugned order cannot be

sustained. Though the grounds of detention indicate the detaining authority's awareness of the fact that the detenu was in custody at the time of

making the order of detention, the detaining authority has not brought on record any cogent material nor furnished any cogent ground in support of the

averment made in grounds of detention that if the aforesaid Surya Prakash Sharma is released on bail “he may again indulge in serious offences

causing threat to public order”. (emphasis supplied) To put it differently, the satisfaction of the detaining authority that the detenu might indulge in

serious offences causing threat to public order, solely on the basis of a solitary murder, cannot be said to be proper and justified.

On the conclusions as above we quash the order of detention.”

12. From the above decision, it is evident that for an order of detention to be valid in respect of a person in custody, 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 custody; and (ii) there were compelling reasons

justifying such detention despite the fact that the detenu is already in detention.

The expression “compelling reasons” has also been explained by the Supreme Court as signifying 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 that it was necessary to detain him in order to prevent him from engaging in such activities.

13. In the present case I find that although there is mention of the fact that the detenu had been arrested in connection with FIR No. 306/2018 but, it is not clear as to whether the detaining authority was aware of the fact that the detenu continued to be in custody. Furthermore, assume that the detaining authority was aware that the detenu was in custody in respect of FIR No. 306/2018, the compelling reasons, referred to above, have not been indicated in the grounds of detention. In other words, the grounds of detention nowhere make a mention or indicate satisfaction that the detenu was being likely to be released from custody in near future. Therefore, in view of the decision of the Supreme Court in *Surya Prakash Sharma*, this alone would vitiate the detention order.

14. Now move to the second point which pertains to the non-supply of relevant material in order that the detenu could make an effective representation against his detention. According to the learned GA, 22 leaves along with dossier have been provided to the detenu. On examination of the record there are only ten leaves which been provided to the detenu.

15. The grounds of detention supplied to the detenu were incomplete. This in itself would vitiate the detention order as the detenu would have been incapacitated from making an effective representation.

16. The third point which was urged by the learned counsel for the petitioner was that translated copies of the detention order/ grounds of detention were not supplied and this can itself invalidate the detention of the detenu. Reliance was placed on the decision of the Supreme Court in the case of *Razia Umar Bakshi v. Union of India and others*: AIR 1980 SC 1751. In that decision, the Supreme Court had observed that where the detaining authority is satisfied that the grounds are couched in a language which is not known to the detenu, it must see to it that the grounds are explained to

the detenu, a translated script is given to him and the grounds bear some sort of a certificate to show that the grounds have been explained to the

detenu in the language which he understands. In the present case, it is an admitted fact that the grounds of detention in Kashmiri language which is the

language which the petitioner understood was not furnished to him. That being the case, this is yet another ground for invalidating the detention order.

17. Viewed thus, the Petition is allowed and the impugned detention order No. 09/DMK/PSA of 2019 dated 01.03.2019, whereunder the detenu

namely Muhammad Shafi Magray S/o Abdul Gaffar Magray R/O Kandi Khass, District Kupwara, is quashed. The detenu is directed to be released

forthwith. Records be returned to the Government Advocate. No order as to costs.