

(2014) 07 BOM CK 0220

In the Bombay High Court

Case No : Criminal Writ Petition No. 16 of 2006

Rafiq

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-07-2014

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1)

Criminal Procedure Code, 1973 (CrPC) — Section 107, 107, 108, 108, 109

Penal Code, 1860 (IPC) — Section 323, 504

Citation : (2015) ALLMR(Cri) 2677

Hon'ble Judges : S.S. Shinde, J;P.R. Bora, J

Bench : Division Bench

Advocate : K.C. Sant, Advocate for the Appellant; G.K. Thigle, AGP, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

S.S. Shinde, J

1. The learned Counsel appearing for the petitioners submitted that on 20th August, 2005, there was quarrel between the petitioners and one Chhotu Hasan Gowli and another person by name Shaikh Kasam Hasan Gowli near Mamaji Talkies in Bhusawal. The petitioners went to Police Station for lodging complaint against the said persons. However, the Police did not register the case. It is submitted that on 23rd August, 2005, the respondents No. 3 took the petitioners to the Police Station and made them to sit for 4 hours without informing them anything as to why they were brought to the police station. Later on, the respondent No. 3 asked the petitioners to pay Rs. 10,000/- stating that he would not register any case against Ganga Kanhaiya and Burhan Buddu but, would initiate proceedings u/s 107 of Cr. P.C., and would set them free. It is further submitted that the arrest of the petitioners on 23rd August, 2005 was without following the procedure. It is further submitted that though the petitioners were ready to furnish sureties, they were unnecessarily kept in arrest till 27th August,

2005. It is submitted that their representations to the various authorities including the Superintendent of Police, Jalgaon and the Commissioner of Police were not considered, no action had been taken on the said representations. Therefore, the learned Counsel for the petitioners submitted that the petition deserves to be allowed.

2. The learned APP appearing for the respondents, relying upon the three affidavits-in-reply filed by the Police Officers, submitted that there was no illegal detention as alleged by the petitioners. It is submitted that CR No. 211/2005 was registered against the petitioners for the offences punishable under Sections 323 and 504 of IPC with Bhusawal City Police Station on 20th August, 2005. The petitioners were arrested for the offence u/s 41(2) of Cr. P.C., and the case was registered bearing No. 74/2005 and 75/2005 for the offence u/s 110(e) and (g) of Cr. P.C. The petitioners were produced before the Special Executive Magistrate, LCB, Jalgaon. It is submitted that since the petitioners did not submit the solvency certificate till 27th August, 2005, they were not released. It is submitted that the Executive Magistrate acted in his jurisdiction and since no solvent surety was furnished, the respondent No. 4 ordered detention of the petitioners. It is therefore, submitted that in the light of the affidavits-in-reply filed by the authorities, the petition is devoid of any merits and the same may be dismissed.

3. We have given careful consideration to the submissions of the learned Counsel for the petitioners and also the learned APP appearing for the State-respondents, perused the pleadings in the petition, annexures thereto, affidavits-in-reply filed by the respondents and also accompaniments of the said affidavits. Upon careful perusal of the documents placed on record and in particular, Exh. R.1 collectively, annexed with the affidavit filed by Rameshsingh s/o Pouladsingh Pardeshi, it is clear that, Chapter Case No. 74/2005 and Chapter Case No. 75/2005 were registered against the petitioners by invoking the provisions of Section 110(e)(g) of Cr. P.C. The said document further shows that the petitioners were arrested on 23rd August, 2005 at 15.05 Hrs. Their arrest was shown to be u/s 41(2) of Cr. P.C. Chapter VIII of Cr. P.C., and in particular, Sections 107 to 116 thereof, provides for initiation of chapter proceedings and also for asking the persons against whom such proceedings have been initiated, to execute bond and if such bond is not executed before the Executive Magistrate, section 116(3) of Cr. P.C. provides that, the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the Commission of any offence or for the public safety, may, for reason to be recorded in writing, direct the person in respect of whom the order u/s 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded.

In the facts of the present case, as it is clear from reading the affidavits-in-reply

filed by the respondents that, on 23rd August, 2005 chapter cases were registered against the petitioners by invoking section 110(e) & (g) of Cr. P.C., which reads, thus:

110. Security for good behaviour from habitual offenders

When an Executive Magistrate receives information that there is within his local jurisdiction a person who-(e) habitually commits, or attempts to commit, or abets the Commission of, offences, involving a breach of the peace, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

4. Upon careful perusal of the provisions of Sections 107 onwards including section 110 of the code, it is clear that there is no provision to arrest a person against whom chapter proceedings are initiated. Admittedly, the petitioners were arrested on 23rd August, 2005 and they were produced before the Magistrate on 24th August, 2005. It is difficult to understand as to how the Police Officers invoked the provisions of section 41(2) of the Cr. P.C., to cause arrest of the petitioners. Such an exercise of powers, in our opinion, was absolutely unwarranted in the facts of the present case. Once the chapter case is registered, as contemplated u/s 111, the concerned person against whom such proceedings are initiated, has to execute bond of good behaviour. The provisions of section 111 of the Code reads, thus:

111. Order to be made

When a Magistrate acting u/s 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Upon careful perusal of the section 111 of the Code, it appears that the powers are entrusted with the Magistrate to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

5. In the affidavit-in-reply filed by Ramsingh Pardeshi, it is mentioned that, on 24th August, 2004, CR No. 50/2004 was registered against the petitioners under Sections 323, 504 of IPC. It is the contention of the respondents that, the said offence was investigated and charge-sheet was filed. It is not necessary for this Court to enter into the said controversy. Suffice it to say that, the arrest of the petitioners on 23rd August, 2005 in chapter proceedings was illegal inasmuch as,

there is no provision to arrest a person on initiation of chapter proceedings. As already observed, it is for the Magistrate to ask the concerned person to execute bond of good behaviour on certain terms and conditions u/s 111 of Cr. P.C.

6. The applications/representations filed by the petitioners with the Superintendent of Police, Jalgaon or with the Commissioner of Police or other authorities, should have been decided by the said authorities. There is no reply on the said aspect as to why their representations were kept pending when they complained about the atrocities of the police on them, their illegal arrest and their continuation in detention though their relatives were ready to give sureties on 25th August, 2005.

7. In the case of Rajesh Nayak Vs. The State of Maharashtra and Shri S.U. Nandanwar, Asst. Commissioner of Police Kotwali Division (Special Executive Magistrate), the Division Bench of this Court held, thus:

11. This, we are required to highlight as a fact that in a proceedings initiated u/s 107 of the Code, it is common practice on the part of the Executive Magistrate to insist for surety bond by passing interim order u/s 116(3) Cr. P.C. The court has taken judicial notice of this that inspite of a clear cut provisions in Clause (a) of the proviso to Sub-section 3 of Section 116 of the Code of Criminal Procedure, in a proceeding initiated u/s 107 of the Code and the form No. 12 (Scheduled II) which is prescribed for executing bond u/s 107 of the Code, persons are detained in judicial custody for their failure to furnish interim surety in a proceedings initiated u/s 107 of Chapter VIII of the Code in exercise of jurisdiction not vested upon them in law. {See State of Maharashtra and Anr. v. Mangali Dewaiyya Pupalla, Mh.L. 483, Pramila Navin Shah Vs. State of Maharashtra and Others . Having clarified the fact that in a proceedings initiated u/s 107 of the Code no surety/security or personal bond is required to be furnished under an interim order u/s 116(3) Cr. P.C., henceforth if it comes to the notice of this Court that a person against whom proceedings are initiated u/s 107 of the Code is detained in judicial custody for failure on his part to furnish interim surety/security Bond or personal Bond pursuant to an order passed u/s 116(3) of Cr. P.C. The State shall be liable to pay compensation to such person for violation of his fundamental right enshrined under Article 21 of the Constitution of India and the aggrieved person may also take recourse to other remedies available to him under the general law viz. to prosecute the said magistrate for wrongful confinement and appropriate compensation for wrongful detention.

8. It would be relevant to place reliance in the case of D.K. Basu v. State of W.B. (supra) and in particular, paragraphs 35 to 39, which read thus:

35. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags

with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the (5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the Arrest and the place of custody of

the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

36. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

37. The requirements, referred to above flow from Articles 21 and 22(1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

38. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

39. The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on All India Radio besides being shown on the National Network of Doordarshan any by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

9. The Supreme Court in case of Joginder Kumar (*supra*), in paragraphs 8, 9, 10 and 20 held thus:

8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first--the criminal or society,

the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In *People v. Defore* (242 NY 13, 24: 150 NE 585, 589 (1926)), Justice Cardozo observed:

The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case [*People v. Adams* (176 NY 351:68 NE 636 (1903))] strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that change has come to pass.

10. To the same effect is the statement by Judge Learned Hand, in *Fried Re* (161 F 2d 453, 465 (2d Cir. 1947)):

The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise." The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

20. In India, Third Report of the National Police Commission at p. 32 also suggested:

An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terrors-stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines

The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest can be made because it is lawful for

the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

10. Therefore, in the light of the discussion herein above, the arrest of the petitioners on 23rd August, 2005 was illegal. Even, in case of legal arrest, procedures contemplated under Cr. P.C., Constitutional safe-guards under the Constitution of India and also the Guidelines issued by the Supreme Court in the case of D.K. Basu (supra), are required to be followed. In the present case, none of these procedures has been followed by the police authorities. The Police Authorities proceeded on the footing that, they have power to arrest even in chapter cases.

11. In the light of the discussion in the foregoing paragraphs, in our opinion, the petitioners are entitled for compensation for their illegal detention. The Supreme Court in case of Saheli, A Women's Resources Centre (supra) held, thus:

An action for damages lies for bodily harm which includes battery, assault, false imprisonment, physical injuries and death. In case of assault, battery and false imprisonment the damages are at large and represent a solatium for the mental pain, distress, indignity, loss of liberty and death. The State is responsible for the tortious acts of its employees. On a conspectus of various decisions of the Court, it is deemed just and proper to direct the State (Delhi Administration) to pay compensation to the mother of the deceased child a sum of Rs. 75,000/- within four weeks. The Delhi Administration may take appropriate steps for recovery of the amount paid as compensation or part thereof from the officers who will be found responsible, if they are so advised.

12. Therefore, in the peculiar facts of this case, we direct the respondent No. 1 to initiate an inquiry against respondents No. 3 and 4 in respect of illegal detention of petitioners. Such inquiry should be initiated by appointing

competent Inquiry Officer, within one month from receipt of order of this Court and it should be concluded within five months of its initiation, after following principles of natural justice and relevant Service Rules.

The respondent No. 1 is directed to pay compensation of Rs. 10,000/- each to the petitioners within two months from today. It would be open for the respondent No. 1 to recover the said amount from the respondent No. 3, after inquiry.

Rule is made absolute in above terms. Petition stands disposed of.