

(1999) 12 AHC CK 0133

In the Allahabad High Court

Case No : Habeas Corpus Writ Petition No. 38159 of 1999

Rajeev Vashistha (in Jail)

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-12-1999

Acts Referred:

Arms Act, 1959 — Section 25
National Security Act, 1980 — Section 3(2), 8
Penal Code, 1860 (IPC) — Section 120B, 302

Citation : (2000) CriLJ 2242

Hon'ble Judges : V.K. Chaturvedi, J;O.P. Garg, J

Bench : Division Bench

Advocate : Syed Farman Ahmad Naqvi, for the Appellant; K.N. Pande, S.N. Srivastava and Mahendra Pratap, A.G.A., for the Respondent

Final Decision : Allowed

Judgement

O.P. Garg, J.—The petitioner, a student of B. Com Part I, a budding youth of 21-22 years of age, seeks a writ of Habeas Corpus for being set at liberty on quashing the order of detention dated 30-6-1999, a copy of which is Annexure 1 to the writ petition, passed by the District Magistrate, Hardwar-respondent No. 2 u/s 3(2) of the National Security Act, 1980 (hereinafter referred to as the "Act"), which was approved by the State Government-respondent No. 1 and later on confirmed on 20-8-1999 after the receipt of the recommendations of the Advisory Board constituted under the Act.

2. The gist of the matter is that on 6-5-1999 at about 4 p.m. on Kankhal Road one Rajesh Sharma was murdered at his shop by opening fires by co-accused persons who were accompanying the present petitioner the detenu. Radheshwar Sharma, brother of the deceased laid an F.I.R. of the incident at 5.35 p.m. on the same day at P.S. Jwalapur, Hardwar in pursuance of which a case-crime No. 191 of 1999 u/s 302, I.P.C. came to be registered. During the course of investigation, the name of the petitioner came to light as the murder was the product of the

criminal conspiracy punishable u/s 120-B, I.P.C. hatched by the petitioner and other co-accused persons. The petitioner was arrested on 13th May, 1999 along with a country made pistol of 315 bore with cartridges. While he was in jail, the detention order dated 30-6-1999, Annexure 1, was passed by Smt. Aradhna Shukla, District Magistrate, Hardwar. The grounds of detention as contemplated u/s 8 of the Act are annexed with the detention order. It is stated that Rajesh Sharma was annihilated at a public place by a assassin Naushad son of Sharif hired by the petitioner in the brilliant light of the day at his own shop with the result fear and terror loomed large in the area and the citizens feeling insecure started running helter-skelter, the shops were closed, the normal tempo of life was disturbed; there was breach of peace and public tranquillity and all-over public disorder prevailed. With a view to normalize the life and to make atmosphere peaceful, the Police contingent had to be deployed during the period 6th to 14th May, 1999. It is also mentioned that the petitioner along with co-accused Nausad, Riasat alias Petha and Rakesh had entered into a criminal conspiracy to exterminate Rajesh Sharma; had hired Naushad for the purpose and a sum of Rs. 50,000 was promised to be paid to him after the work was accomplished though a sum of Rs. 16,000 was paid as advance. It was also mentioned in the grounds of detention that the petitioner has moved an application for bail before the District and Sessions Judge, Hardwar on 29th June, 1999 which was fixed for hearing on 4-7-1999; the petitioner was successful in getting released on bail, it is anticipated that he may resort to criminal activities thereby disturbing the "public order". On the basis of the above grounds the order of detention was passed.

3. Counter and rejoinder affidavits have been exchanged. Heard Syed Farman Ahmad Naqvi, learned counsel for the petitioner, Sri K.N. Pande, appearing on behalf of the Union of India and Sri Mahendra Pratap, learned A.G.A. on behalf of rest of the respondents at considerable length.

4. Though the petitioner has assailed his detention on all conceivable grounds, Sri Naqvi, learned counsel for the petitioner confined his submission primarily on two grounds, firstly, that it was a case of mere breach of law and order and not that of "public disorder" and secondly, the petitioner has been seriously prejudiced on account of unwarranted delayed disposal of the representation made by him. Learned counsel for the respondents resisting the grounds raised on behalf of the petitioner have controverted the various averments on all the counts and have justified the detention order.

5. Sri Mahendra Pratap, learned A.G.A. urged that the correctness or otherwise of the facts on the basis of which the detaining authority felt satisfied in passing the detention order cannot be sifted or probed by this Court since it has a limited role in the matter of examining the validity or otherwise of the detention order. He fortified his submissions with reference to the various observations made by the Apex Court in the case of State of Gujarat Vs. Adam Kasam Bhaya, ; Smt. K. Aruna Kumari Vs. Government of Andhra Pradesh and Others, ; U. Vijay Laxmi v.

State of Tamil Nadu 1995 SCC (Cri) 176 : AIR 1994 SC 615 and the decision of this Court in Vijay Pal alias Pappu v. Union of India 1996 (33) ACC 741. It is true that this Court cannot sit in appeal over the discretion exercised by the detaining authority on the basis of the material placed before him, nevertheless, one cannot lose sight of the fact that the law of preventive detention is a hard law and, therefore, it should be strictly construed. Care should be taken that the liberty of a person is not jeopardized unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of the accused who is involved in a criminal prosecution. It is not intended for the purpose of keeping a man under detention when under ordinary criminal law it will not be possible to resist the issue of orders of bail unless the material available is such as would satisfy the requirement of the legal provisions authorising such detention. When a person is enlarged on bail by competent criminal Court, great caution should be exercised in scrutinizing the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal Court. It is true that this Court cannot substitute its opinion for that of the detaining authority. In a recent decision of the Court reported in the case of Ravi Singh v. State of U.P. (1999) 1 JIC 99 : 1998 AILLJ 1334 similar view was taken that it is the subjective satisfaction of the detaining authority which should weigh and this Court cannot interfere if there was enough material before the detaining authority to form a particular opinion. There can be no quarrel with the legal position as has been stated above, nevertheless, we cannot agree with the learned AGA that those who are responsible for the maintenance of "public order" must be the sole judges of what the "public order" requires. In Vijay Narain Singh Vs. State of Bihar and Others, , Hon"ble Chinnappa Reddy, J., who agreed with Hon"ble E.S. Venkata-ramiah, J. (majority view), observed as follows (at page 1336 of AIR) :-

... It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters. Preventive detention is considered so treacherous and such an arithema to civilized thought and democratic polity that safeguards against undue exercise of the power to detain without trial have been built into the Constitution itself and incorporated as Fundamental Rights. There are two sentinels, one at either end. The Legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the Courts are required to examine, when demanded, whether there has been any excessive detention that is whether the limits set by the Constitution and the Legislature have been transgressed. Preventive detention is not beyond judicial scrutiny. While adequacy or sufficiency may not be a ground of challenge, relevancy and proximity are certainly grounds of challenge. Nor is it for the Court to put itself in the position of the detaining authority and to satisfy itself that the untested facts reveal a path of crime. I agree with my brother Sen, J. when he says "It has always been the view of this Court that the detention of individuals without trials for any

length of time, however short, is wholly inconsistent With the basic ideas of our Government and the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of the citizen except in accordance with the procedure established by law.

In *Safiq Ahmad v. District Magistrate, Meerut* AIR 1990 SC 220 the Apex Court observed that it has to be seen by this Court whether the grounds or the reasons supplied to the detenu in support of the detention order were germane to the maintenance of "public order". The Court can examine the record and determine the validity whether the order is based on no material or whether materials have rational nexus with satisfaction that "public order" was breached.

6. Without being unnecessarily tangled in the technical web we would like to steer clear the controversy whether on the facts narrated above, or say, contained in the grounds accompanied with the order of detention, a case of breach of "law and order" or that of "public disorder" is made out. It is no gainsaying that if it is purely a case of breach of law and order" in that event, the District Magistrate shall have no jurisdiction to pass an order of detention by invoking the provisions of Section 3(2) of the Act. The order of detention can only be passed for the maintenance of the "public order" and such an order cannot be a substitute to detain an accused person who has breached the law and order" and can adequately be dealt with under the ordinary criminal law. There is a fine distinction between the two connotations, viz., "breach of law" as well as "public disorder". The distinction has come to be canvassed in a catena of decisions of Apex Court as well as this Court. The oft quoted leading decision in the cases of *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, ; *Arun Ghosh Vs. State of West Bengal*, , came to be considered in the subsequent cases in *Pushkar Mukherjee and Others Vs. The State of West Bengal*, ; *Nagendra Nath Mondal Vs. The State of West Bengal*, ; *Kishori Mohan Bera Vs. The State of West Bengal*, ; *Shri Amiya Kumar Karmakar Vs. The State of West Bengal*, ; *Samaresh Chandra Bose and Others Vs. The District Magistrate, Burdwan and Others*, ; *Tribhuvan Nath Vs. The State of Maharashtra*, ; *Babul Mitra Vs. State of West Bengal and Others*, , *Ram Ranjan Chatterjee Vs. The State of West Bengal*, ; *Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others*, ; *Ashok Kumar Vs. Delhi Administration and Others*, *State of U.P. Vs. Kamal Kishore and Another*, ; *Gulab Mehra Vs. State of U.P. and Others*, ; *Angoori Devi for Ram Ratan Vs. Union of India (UOI) and Others*, ; *Mrs. Harpreet Kaur Harvinder Singh Bedi Vs. State of Maharashtra and another*, ; *Kamlabai (Smt) Vs. Commissioner of Police, Nagpur and Others*, as well as other recent decisions of the Apex Court as well as this Court. To eschew prolixity, we refrain from detailing all those cases, except the observations made in *Angoori Devi for Ram Ratan Vs. Union of India (UOI) and Others*, in which the Apex Court distinguishing between "public order" and law and order" had the occasion to observe thus (at page 373 of AIR) :

The impact on "public order" and law and order" depends upon the nature of the

act, the place where it is committed and motive force behind it. If the act is confined to an individual without directly or indirectly affecting the tempo of the life of the community, it may be a matter of law and order only. But where the gravity of the act is otherwise and likely to endanger the public tranquillity, it may fall within the orbit of the public order. This is precisely the distinguishing feature between the two concepts.

The firm legal position as has emerged from the series of decisions on the point is that an act - whether it amounts to breach of law and order" or breach of "public order" solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentialities of the act is so deep as to affect the community at large and/or the even tempo of the community then it becomes a breach of the "public order". It is also well settled that even a single instance may be sufficient to clamp the detention order but a criminal act, such as, solitary assault on one individual can hardly be said to disturb the public peace or "public order", so much so, to bring the case within the purview of the Act. In *Mrs. T. Devaki Vs. Government of Tamil Nadu and others*, it was observed that such a solitary incident can only raise a "law and order" problem and no more.

7. In the case of *Harish Kasana v. State of U.P.* 1998 (37) ACC 724 : 1999 AILLJ 598 the order of detention u/s 3(2) of the Act was quashed. In that case, one Ram Sarup Mittal, aged 67 years, was kidnapped and his son Ramesh Chand Mittal received a call from an unknown person who informed that unless a ransom amount of Rs. one crore is paid, the abducted shall not be let off. After negotiations, the demand was brought down to Rs. 50 lacs. An F.I.R. was lodged. The grounds in the detention order indicated that the kidnapping incident raised a sense of fear amongst the business community of the locality; passers-by, who had witnessed the incident, fled from the place; traffic in the locality was disturbed and business establishments were closed on account of which serious disturbance to the public order was caused. Persons of the trading class approached senior police and administrative officers seeking protection and security and requested them to find out culprits involved in the incident. Due to the kidnapping incident people stopped going on morning walk and different political parties expressed concern about the effectiveness of the local administration. Resentment was expressed that incidents of kidnapping of persons of the business and trading class and demand of substantial amount as ransom for release have become common in the town. Another instance narrated in the grounds of detention related to incident of 5-9-1997 in which the detenu was caught and was found in illegal possession of a country made 12 bore pistol and three cartridges while moving on a scooter in front of the police out-post Bundu Katra and consequently, a crime case No. 325 of 1997 u/s 25 of the Arms Act was registered at the same police station. On the basis of the material placed before this Court, it was held that it could not be reasonably held that the detaining authority could feel satisfied that due to the incident the even tempo of

life of the locality had been disturbed. It was observed :

...position is fairly well settled that any incident involving criminal activity is likely to cause some self restriction on the normal activities of the people and thereby cause some disturbance in the order of the society but that is not sufficient to say that there has been disturbance of public order.

In another case *Atiq Ahmad v. State of U.P.*, (Habeas Corpus Writ No. 44205 of 1998), decided by this Court on 5-10-1998, a murder had taken place on 25-7-1997 at 7.45 a.m. in the densely populated area of Allahabad city in which a passer-by also received gun shot injury. The impact of the shooting incident was that it caused stampede and a sense of fear and terror amongst the people of the locality loomed large. The people ran away leaving their vehicles; trolleys and rickshaws carrying school children left the spot; a total desolation IUukVk prevented at the spot; the shutters of the doors and windows of the houses in the vicinity remained closed which led to disturbance of the "public order". Testing the facts of the case on the touch-stone of the principles laid down by the Apex Court in the case of *Dipak Bose alias Naripada Vs. State of West Bengal*, *Ram Veer Jatav v. State of U.P.* 1987 ACR 110 and Full Bench decision of this Court in the case of *Shesh Dhar Misra v. Superintendent, Central Jail, Naini* 1985 ALLJ 1222; *Arvind Kumar Shukla v. State of U.P.* 1995 ALJ 1259 SC it was concluded that the single incident of murder stated in the grounds of detention in the absence of any other circumstance cannot reasonably form the basis of the satisfaction that the petitioner was involved in an incident relating to "public order".

8. Apart from the above decisions of this court, it would be advantageous to place reliance on a recent decision of the Apex Court in the case of *Smt. Tarannum Vs. Union of India and Others*, in which the main incident pertained to looting of gold ornaments; Wrist watches and cash from the house by the detenu and his associates by wielding knives and pistols. The other ground of detention was based on an incident relating to alleged threats held out by the detenu himself or through his agent while he was in jail. After discussing the case of *Angoori Devi (supra)* it was held that the incident pertained to "law and order" problem and not to the maintenance of "public order". In *Tarannum's* case (*supra*), the following observations made in *Mrs. Harpreet Kaur Harvinder Singh Bedi Vs. State of Maharashtra* and another, . were quoted with approval (at page 984 of AIR) :

Crime is a revolt against the whole society and an attack on the civilisation of the day. Order is the basic need of any organized civilised society and any attempt to disturb that order affects the society and the community. The distinction between breach of "law and order" and disturbance of "public order" is one of degree and the extent of reach of the activity in question upon the society. In their essential quality, the activities which affect "law and order" and those which disturb "public order" may not be different but in their potentiality and effect upon even tempo of the society and public tranquillity there is a vast difference. In each

case, therefore, the Courts have to see the length, magnitude and intensity of the questionable activities of a person to find out whether his activities are prejudicial to maintenance of "public order" or only "law and order".

There is no gainsaying that in the present state of law, a criminal can be punished only when the prosecution is able to lead evidence and prove the case against an accused person beyond a reasonable doubt. Where the prosecution is unable to lead evidence to prove its case, the case fails, though that failure does not imply that no crime had been committed. Where the prosecution case failed, because witnesses are reluctant on account of fear of retaliation to come forward to depose against an accused, obviously, the crime would go unpunished and the criminal would be encouraged. In the ultimate analysis, it is the society which suffers. Respect for law has to be maintained in the interest of the society and discouragement of a criminal is one of the ways to maintain it. The objectionable activities of a detenu have, therefore, to be judged in the totality of the circumstances to find out whether those activities have any prejudicial effect on the society as a whole or not. If the society, and not only an individual, suffers on account of the questionable activities of a person, then those activities are prejudicial to the maintenance of "public order" and are not merely prejudicial to the maintenance of "law and order".

It was observed in Tarannum's case (supra) that the above passage relied upon by the learned counsel for the State of U.P. cannot come to his rescue. On the other hand, in the light of the passage extracted above from Smt. Angoori Devi's case (supra) it was found that the authorities were not right in passing the impugned detention order for "law and order" problem treating the same as "public order" problem.

9. After carefully considering the first ground of detention and in the backdrop of the above legal position, we are of the opinion that the incident did give rise to "law and order" problem for the local police and special force had to be deployed in the locality for some time but we are not satisfied that it is a case in which "public order" was affected to a great extent. We are conscious of the fact that in case of detention, it is the subjective satisfaction of the District Magistrate and this Court does not sit as a Court of appeal to appreciate the correctness of the facts of sufficiency of the material. But accepting the facts narrated in the grounds of detention as correct, we are of the view that the detention of the petitioner under the Act was not justified as it was purely a case concerning breach of "law and order".

10. Now let us consider the other ground mentioned in the order of detention with regard to the fact that if the detenu is successful in obtaining bail he may, by his criminal activities, disturb the "public order". The primary question, therefore, is whether the detention of the petitioner could be justified solely on the ground that he was trying to come out on bail and there was enough possibility of his being bailed out and he would act prejudicially to the maintenance of the "public order". Learned A.G.A. placed reliance on the case of

Kartic Chandra Guha Vs. The State of West Bengal and Others, that even likelihood of his being released on bail could be taken into consideration because bail being the rule and jail an exception, it is usually seen that the Session and High Courts are liberal in bail matters. It might be so, but this element of likelihood has to be plausible and in the realm of a reasonable feasibility, rather than a fanciful proposition. It is in the totality of the context that the issue requires determination having regard to the background of criminal activities attributed to the detenu by the State itself. It will be going too far today that he would have been granted bail just for the asking of it. After all, in such type of cases notice is usually given to the State to highlight its side of the story; moreover, if the latter deems it appropriate, it could still forestall the release by passing the detention order during the intervening period. A reference was also made to Alijan Mian Vs. District Magistrate, Dhanbad and Others, in which it was held that merely because there was a pending prosecution and the accused were in jail that was no impediment for their detention u/s 3(2) of the Act if the detaining authority was satisfied that their being enlarged on bail would be prejudicial to the maintenance of "public order". This view has been reiterated by the Apex Court in Raisuddin alias Babu Tamchi Vs. State of Uttar Pradesh and Another, . The observations made in these cases are beyond the pale of challenge. The element of likelihood of seeking the bail has to be plausible and in the realm of reasonable feasibility rather than a fanciful proposition. It would be going too far to assert that the petitioner would have been granted bail just for asking of it. It is in the totality of the context that the issue requires determination having regard to the background of criminal activities attributed to the detenu by the State itself. After all, in such type of cases, notice is usually given to the State to highlight its side of the story, moreover if the latter deems it appropriate, it could still forestall the release by passing detention order during the intervening period. In the case of Ramesh Yadav Vs. District Magistrate, Etah and Others, at page 234, the Apex Court observed (at page 316 of AIR) :

On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order to the higher forum had to be raised. Merely on the ground that an accused in detention as an under-trial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed.

What was stressed in the above case is that an apprehension of the detaining authority that the accused if enlarged on bail would again carry on his criminal activities is by itself not sufficient to detain a person under the Act. In paragraph 12 of the report of another celebrated decision rendered in Shashi Aggarwal Vs. State of U.P. and Others, the Apex Court observed thus (at page 598 of AIR) :

12. Every citizen in this country has the right to have recourse to law. He has the right to move the Court for bail when he is arrested under the ordinary law of the land. If the State thinks that he does not deserve bail the State could oppose the grant of bail. He cannot, however, be indicted from moving the Court for bail by clamping an order of detention. The possibility of the Court of the granting bail may not be sufficient. Nor a bald statement that the person would repeat his criminal activities would be enough. There must also be credible information or cogent reasons apparent on the record that the detenu, if enlarged on bail would act prejudicially to the interest of public order. That has been made clear in Binod Singh Vs. District Magistrate, Dhanbad, Bihar and Others, at 421 where it was observed :

A bald statement is merely in ipse dixit of the officer. If there were cogent materials for thinking that the detenu might be declared then these should have been made apparent. Eternal vigilance was. the part of the authority charged with both law and order and public order is the price which the democracy in this country extracts from the public officials in order to protect the fundamental freedoms of our citizens.

Similar views was taken in subsequent decisions in Anand Prakash Vs. The State of Uttar Pradesh and others, Ahmedhussain Shaikhussain @ Ahmed Kalio Vs. Commissioner of Police, Ahmedabad and Another, Surya Prakash Sharma Vs. State of U.P. and Others, and Dharmendra Suganchand Chelawat and another Vs. Union of India and others, . This Court has also taken a similar view in the cases of Harish Kasana and Atiq Ahmad (supra) as well as Adesh Kumar v. Karagar Pratapgarh 1997 UPCR 647. What has been stressed in all the above cases is that an apprehension of the detaining authority that the accused, if enlarged on bail would again carry on his criminal activities is by itself not a sufficient ground to detain a person under the Act. The second ground for detention, is therefore, also not workable in the instant case.

11. In the result, it was a case of commission of the crime of murder for entirely personal reasons and to feed-fat the private grudge. Since the case squarely falls within the domain of breach of law and order", the impugned order of detention under the Act with a view to maintain the "public order" was wholly uncalled for. There appears to be considerable force in the submission of the learned counsel for the petitioner that the detention order was passed with a view to frustrate and nullify the right of the petitioner to seek bail under the ordinary law. As a matter of fact, this Court, by order dated 17-8-1999 has granted bail to the petitioner. On account of the detention order, which has been adjudged to be illegal, for the reasons stated above, continuance of the petitioner under detention is wholly unjustified.

12. In view of the above finding, the other grounds of challenge are not necessary to be gone into.

13. In conclusion the writ petition succeeds and is allowed. The impugned order

of detention dated 30-6-1999 passed by the District Magistrate, Hardwar is hereby quashed. The petitioner shall be set at liberty forthwith if he is not wanted in the other cases.