
(1998) 12 BOM CK 0006

In the Bombay High Court

Case No : Criminal W. Petns. No's. 119, 120, 127, 130 and 171 of 1998

Raju Shivaji Thakre

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 22-12-1998

Acts Referred:

Arms Act, 1959 — Section 25, 4
Bombay Police Act, 1951 — Section 135
Constitution of India, 1950 — Article 22(5), 226
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (1998) 12 BOM CK 0006

Hon'ble Judges : S. D. Gundewar, J; M. B. Ghodeswar, J

Bench : Division Bench

Advocate : S. A. Jaiswal, for the Appellant; R. G. Agrawal, R. R. Paranjape, D. B. Patel and A. S. Sonare, Asst. Public Prosecutors, for the Respondent

Judgement

S. D. Gundewar, J.—These five Criminal Writ Petitions bearing Nos. 119/98, 120/98, 127/98, 130/98 and 171/98 filed under Article 226 of the Constitution of India for issue of a writ in the nature of certiorari to quash and set aside the orders of detention dated 13-2-1998, 11-2-1998, 9-2-1998, 2-3-1998 and 24-3-1998 respectively passed by the Commissioner of Police, Nagpur City and release of detenus, who are detained in Central Prison, Nagpur arise in the identical facts and circumstances. So also common questions of law are involved in all these writ petitions. Hence, we propose to dispose them of by this common judgment.

2. In the exercise of powers conferred under sub-section (1) of section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (Act No. 55 of 1981) (hereinafter referred to as "the Act"), the Commissioner of Police, Nagpur City passed orders on 13-2-1998, 11-2-1998, 9-2-1998, 2-3-1998 and 24-3-1998 detaining the detenus Raju @ Dadya Shivaji Thakre, Mahendra @ Handya Shivdas Indurkar, Kamlesh @ Kamyia Dhurvaji Choudhary, Sandip @ Langdya Atmaram Lokhande

and Chandu @ Chandrashekhar Ramaji Dangre all residents of Nagpur with a view to preventing them from acting in any manner prejudicial to the maintenance of public order. Thereafter the abovenamed detenus were arrested and were served with the order of detention on 13-2-1998, 11-2-1998, 9-2-1998, 2-3-1998 and 24-3-1998 respectively. The grounds of detention were also served on them on the aforesaid dates. In the meanwhile, the Commissioner of Police reported to the State Government about the passing of the aforesaid detention orders. The report sent by Commissioner of Police was considered by the State Government and the Government approved the aforesaid orders of detention passed by the Commissioner of Police.

3. In the grounds of detention, it is mentioned that the detenus are continuously engaging themselves in the commission of violent and desperate acts such as assault, attempt to commit murder, robbing the people at the point of deadly weapons, dacoities, intimidation, abusing filthily, moving with deadly weapons, flouting prohibitory orders in force, etc. and they created a reign of terror and panic amongst the peace loving and law abiding citizens residing in the area of Tahsil, Panchpaoli and Jaripatka Police Stations.

4. It was pointed out to us that the grounds which weighed before the Commissioner of Police consisted of "registration of crimes consisting of ones punishable under sections 147, 148, 149, 427, 324, 384, 307, 435, 302, 385, 326, 448, etc. read with section 34 of Indian Penal Code, 4/25 of Arms Act read with section 135 of Bombay Police Act. These are the offences for which as many as 5 crimes bearing Nos. 90/97, 91/97, 304/97, 227/97 and 414/97 came to be registered against the petitioner Mahendra @ Handya; 3 crimes bearing Nos. 90/97, 91/97 and 175/97 against the petitioner Raju; 2 crimes bearing Nos. 340/97 and 408/97 against the petitioner Kamlesh @ Kamya; 2 crimes bearing Nos. 98/97 and 16/98 against the petitioner Sandeep @ Langdya and 3 crimes bearing Nos. 188/97, 557/97 and 327/97 against the petitioner Chandu @ Chandrashekhar came to be registered which are considered by the Commissioner of Police to be the grounds to categorise the petitioners to be "the dangerous persons" and invoking the provisions of the Act, to pass the aforesaid orders of detention against them. The aforesaid cases which are pending against the aforesaid petitioners were treated as grounds giving rise to the apprehension that the petitioners' activities were prejudicial to "public order".

5. The petitioners have urged various grounds before us in order to challenge the orders of detention. After hearing the learned Counsel for the petitioners as well as the learned Additional Public Prosecutors, we find that it is not necessary for us to deal with the various grounds urged by the petitioners as, in our view, the following two grounds only need consideration in the present matters. We, therefore, restrict ourselves to the following grounds only :-

(i) Whether the detaining authority erred in law and also on facts in holding that the petitioners are "dangerous persons" without concluded convictions for the offences specified in the defining clause which were found to have been shown

against them?

(ii) Whether the detaining authority erred in law in not intimating the detenus that they have right to make representation to the detaining authority also?

6. So far as the first ground urged by the learned Counsel for the petitioners is concerned, we would like to state that the Act was enacted by the State Legislature to provide for preventive detention of the slumlords, bootleggers and drug offenders for preventing their dangerous activities prejudicial to the maintenance of the public order. Section 2(a) as it stood before the amendment in 1996 defines the meaning of expression "acting in any manner prejudicial to the maintenance of public order" and reads as follows :-

"2. In this Act, unless the context otherwise requires -

(a) "acting in any manner prejudicial to the maintenance of public order" means -

(i) in the case of a slumlord, when he is engaged or is making preparations for engaging in any of his activities as a slumlord, which affect adversely, or are likely to affect adversely the maintenance of public order;

(ii) in the case of a bootlegger when he is engaged or is making preparation for engaging in any of his activities as a bootlegger, which affect adversely, or are likely to affect adversely, the maintenance of public order;

(iii) in the case of a drug offender, when he is engaged or is making preparations for engaging in any of his activities as a drug offender, which affect adversely, or are likely to affect adversely, the maintenance of public order."

Explanation. - For the purpose of this Clause (a), public order shall be deemed to have been affected adversely, or shall be deemed likely to be affected adversely inter alia, if any of the activities or any of the persons referred to in this clause directly or indirectly, is causing or calculated to cause any harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life or public health."

Sections 2(b), (e) and (f) define the terms "bootlegger", "drug-offender" and "slumlord" respectively.

7. By Amendment Act viz. XXXIX of 1996 section 2(b-1) was inserted to add the category of "dangerous person" in addition to the categories of "slumlords", "bootleggers" and "drug offenders". Clause (b-1) defines "dangerous person" to mean a person who either by himself or as a member or leader of a gang, habitually commits or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code or any of the offences punishable under Chapter V of the Arms Act, 1959. Clause (2)(a) of the Act which defines "acting in any manner prejudicial to the maintenance of "public order" has been amended to include Clause (iv) which reads as follows :-

"(iv) in the case of a dangerous person, when he is engaged or is making preparation for engaging in any of his activities as a dangerous person, which affect adversely; or are likely to affect adversely, the maintenance of public order."

The impugned orders of detention have been passed on the detaining authority being satisfied that the detenus are the dangerous persons within the meaning of Clause (b-1) of section 2 of the Act and their activities are prejudicial to the maintenance of public order.

8. The above-mentioned amendment to the Act has introduced the concept of dangerous person which is *pari materia* to the provisions of sections 2(c) and 3(i) of Gujarat Prevention of Anti-Social Activities Act, 1985 and the Apex Court in the case of *Mustakmiya Jabbarmiya Shaikh Vs. M.M. Mehta, Commissioner of Police and Others*, had an occasion to examine this concept. The Apex Court was dealing with the case of the petitioner, who was alleged to have been involved in various offences and after considering the facts of the case the Apex Court observed as to what is meant by "dangerous person" in paragraphs 7, 8 and 9 of the judgment as under :-

"7. A reading of the preamble of the Act will make it clear that the object of provisions contained in the Act including those reproduced above is to prevent the crime and to protect the society from antisocial elements and dangerous characters against perpetration of crime by placing them under detention for such a duration as would disable them from resorting to undesirable criminal activities. The provisions of the Act are intended to deal with habitual criminal dangerous and desperate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal laws and the moral fear of punishment for crime are not sufficient deterrents for them. Section 3 of the Act is, therefore, intended to deal with such criminals who cannot readily be apprehended to be booked under the ordinary law and who for special reasons, cannot be convicted under the penal laws in respect of the offences alleged to have been perpetrated by them. But this power under the Act to detain a person should be exercised with restraint and great caution. In order to pass an order of detention under the Act against any person the detaining authority must be satisfied that he is a "dangerous person" within the meaning of section 2(C) of the Act who habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act as according to sub-section (4) of section 3 of the Act it is such "dangerous person" who for the purpose of section 3 shall be deemed to be a person "acting in any manner, prejudicial to the maintenance of public order" against whom an order of detention may lawfully be made.

8. The Act has defined "dangerous person" in clause (C) of section 2 to mean a person who either by himself or as a member or leader of a gang habitually commits or attempts to commit or abets the commission of any of the offences

punishable under the Chapters XVI or XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression "habit" or "habitual" has however, not been defined under the Act. According to The Law Lexicon by P. Ramanatha Iyyar, Reprint Edition, 1987 page 499 "habitually"; means constant, customary and addicted to specified habit and the term habitual criminal may be applied to any one who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word "habitually" means "usually" and "generally". Almost similar meaning is assigned to the words "habit" in Aiyar's judicial Dictionary, 10th Edition - page 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a "dangerous person" unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal. In Gopalanachari Vs. State of Kerala, this Court had an occasion to deal with expressions like "bad habit", "habitual", "desperate", "dangerous", and "hazardous". This Court observed that the word habit implies frequent and usual practice. Again in Vijay Narain Singh Vs. State of Bihar and Others, , this Court construed the expression "habitually" to mean repeatedly or persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated individual and dissimilar acts and that repeated persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person within the expression "dangerous person" as defined in clause (C) of section 2 of the Act, there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or XVII of the Indian Penal Code or under Chapter V of the Arms Act and that a single or isolated act falling under Chapters XVI or XVII of Indian Penal Code or Chapter V of Arms Act cannot be characterized as a habitual act referred to in section 2(C) of the Act.

9. Further, sub-section (1) of section 3 of the Act confers power on the State Government and a District Magistrate or a Commissioner of Police under the direction of the State Government to detain a person on being satisfied that it is necessary to do so with a view to preventing him from acting in any manner prejudicial to the maintenance of "public order". The explanation attached to subsection (4) of section 3 reproduced above in the foregoing para contemplates that "public order" shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia if any of the activities of any person referred to in subsection (4) directly or indirectly, are causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Sub-section (4) of section 3 also provides that for the purpose of section 3, a person shall be deemed to be "acting in any manner prejudicial to

the maintenance of public order" when such person is a "dangerous person" and engaged in activities which affect adversely or are likely to affect adversely the maintenance of public order. It, therefore, becomes necessary to determine whether besides the person being a "dangerous person" his alleged activities fall within the ambit of the expression "public order". A distinction has to be drawn between law and order and maintenance of public order because most often the two expressions are confused and detention orders are passed by the authorities concerned in respect of the activities of a person which exclusively fall within the domain of law and order and which have nothing to do with the maintenance of "public order". In this connection it may be stated that in order to bring the activities of a person within the expression of "acting in any manner prejudicial to the maintenance of public order", the fall out and the extent and reach of the alleged activities must be of such a nature that they travel beyond the capacity of the ordinary law to deal with him or to prevent his subversive activities affecting the community at large or a large section of society. It is the degree of disturbance and its impact upon the even tempo of life of the society or the people of a locality which determines whether the disturbance caused by such activity amounts only to a breach of "Law and order" or it amounts to "public order". If the activity falls within the category of disturbance of "public order" then it becomes essential to treat such a criminal and deal with him differently than an ordinary criminal under the law as his activities would fall beyond the frontiers of law and order, disturbing the even tempo of life of the community of the specified locality. In the case of Arun Ghosh Vs. State of West Bengal, this Court had an occasion to deal with the distinction between law and order and public order. Hidayatullah, C.J. (as he then was), speaking for the Court observed that public order would embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of "law and order". It has been further observed that the implications of "public order" are deeper and it affects the even tempo of life and "public order" is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Again in the case of Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad City and Another, , this Court took the view that in order that an activity may be said to affect adversely the maintenance of public order, there must be material to show that there has been a feeling of insecurity among the general public. If any act of a person creates panic or fear in the minds of the members of the public upsetting the even tempo of life of the community, such act must be said to have a direct bearing on the question of maintenance of

public order. The commission of an offence will not necessarily come within the purview of public order which can be dealt with under ordinary general law of the land."

9. It is no doubt true that the expression "habit" or "habitual" has not been defined under the Act and according to The Law Lexicon by P. Ramanatha Iyer, Reprint Edition, 1987 page 499 "habitually" means constant, customary and addicted to specified habit and the term habitual criminal may be applied to any one who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word "habitually" means "usually" and "generally". Almost similar meaning is assigned to the word "habit" in Iyer's Judicial Dictionary, tenth edition-485.

10. From the aforesaid definition of the expression "habit" or "habitual" given in the Law Lexicon, it can be said that the term habitual criminal may be applied to any one who has been previously convicted of a crime to the sentences and committed to prison more than twice. In our view, this does not necessarily mean that in order to consider a detenu to be a dangerous person, the previous conviction to his discredit is a must. Even the Apex Court in *Mustakmiya*'s case (cited supra) has nowhere held that in order to brand a detenu as a dangerous person, he must have two or more convictions to his discredit. What the Apex Court held in the said decision is that there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or XVII of the Indian Penal Code or under Chapter V of the Arms Act and that a single or isolated act falling under the aforesaid Chapters cannot be characterized as a habitual act referred to in section 2(C) of the Act. In earlier decision in *Dhanji Ram Sharma Vs. Superintendent of Police, North Dist, Delhi Police and Others*, also the Apex Court held that a habitual offender or a person habitually addicted to crime is one who is a criminal by habit or by disposition formed by repetition of crimes. According to the Apex Court, reasonable belief of police officer about a person being habitually addicted to crime, etc. is enough. In the said decision also, the Apex Court has nowhere mentioned that in order to brand a detenu as a dangerous person, he must have been previously convicted.

11. In view of the above referred Apex Court decisions, the view taken by this Court in Criminal Writ Petitions Nos. 134/97, 258/97 and 259/97 that in order to describe a person under the Act to be dangerous, two or more convictions to his discredit are essential, is not a good law. In our view habitual offender or a person habitually addicted to crime is one who is a criminal by habit or by disposition formed by repetition of crimes. We, therefore, find no merit in the submission made by Mr. Jaiswal, the learned Counsel for the petitioners, that unless there are two or more convictions to the discredit of the detenu, he cannot be described as a "dangerous person".

12. In the present cases, the material placed on record indicates that the petitioners are the persons habitually committing or attempting to commit or

abetting the commission of offences which are punishable under Chapter XVI or XVII of the Indian Penal Code and under Chapter V of the Arms Act and, therefore, in our view, their act has been rightly characterized as habitual act referred to in section 2(C) of the Act by the detaining authority and, therefore, the detaining authority cannot be said to have erred in law or on facts in holding that the petitioners are dangerous persons.

13. Mr. Jaiswal, the learned Counsel for the petitioners, has then urged before us that the detenu has right to make a representation to the detain!" authority also. According to him, in none of the present cases, the (sic) authority had communicated to the detenus, in the grounds of detention, (sic) time of service of the grounds of detention on them, that they have right to make a representation to the detaining authority also. According to him to said non-communication has deprived the petitioners of their right to make (sic) effective and purposeful representation to the detaining authority and it him resulted into a denial of vital right of the detenus enshrined in Article 22(5) of the Constitution of India.

14. In Kamleshkumar Ishwardas Patel Vs. Union of India (UOI) and Others, it is held by the Apex Court that the right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation.

15. The learned Additional Public Prosecutor relying on a decision of the Supreme Court in Amin Mohammed Qureshi Vs. Commissioner of Police, Greater Bombay, submitted that the detaining authority need not convey to detenu that he can make representation to the detaining authority as the competent authority is Central and State Government and not the detaining authority. However, we are unable to concede to the aforesaid proposition made by the learned Additional Public Prosecutor in view of the decision of the Apex Court in Kamlesh Kumar's case (cited supra) because in paragraph 38 of the aforesaid decision, it has been clearly laid down by the Apex Court that the detenu has a right to make representation to the Officer specially empowered for that purpose. It is further observed by the Supreme Court in the said decision that this right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and failure to do so results in denial of the right of the person detained to make representation. Similar view has been taken by this Court in Criminal Writ Petition No. 769 of 1995, Yeosaf Kizhakke Kushika Kandiyil vs. The State of Maharashtra and another decided on 12-4-1996.

16. In view of the aforesaid clear enunciation of law by the Apex Court, in our view, the petitions must succeed on this ground alone. Accordingly, we quash

and set aside the orders of detention dated 13-2-1998, 11-2-1998, 9-2-1998, 2-3-1998 and 24-3-1998 in respect of the aforesaid petitioners/detenus, namely, Raju s/o Shivaji Thakre, Mahendra @ Handya Shivdas Indurkar, Kamlesh @ Kanya s/o Dhurvaji Choudhari, Sandip @ Langdya s/o Atmaram Lokhande and Chandu @ Chandrashekhar s/o Ramaji Dangre passed by the Commissioner of Police, Nagpur under the provisions of section 3(1) of the Act and direct that the petitioners be released forthwith, if not required in any other cases.

17. The rule is made absolute in the aforesaid terms.