

(2005) 01 DEL CK 0085

In the Delhi High Court

Case No : Writ Petition (Criminal) No. 1036 of 2004

Sharafat Sheikh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-01-2005

Acts Referred:

Constitution of India, 1950 — Article 22, 22(5)
Criminal Procedure Code, 1973 (CrPC) — Section 107, 110G, 151
National Security Act, 1980 — Section 3(2)
Penal Code, 1860 (IPC) — Section 34, 380, 411, 420, 448

Citation : (2005) 116 DLT 656 : (2005) 79 DRJ 340 : (2005) 2 RCR(Criminal) 471

Hon'ble Judges : R.S. Sodhi, J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : K.K. Sud, Herjinder Singh, Naveen Malhotra and Neeraj Jain, for the Appellant; Madhu Tewatia and Mukta Gupta, Standing Counsel (Crl.), Ravinder Chadha and Ankur Jain for Respondents 2 to 4, for the Respondent

Judgement

Mukundakam Sharma, J.—In this writ petition filed by the petitioner for issuance of a Writ of Habeas Corpus, the petitioner has challenged the legality and validity of the order of detention dated 11th June, 2004 passed by the Commissioner of Police, Delhi, the respondent No. 3 u/s 3(2) of the National Security Act, 1980 as also the order of approval dated 18th June, 2004 communicated by the Deputy Secretary (Home) and has also prayed for setting the petitioner at liberty forthwith.

2. The Commissioner of Police, Delhi, passed an order of detention against the petitioner on 11th June, 2004 on being satisfied that it is necessary to make an order directing that the petitioner should be detained with a view to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order. The said order of detention was passed by the Commissioner of Police in the purported exercise of power conferred on him under sub-section (2) of Section 3 of the National Security Act. The aforesaid order of detention was

served on the petitioner on 15th June, 2004. The petitioner was also served along with the order of detention, the grounds of detention along with documents which were supplied with a list of annexures. The aforesaid order of detention was approved by the State Government under its order dated 18th June, 2004. Both the aforesaid orders are under challenge in this writ petition.

3. The counsel appearing for the petitioner, after referring to the grounds of detention, submitted before us that in the grounds of detention initially 23 incidents have been relied upon by the detaining authority to prove the past history of the petitioner and the said incidents relied upon are of the years 1985 to 2002. It was submitted that all the aforesaid 23 incidents, which are relied upon, relate to his past criminal activities, which were also subject matter of an order passed against the petitioner by the respondents under the National Security Act on 8th October, 2002. It was submitted that the Advisory Board submitted an opinion in respect of the aforesaid order of detention to the State Government and in the light thereof, the Lt. Governor of Delhi revoked the said order of detention dated 8th October, 2002 by his order dated 4th December, 2002. It was also submitted that in the present order of detention, the criminal activities mentioned in Serial number 24 to 28 have been relied upon as ground for passing the order of detention against the petitioner. It was also submitted by him that out of the 28 criminal cases registered against the petitioner, he has been acquitted in 11 cases, discharged in six cases whereas one case has been cancelled and that eight cases are pending for trial and one case is still pending investigation against him. It was submitted that none of the aforesaid criminal cases, which were cited as grounds of detention, could be said to be an incident concerning and having potentiality to disturb the even tempo of the life of a community and thereby Constituting acts prejudicial to the maintenance of the public order. It was submitted that at the most the said incidents could be said to be incidents of law and order and not public order and, Therefore, the order of detention is liable to be set aside and quashed. It was also submitted that the reference made in the order of detention to certain activities relating to narcotic cannot be relied upon as grounds of detention as it was simply referred to in the order of detention by way of passing remark. It was also submitted that even assuming that the same could be construed as grounds of detention, the same was vague and uncertain and, Therefore, no order of detention could be passed on such vague grounds.

4. Counsel appearing for the respondents, however, submitted that the petitioner even after his release from jail after revocation of his earlier order of detention, did not mend himself and remained actively involved in the criminal activities, which are mentioned as Serial No. 24 to 28, which are prejudicial to the maintenance of public order. It was also submitted that the petitioner also was a hub of a wide network of drug peddlers in the area of Police Station Hazrat Nizamuddin inasmuch as he is running illicit traffic in narcotics by exploiting and using poor and unemployed youth as peddlers on salary-cum-commission basis. It was submitted by her that the aforesaid order of detention was issued on the

basis of the aforesaid criminal activities mentioned from Serial numbers 1 to 28 as also on the ground of his running illicit traffic in narcotics, particulars of which were also supplied to the petitioner by way of documents supplied along with the ground of detention. She also submitted that due to continuous commission of the aforesaid criminal activities by the petitioner, he has become a dangerous and desperate criminal and that due to a terror and fear created by him, the prosecution witnesses feel scared and would not come forward to depose against him.

5. A bare perusal of the order of detention would indicate that the petitioner was detained under the provisions of the National Security Act to prevent him from acting in any manner prejudicial to the maintenance of the public order. The grounds of detention, which was also served on the petitioner, list 28 cases which were instituted against him. Out of the said list of 28 cases, 23 criminal cases are of the period 1985 to 2002. An order of detention was also passed against the petitioner under the National Security Act treating the facts of the said 23 cases as grounds of detention on 8th October, 2002. The said order of detention was executed upon him on 16th October, 2002 and the said order of detention was also approved by the Lt. Governor of Delhi on 16th October, 2002. However, the aforesaid order of detention was referred to the Advisory Board in terms of the provisions of the National Security Act. The Advisory Board submitted its opinion after perusal of the records and in the light of the aforesaid opinion, the Lt. Governor of Delhi revoked the order of detention by order dated 4th December, 2002. Consequently, the petitioner was released from jail on 5th December, 2002.

6. Now, in the present order of detention five more cases are added from Serial number 24 to 28. The case mentioned against item No. 24 is a case u/s 110G of the Cr.P.C. The said case is pending trial as of today. The next case which is also a case registered under Sections 107/151 Cr.P.C. was registered on 7th June, 2003 in which the petitioner already stands discharged. The case which is referred to and relied upon under Serial number 26 is a case under Sections 380/420/34 IPC. The said case was registered on 8th June, 2003 and as of date is pending trial. The next case was registered on 14th June, 2003 under Sections 380/420/411/34 IPC in which the petitioner is already discharged. The last case in the list is a case pertaining to FIR No. 175 dated 27th March, 2004. The FIR was registered on 27th March, 2004 under Sections 448/380/506/34 IPC, which is as of now is pending investigation. Copies of the aforesaid FIRs are also annexed and similar facts leading to the filing of the FIR/DD entries are also given in the order of detention itself. The case relating to FIR No. 175 although is registered on 27th March, 2004 but the incident mentioned therein is an incident of 4-5 years old i.e. some time in 1999/2000. The aforesaid five cases were relied upon for passing the detention order against the petitioner in 2004, which is clear and apparent from the aforesaid recital in the grounds of detention. (page 57 of the paper book). Copies of FIRs/DD entries of the above mentioned cases and the other relevant documents are annexed from annexure 1 to 28. The criminal activities from Serial number 1 to 23 relate to his past criminal activities

whereas the criminal activities mentioned in the cases at Serial numbers 24 onwards have been relied upon for passing the present detention order against him. The detention order sets out the facts and details of the cases leading to filing of the aforesaid FIRs/DD entries, which is followed by the following extract:

"The above mentioned relied upon criminal activities committed by Sharafat clearly shows that he is dangerous and desperate criminal whose activities are certainly prejudicial to the maintenance of public order. His acts of violence against the public and property shows his complete contempt for the law of the land. The prosecution witnesses are extremely terrified to depose against him in the court. His continuous criminal activities have disturbed the normalcy of the society. He is the hub of a wide network of drug peddlers in the area of P.S. H.N. Din. He is running illicit traffic in narcotics by exploiting and using poor and unemployed youth as peddlers on salary-cum-commission basis. He indulged in sale of smack and other narcotic drugs through young unemployed youth in poor locality of Basti H.N. Din and nearby slums."

The order of detention further mentions as follows"

"Sharafat has been granted bail in all the criminal cases pending against him and at present he is out of jail. Keeping in view his past criminal activities there is every apprehension/imminent possibility that he will again indulge in similar type of criminal activities which will adversely affect the maintenance of public order."

7. So far these five cases, which are the basis of and grounds for issuance of an order of detention, are to be looked into and scrutinised to ascertain whether or not they make out any case of public order or are merely incidents of law and order. Out of the said five cases, admittedly the petitioner stood discharged in two cases. Therefore, two cases are pending for trial and one is pending for investigation, which, however, pertains to an incident, which is five years old. Out of the said two cases, which are pending for trial, one is a matter relating to Section 110g Cr.P.C. and the other is a case under Sections 448/380/506/34 IPC. In respect of the cases which find mention from Serial number 1 to 23 as past incidents of the petitioner the same were grounds of earlier order of detention passed against the petitioner. The Advisory Board gave its opinion in respect of the said grounds and the order of detention in the light of which the detaining authority had to revoke the order of detention. Out of the rest five cases, in two cases the petitioner has already been discharged. These cases which mainly relate to cases of theft and burglary would at the most make out cases of law and order and not public order. In this connection, we may appropriately refer to the decision of the Supreme Court in Abdul Razak Nannekhan Pathan Vs. Police Commissioner, Ahmedabad and Another, , wherein in paragraph 10 of the said judgment the Supreme Court has stated thus:

"It has already been stated hereinbefore that offences under Chapter XVI of Indian Penal Code have been compounded and the detenu has been acquitted. As regards the third case that is, Kagdapith case No. 225/87 u/s 135 of Bombay

Police Act, the petitioner was convicted. This offence is not one of the offences falling within the offences mentioned in Section 2(c) of the PASA Act and as such this case cannot be taken into consideration to hold the detenu a dangerous person. As regards the fourth case - Maninagar case No. 122/86, being not proved against the petitioner he has been acquitted of the offences charged in the said case. The other three remaining cases that is, Maninagar case No. 33/88, Kagdapith case Nos.15/88 and 81/88 are all under investigation. Therefore, the fourth case in which the petitioner had already obtained acquittal could not be taken into consideration. For the purpose of determining the petitioner as a dangerous person, it is also very relevant to notice that Section 2(c) defines dangerous person as a person who habitually commits or attempts to commit offences punishable under Chapter XVI or Chapter XVII of Indian Penal Code or any of the offences under Chapter V of the Arms Act. From the aforesaid seven criminal cases, two cases are of 1985 and 1986 which are not proximate to the date of the order of detention and so stale. Moreover, the petitioner being acquitted the said cases could not be taken into consideration. Similarly case No. 3 also falls outside the purview of the Section 2(c) of the said Act. Fourth case No. 122/86 can also not be considered as petitioner earned acquittal. Merely on consideration of the other three criminal cases which are under investigation and are yet to be decided the detaining authority cannot come to his subjective satisfaction that the detenu was a dangerous person who habitually indulges in committing offences referred to in Section 2(c) of the PASA Act."

8. Therefore, those two cases where the petitioner has been discharged could not have been relied upon by the detaining authority for arriving at his satisfaction as is indicated in the order of detention. Out of other three cases, one is pending investigation, which is an incident of about five years old and, Therefore, cannot be said to be an incident which is proximate to the date of order of detention. So far the other two cases are concerned, one is a case u/s 110g Cr.P.C. and the second case is a case under Sections 380/420/34 IPC, which cannot be said to be a case which would disturb and affect the society and the community and would affect and disturb the even tempo of life and society as a whole so as to create public order.

9. Being so situated and positioned, the counsel appearing for the respondents tried to fall back upon the recitation in the order of detention to the alleged activities of the petitioner relating to narcotics. Relevant portion of the grounds of detention have been extracted above, which indicates that the order of detention was based on the criminal activities of the petitioner as recited in Serial numbers 1 to 28. In none of the aforesaid relevant paragraphs, which constitute the grounds of detention, no mention and reference was made at all to the alleged activities of the petitioner relating to narcotics. The documents furnished as annexures also pertain to the criminal activities of the petitioner relating to 28 cases specifically. It is mentioned in the order of detention that the order of detention is passed considering the five criminal activities of the petitioner

mentioned in Serial number 24 to 28. So far the recital with regard to the drug peddling and running illicit traffic in narcotics is concerned, the same was mentioned towards the end of order by way of a passing reference mentioning about the petitioner's alleged activities in running illicit traffic in narcotics. The said sentences wherein the aforesaid activity is referred to finds mention towards the concluding portion. It also does not refer to any documents connected therewith in the grounds supplied although in the documents enclosed with the grounds of detention, some statements of some young boys have been annexed. The order of detention was passed on consideration of the criminal activities of the petitioner as mentioned in Serial number 24 to 28 which are relied upon as present incidents relating to criminal activities of the petitioner. The detaining authority never intended to rely upon the alleged narcotic activity of the petitioner as a ground of detention.

10. Counsel appearing for the respondents, however, submitted that reference to the activities of the petitioner with regard to running illicit traffic in narcotics was in fact mentioned as grounds of detention. The said statement of the counsel, even assuming to be correct, would not legalise and validate the order of detention, which was passed against the petitioner inasmuch as the said activities referred to and relied upon pertaining to the alleged activity of the petitioner of running illicit traffic in narcotics is *ex facie* conclusion of facts. No basic facts and materials were mentioned in respect of the said alleged activity of the petitioner in the grounds of detention.

11. In our considered opinion, the said recitation is vague and not specific. In *Abdul Razak Nannekhan Pathan (supra)*, it was held by the Supreme Court that Article 22(5) of the Constitution of India requires that the grounds must not be vague but must be specific and relevant in order to enable the detenu to make an appropriate and effective representation against the same before the Advisory Board as well as before other authorities including detaining authority. In the said case, it was held by the Supreme Court that the grounds and the averments made in the grounds which were served on the detenu are vague and as such they are violative of Article 22(5) of the Constitution of India. When the learned counsel for the respondents was confronted with the aforesaid position, she submitted before us that although the recital in the grounds of detention to the effect:

"His continuous criminal activities have disturbed the normalcy of the society. He is the hub of a wide network of drug peddlers in the area of P.S. H.N. Din. He is running illicit traffic in narcotics by exploiting and using poor and unemployed youth as peddlers on salary-cum-commission basis."

could be said to be conclusion of facts but the next sentence to the effect:

"He indulged in sale of smack and other narcotic drugs through young unemployed youth in poor locality of Basti H.N. Din and nearby slums"

should be read by the court as basic facts and materials which were supplied to

the petitioner.

12. However, the said contention appears to us to be without merit as according to us the said sentence is a mere reiteration of the earlier statements which are held to be only conclusions of fact. In the grounds of detention, it is the bounden duty and responsibility and a statutory obligation of the detaining authority not only to give the conclusion of fact but also basic facts and materials so as to enable the detenu to submit an effective representation. It is one of the main safeguards, which is provided under Article 22(5) of the Constitution of India. It is, Therefore, apparent that neither any basic facts or materials were furnished to the petitioner in respect of the aforesaid conclusions in the grounds of detention. The detaining authority has not provided in the grounds of detention facts and materials like names of drug peddlers or young boys who were allegedly engaged by him. It also does not mention or cite any instance of such activity in support of the said conclusions. Therefore, the same cannot be said to be self sufficient or self explanatory. We are also satisfied that the aforesaid statement made in the grounds of detention even if is held and assumed to be a ground of detention, the same is held as vague which prevented the petitioner from making an effective representation resulting in violation of the provisions of Article 22(5) of the Constitution of India. In *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, , the following paragraph, which was relied upon as a ground, was found to be vague and held to be resulting in depriving the detenu to make an effective representation.

"You have been organising the movement by enrolling volunteers among refugees in your capacity as President of the Refugee Association of the Bara Hindu Rao, a local area in Delhi. "

13. In *Rameshwar Lal Patwari Vs. State of Bihar*, , the second ground was assailed as a vague ground before the Supreme Court. In that context, the Supreme Court observed as follows:

"The second ground says that his trucks always take to wicked routes to Saithia (West Bengal) and he himself pilots them. This ground is extremely vague. It does not mention a single instance of a truck taking a particular route so that the detenu could prove to the satisfaction of the Advisory Board that the statement was false."

As the said ground was found to be vague, the order of detention was quashed.

14. In *Motilal Jain Vs. State of Bihar and Others*, , similar view was taken by the Supreme Court. In *Mohd. Yousuf Rather Vs. State of Jammu and Kashmir and Others*, , it was held by the Supreme Court in paragraph 8 as follows:

""Vagueness" is a relative term, and varies according to the circumstances of each case, but if the statement of facts contains any ground of detention which is such that it is not possible for the detenu to clearly understand what exactly is the allegation against him, and he is thereby prevented from making an effective

representation, such a vague ground is sufficient to justify violation of Article 22(5)."

15. In *Khudiram Das v. The State of West Bengal and Ors.* reported in 1975 SCC 435, it has been held by the Supreme Court that "grounds" means all the basic facts and materials which have been taken into account by the detaining authority in making the order of detention and on which, Therefore, the order of detention is based. In paragraph 6 thereof it was held by the Supreme Court in clear terms that nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must be communicated to the detenu, which is the plain requirement of the first safeguard in Article 22(5). In paragraph 13 of the said judgment, the Supreme Court has stated as follows:

"Section 8(1) of the Act, which merely re-enacts the constitutional requirements of Article 22(5), insists that all basic facts and particulars which influenced the detaining authority in arriving at the requisite satisfaction leading to the making of the order of detention must be communicated to the detenu, so that the detenu may have an opportunity of making an effective representation against the order of detention. It is, Therefore, not only the right of the Court, but also its duty as well, to examine what are the basic facts and materials which actually and in fact weighed with the detaining authority in reaching the requisite satisfaction."

16. In *Smt. Shalini Soni and Others Vs. Union of India (UOI) and Others*, , it was held by the Supreme Court that "Grounds" in Article 22(5) do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. It was held that the "Grounds" must be self-sufficient and self-explanatory. In the said decision, it was also held that copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds" and that failure to communicate the factual material as a part of the "grounds" would amount to non-communication of grounds on which the order of detention has been made and thus would infringe Article 22(5) of the Constitution.

17. The aforesaid pronouncement of the Supreme Court has relevance in the present case. The detaining authority being aware of the aforesaid legal position made a reference to the FIRs and DD entries in the grounds of detention itself stating in clear terms that copies thereof have been enclosed. However, so far the alleged narcotic activity of the petitioner is concerned, the same was not relied upon by the detaining authority as ground of detention. This fact would be clear from the fact that in the grounds of detention no such reference is made to any copy of documents in support of the said contention. Therefore, the very fact that the documents in support of the allegation were not referred to in the grounds of detention would prove and establish that the said alleged activities relating to narcotic were not considered and relied upon by the detaining authority as a ground of detention but was made by way of a passing reference

only. In Mohd. Yousuf Rather (supra), it was stated by the Supreme Court in paragraphs 7 and 8 in the following manner:

"7. The sixth paragraph is also vague, for while it states that the petitioner was found leading the unruly mobs in different villages and instigating them to set fire to the house of the worker of Jamait-e-Islami, the names of those villages and the name of the owner of burnt house have not been stated.

8. It is obvious Therefore that the above grounds of detention are vague. This Court has disapproved of vagueness in the grounds of detention because that impinges on the fundamental right of the detenu under Article 22(5) of the Constitution to make a representation against the order of detention when the grounds on which the order has been made are communicated to him. The purpose of the requirement is to afford him the earliest opportunity of seeking redress against the order of detention. But as is obvious, that opportunity cannot be said to be afforded when it is established that a ground of detention is so vague that he cannot possibly make an effective representation. Reference in this connection may be made to this Court's decision in *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, where the guarantee of Article 22(5) has been characterised as an elementary right of a citizen in a free democratic State, and it has been held that if a ground of detention is not sufficient to enable the detained person to make a representation at the earliest opportunity, it must be held that his fundamental right in that respect has been infringed inasmuch as the material conveyed to him does not enable him to make the representation. So as the aforesaid grounds of detention are vague, the petitioner is entitled to an order of release for that reason alone. It is true that, as has been held in *Naresh Chandra Ganguli* case, "vagueness" is a relative term, and varies according to the circumstances of each case, but if the statement of facts contains any ground of detention which is such that it is not possible for the detenu to clearly understand what exactly is the allegation against him, and he is thereby prevented from making an effective representation, it does not require much argument to hold that one such vague ground is sufficient to justify the contention that his fundamental right under clause (5) of Article 22 of the Constitution has been violated and the order of detention is bad for that reason alone. Reference in this connection may also be made to the decisions in *Tarapada De and Others Vs. The State of West Bengal*, , *Dr. Ram Krishan Bhardwaj Vs. The State of Delhi and Others*, , *Shibban Lal Saksena Vs. The State of Utter Pradesh and Others*, , *Rameshwar Lal Patwari Vs. State of Bihar*, , *Motilal Jain v. State of Bihar* {1968 SC 1509} and *Pushkar Mukherjee and Others Vs. The State of West Bengal*, ."

18. Counsel appearing for the respondents, however, placed strong reliance on the decision of the Supreme Court in *The State of Bombay Vs. Atma Ram Sridhar Vaidya*, . In the said decision, the Supreme Court has held that the grounds are conclusions of facts and not a complete detailed recital of all the facts. In the said decision it is also stated by the Supreme Court that the basic

material and the inference drawn from the said materials must be supplied to the petitioner so as to enable him to file a meaningful representation. It is also stated in the said case whether a ground is vague or not would depend on the facts and circumstances of each case. In our considered opinion, the said decision also reiterates the same position. Reliance was also placed by her on the decision of the Supreme Court in *Mrs. Harpreet Kaur Harvinder Singh Bedi Vs. State of Maharashtra and another*, . In the said decision, it was laid down that 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 maintenance of "public order" and are not merely prejudicial to the maintenance of "law and order". It was further held that 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 and that 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 tranquility there is a vast difference in each case.

19. The said decision, in our considered opinion, does not help the respondents at all inasmuch as it is pointed out that incidents mentioned that most of the cases relate to theft and burglary and, Therefore, cannot disturb in any manner the even tempo of the society and public tranquility.

20. Counsel also relied upon the decision of *The Commissioner of Police and Others Vs. Smt. C. Anita*, . In the said decision, the Supreme Court has held that the detaining authority may act on any material and on any information that it may have before it and that such material and information may merely afford basis for a sufficiently strong suspicion to take action, but may not satisfy the tests of legal proof on which alone a conviction for offence would be tenable. It was also held that such jurisdiction has at times been even called a jurisdiction of suspicion. The Supreme Court, in the said decision, has also made distinction between the expression "law and order" and "public order", when it stated that "while the expression "law and order" is wider in scope inasmuch as contravention of law always affects order, "public order" has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality." In paragraph 13, it is held by the Supreme Court, after referring to the case of *Harpreet Kaur* (supra) and other cases that the two concepts, namely, "law and order" and "public order" have well-defined contours, it being well establish that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. It was further held that infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder.

In our considered opinion, the said case instead of helping the State, helps the petitioner. In the context of the aforesaid discussion, we are of the considered opinion that the order of detention passed by the detaining authority cannot be sustained and upheld. The same is accordingly set aside and quashed and the detenu is directed to be released forthwith from detention, if he is not wanted in any other case.