

(1989) 04 BOM CK 0025

In the Bombay High Court

Case No : Criminal Writ Petition No. 46 of 1989

Smt. Shamim Rehmatkhan

APPELLANT

Vs

V.K. Saraf and others

RESPONDENT

Date of Decision : 07-04-1989

Acts Referred:

National Security Act, 1980 — Section 3(2)

Citation : (1989) 2 BomCR 183 : (1989) 91 BOMLR 228 : (1990) CriLJ 381 : (1990) 1 MhLj 342

Hon'ble Judges : V.P. Tipnis, J;S.M. Daud, J

Bench : Division Bench

Judgement

Daud, J.—This petition by the detenu's mother questions an order of detention made on 12 December 1988 u/s 3(2) of the National Security Act, 1980 (No. 65 of 1980).

2. Nazakat alias Batla, a notorious bully from Vakola locality was murdered by some persons at Shastri Nagar in the jurisdiction of the Vakola Police Station. Batla was interrogated by PSI Sawant prior to his death and at that time he named his assailants as Salim, Aziz, Ramesh and Dilip. This led to the registration of C.R. No. 375 of 1988. In the same night Ramesh, one of the four named persons was nabbed by Vakola Police and on the basis of the information furnished by him, a Police posse formed a ring around room No. 3 of Miranda Chawl, Kalina-Kurla Road, Santacruz (East). This room is in the occupation of the detenu and it was raided because of the information that two of the assailants of Batla had taken asylum there. After reaching the room indicated the posse cordoned off the same. On the door of the room being knocked, a girl came to a window thereof and gave out that she was alone in the house. Despite the insistence of the Police, the lady declined to open the door. The answer given by the girl did not carry conviction as the Police could hear whisperings indicating the presence of males inside the room. A decision was taken to force open the room and search it. While the door was being banged, some of the members of

the staff noticed the appearance of people on the roof of the building. The PSI forming part of the posse and constables took position on either sides of the roof and one of the persons spotted thereon was the son of the petitioner. Petitioner's son and his associates were requested to come down and surrender. Instead of complying with this demand, they flung tiles removed from the roof at the Police party. PSI Marathe and Constable Bamne made movements suggestive of the desire to pursue the miscreants on the roof. To deter the Police party, the detenu fired from the revolver that he was carrying at Marathe and Bamne. The latter sustained a bleeding injury. To protect himself and his companion, Marathe fired from his service revolver. Detenu returned the fire. This went on for sometime and it gave a chance to some of the associates of the detenu and the detenu himself to effect an escape. The incident gave rise to the registration of C.R. No. 376 of 1988. On 4 November 1988, the detenu was arrested and on information furnished by him, a pistol loaded with three live bullets was seized. There was another hold-up on 28 October 1988 said to be the work of the detenu's associates, the victim Mukesh and Hiro. The criminals got-away with a gold chain and wrist watch. The gold chain was traced to one Abdul Hamid who admitted to having purchased the same from the detenu. Detenu applied for and was offered bail in both the crimes - the bail amounts being fixed at Rs. 5000/- and Rs. 4000/- respectively. Citing these two grounds, the detaining authority recites :

"There is possibility that you may avail of the bail orders in both the above cases. Looking into your past criminal record, I am satisfied that in the event of your becoming a free person, you are likely to revive your prejudicial activities endangering the lives of law abiding and peace-loving citizens. The fact that you fired at a police party who were carrying out their lawful duty, undoubtedly points that you are a dreaded person having no respect to the existing law of the land and no fear of even the law enforcement agency, viz. police. This has certainly caused panic in the minds of public at large in Gr. Bombay particularly the residents of Kalina, Vakola etc. who are living under a constant shadow of fear. These activities of yours are prejudicial to the maintenance of public order in Greater Bombay."

These two grounds form the basis of the impugned detention order passed on 12th December, 1988.

3. The order is assailed on various grounds which we consider below :

Mr. Barday first says that the fire arm and cartridges allegedly attached at the instanced of the detenu were sent for forensic examination. The report received from the ballistic expert is not referred to in the documents accompanying the grounds. In the absence of such a report the detaining authority was not correct in presuming the use of a fire-arm and the detenu having fired at a police party. It is not possible to agree with this submission. The present detention is not a prosecution under the Arms Act. What the detaining authority had taken into consideration is the use of a fire-arm. For the purpose of securing better evidence and a conviction under the Arms Act, the fire-arm yard bullets may

have been sent to the ballistic expert. His report received or to be received in future may be of use to the prosecution in the trial of the detenu for the infraction of the Arms Act. However, the report is not of any relevance to assail the passing of the order of detention impugned in this petition.

4. Mr. Barday next submits that the detenu had levelled allegations of high handedness against Police Inspector Kavi and PSI Marathe of the Vakola Police Station. These allegations are to be found in Exhs. A to F appended to the petition. Before passing the order of detention, the Commissioner of Police should have taken into consideration the representation made by the detenu against the Police Officers and inasmuch as these representations were not taken into consideration, the detention order stands vitiated. We have not been able to understand this submission. That the reports should have been taken into consideration while considering the representation made by the Petitioner against the order of detention is one thing. Their relevance vis-a-vis the passing of the order of detention is not established. For all we know the representation made before the passing of the detention order assailed in this petition may have been dismissed as the interested rantings of an anti-social.

5. Mr. Barday then contends that the object of the detention order was to thwart the possibility of the detenu being in a position to furnish bail and thus secure his release. An order of detention aimed at so doing is not permissible and in support of this contention, learned Counsel relies upon *Ramesh Yadav Vs. District Magistrate, Etah and Others*, . There are some observations in the reported decision which would give the impression of their supporting the stand taken by Mr. Barday. However, what has been emphasised in *Ramesh Yadav's* case is that an order of detention under the Act should not ordinarily be passed merely on the ground that an accused in detention as an under trial prisoner was likely to get bail. Here, the gravity of the happening dated 14 August 1988 is emphasised and also referred to is the panic generated by that incident. It is that which has been the inspiring factor behind the passing of the order of detention. Therefore it is not merely the likelihood of the detenu availing of the bail which, has inspired the order of detention.

6. Fourthly, Mr. Barday says that ground No. 2 cited in the grounds is totally ill-founded vis-a-vis the detenu. Here, we must agree. This is because the happening of 28 October 1988 is ascribed to the associates of the detenu. True, there is a reference to the chain looted in the event of 28 October 1988 sold to Abdul Hamid from whom it was attached by the Police. But the ground as recited gives the impression of the detenu being a master-mind though absent when the occurrence took place. Mrs. Desai refers us to the statements of the detenu and one Shakil to show that he had participated in the hold-up which took place on 28 October 1988. Shakil's statement which is at page 193 of the compilation refers to the detenu offering to sell the wrist-watches robbed from Mukesh and Hero. As to the statement of the detenu himself there is an admission that the robbery was committed by the detenu along with Farid, Sayed and Prakash.

However, the grounds do not mention the detenu as a participant in the robbery. In fact, the grounds are clear that the robbery though carried out by the associates of the detenu was so carried out without him being personally present at that time. In including the event of 28 October 1988 in the grounds, the detaining authority has shown a clear non-application of mind. But S.S.A. of the Act said the assailed order.

7. The fifth contention raised by Mr. Barday is about the delay caused by the Union of India in considering the representation of the detenu. The representation was sent on 11 January 1989 and it was received by the Union of India on 17 January 1989. The Union of India felt the need to collect some information and for that purpose addressed a wireless query to the State Government on 18 January 1989. The query was replied and the reply came to the Union of India on 2 February 1989. The decision to reject was taken by the Union of India on 7 February 1989 and it was communicated to the detenu on 10 February 1989. Having regard to the above data, it is not possible to say that an unduly long time was taken in considering the representation.

8. Last, Mr. Barday submits that the representation against the detention made by the detenu should have been disposed of before the confirmation of the detention order by the Advisory Board which did so confirm it on 3 February 1989. As said earlier, the decision of the Union of India to reject the representation was taken on 7 February 1989 i.e. four days after the confirmation of the said order by the Advisory Board. In support of the contention, Mr. Barday relies upon the following passage from *Vimalchand Jawantraj Jain Vs. Shri Pradhan and Others*, :-

"There are thus two distinct safeguards provided to a detenu; one is that his case must be referred to an Advisory Board for its opinion if it is sought to detain him for a longer period than three months and the other is he should be afforded the earliest opportunity of making a representation against the order of detention and such representation should be considered by the detaining authority as early as possible before any order is made confirming the detention."

Reading the above literally would be to commit an error. The context of the passage has to be seen. This shows that what the Court was really concerned with was, the State Government abdicating its responsibility to consider the detenu's representation independently of the view propounded by the Advisory Board. This is clear from the following which succeeds the passage relied upon by the learned Counsel :

"Neither safeguard is dependent on the other and both have to be observed by the detaining authority. It is no answer for the detaining authority to say that the representation of the detenu was sent by it to the Advisory Board and the Advisory Board has considered the representation and then made a report expressing itself in favour of detention. Even if the Advisory Board has made a report stating that in its opinion there insufficient cause for the detention, the

State Government is not bound by such opinion and it may still on considering the representation of the detenu or otherwise, decline to confirm the order of detention and release the detenu. The detaining authority is, therefore, bound to consider the representation of the detenu on its own and keeping in view all the facts and circumstances relating to the case, come to its own decision whether to confirm the order of detention or to release the detenu".

This establishes the point we are trying to make which is that the law does not mandate a decision by the Governments whether State or Central, before the Advisory Board gives its own opinion.

9. Having dealt with all the points raised by the learned Counsel and having negatived the same, we dismiss the petition and discharge the rule.

10. Petition dismissed.