

(1999) 09 KL CK 0069
In the High Court Of Kerala
Case No : O.P. No. 16864 of 1999-S

Solomon Castro

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 —
Section 3(1)
Constitution of India, 1950 — Article 21, 22, 22(5), 226

Citation : (2000) CriLJ 2486 : (2000) 1 ILR (Ker) 97

Hon'ble Judges : Arijit Pasayat, C.J.; K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : B. Raman Pillai and S. Vijaya Kumar, for the Appellant; K. Sasikumar, Govt. Pleader for Nos. 1, 2, 4 and K. Ramakumar, SCGSC for No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Arijit Pasayat, C.J.—The order of detention passed by the Principal Secretary to Government (Home), Government of Kerala in purported

exercise of power conferred u/s 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (in short "the

Act") is challenged in this Original Petition for a writ of Habeas Corpus under Article 226 of the Constitution of India, 1950 (in short "the

Constitution"), filed by the father of Benny, J. Solomon (hereinafter referred to as "the detenu").

2. The aforesaid detenu was directed to be detained and kept in custody in the Central Prison, Thiruvananthapuram in pursuance of the said

mittimus order of detention, which is Ext. P1 to the Original Petition. The direction for detention came with a view to preventing him from abetting

the smuggling of goods. Several acts have been described to show why detention was considered necessary.

3. The only point urged in support of the Original Petition is the alleged delay in disposal of the representation filed by the detenu. It is submitted

that the representation filed by the detenu was not dealt with the promptitude warranted. Learned counsel for the State and the Central

Government took the stand that there is no delay in disposal of the representation and it was dealt with utmost expedition.

4. The crucial question is whether the representation of the detenu was dealt with due expedition mandated under Article 22(5) of the Constitution.

The writ of Habeas Corpus was called by Blackstone as "the great and efficacious writ in all manner of illegal confinement". It really represents

another aspect of "due process of law". As early as 1839, it was proclaimed by Lord Denman that "it had been for ages effectual to an extent

never known in any other country". Lord Halsbury L. C. stated in *Cox v. Hakes* (1980) 15 AC 506 that "the right to an instant determination as to

the lawfulness of an existing imprisonment" is the substantial right made available by this writ. Article 22 of the Constitution confers four

fundamental rights on every person, except in two cases mentioned in clause (3), as essential requirements and safeguards to be followed when it is

necessary to deprive any person, for any cause whatsoever and for, however, brief a period of high personal liberty by placing him under arrest or

keeping him in detention. Those are : (i) to be informed, as soon as may be, of the grounds of such arrest; (ii) not to be denied the right to consult

and to be defended by a legal practitioner of his choice; (iii) to be produced before the nearest Magistrate within a period of twenty-four hours of

such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate; and (iv) not to be detained in

custody beyond the said period of twenty-four hours without the authority of a Magistrate. Clauses (1) and (2) contain the guarantee of the four

Fundamental Rights enumerated above. Clause (3) contains two exceptions and provides that the constitutional guarantees do not apply to (a)

enemy aliens, and (b) persons arrested or detained under any law providing for preventive detention. Clauses (4) to (7) are devoted to laying

down certain fundamental principles as to preventive detention and guaranteeing certain Fundamental Rights to persons who are arrested under any

law for preventive detention. The Fundamental Rights guaranteed by clauses (4) to (7) to persons detained under any law for preventive detention

relate to the maximum period of detention, the provisions of any Advisory Board to consider any report on the sufficiency of the cause for detention

in certain cases, the right to be informed the grounds of detention and the right to have the earliest opportunity of making a representation against

the order of detention. Preventive detention is an anticipatory measure and does not relate to an offence while the criminal proceedings are to

punish a person for an offence committed by him. They are not parallel proceedings. The object of the law of preventive detention is not punitive

but only preventive. It is resorted to when the Executive is convinced that such detention is necessary in order to prevent the person detained from

acting in a manner prejudicial to certain objects which are specified by the law. The action of Executive in detaining a person being only

precautionary, the matter has necessarily to be left to the discretion of the executive authority. It is not practicable to lay down objective rules of

conduct, the failure to conform to which should lead to detention. The satisfaction of the detaining authority, therefore, is a purely subjective affair.

The detaining authority may act on any material and on any information that it may have before it. 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 will be

tenable. In case of preventive detention of citizen, Article 22(5) of the Constitution enjoins the obligation of the appropriate Government or of the

detaining authority to accord the detenu the earliest opportunity to make a representation and to consider that representation speedily. The right to

make a representation implies "the right of making an effective representation". It is the Constitutional right of the detenu to get all the grounds on

which the order has been made. As has been said by Benjamin Cordozo, "'A Constitution states or ought to state not rules for the passing hour but

the principles for an expanding future'". The concept of "grounds" used in the context of detention in Article 22(5) has to receive an interpretation

which will keep it meaningfully in tune with contemporary notions of the realities of the society, and the purpose of the Act in the light of concepts

of liberty and fundamental freedoms. While the expression "grounds" for that matter includes not only conclusion of fact but also all the "basic

facts" on which those conclusions were founded; they are different from subsidiary facts or further particulars or the basic facts. The detenu is

entitled to obtain particulars of the grounds which will enable him to make an effective representation against the order of detention.

5. So far as the question whether there was delay in disposal of the representation is concerned, same has to be considered in the background of

Article 22(5) of the Constitution. A Constitutional protection is given to every detenu which mandates the grant of liberty to the detenu to make a

representation against detention, as imperated in Article 22(5) of the Constitution. It also imperates the authority to whom the representation is

addressed to deal with the same with utmost expedition. The representation is to be considered in its right perspective keeping in view the fact that

the detention of the detenu is based on subjective satisfaction on the authority concerned, and infringement of the Constitutional right conferred

under Article 22(5) invalidates the detention order. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of

constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure

established by law. The stringency and concern of the judicial vigilance that is needed was aptly described in the following words in Thomas

Pacham Dales" case (1881) 6 QBD 376 :

Then comes the question upon the habeas corpus. It is a general rule which has always been acted upon by the Courts of England, that if any

person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow

every step in the process with extreme regularity the Court will not allow the imprisonment to continue.

The object of preventive detention is not to punish a man for having done something but to intercept him before he does it and to prevent him from

doing it. No offence is proved, nor any charge is formulated; and the justification of such detention is suspicion or reasonable probability and there

is no criminal conviction which can only be warranted by legal evidence. In this sense, it is an anticipatory action. Preventive justice requires an

action to be taken to prevent apprehended objectionable activities. Incase of punitive detention, the person concerned is detained by way of

punishment after being found guilty of wrong doing where he has the fullest opportunity to defend himself, while preventive detention is not by way

of punishment at all, but it is intended to prevent a person from indulging in any conduct injurious to the society. (See : Rex v. Halliday 1917 AC

260 and Kubic Dariuszv. Union of India : AIR 1990 SC 605 : (1990 Cri LJ 796).

6. Effective enforcement of the law in a democracy is based on an equitable balance between the rights of the individual and the welfare of society.

The individual relinquishes a portion of his personal prerogatives through the legislative process" in order that he and his fellow-citizens may be free

from criminal activities. Through this process, the officer is authorised under appropriate circumstances, to invade personal privacy, to restrict

individual liberty, and to require disclosure of information. Thus, law enforcement depends upon legally sanctioned interference with individual

rights. Every citizen has a vital interest in preserving a reasonable relationship with individual liberties and law enforcement in view of the intolerable

alternatives which are possible. If the officer has unrestrained authority to ignore personal liberties, the product is a police State; if he is barred from

any interference with private rights, the result is criminal anarchy. In order to avert these alternative perils and their intermediate gradations, it is the

responsibility of the Judge and the law maker to establish rules for law enforcement which will give society maximum protection from the criminal

with a minimum of interference with individual liberties.

7. Considering the question of onus when the infringement of liberty of a person is challenged, the Supreme Court observed in Mohd. Alam Vs.

State of West Bengal, :

Our democratic Constitution inhibits blanket and arbitrary deprivation of a person's liberty by authority. It guarantees that no one shall be

deprived of his personal liberty except in accordance with procedure established by law. It further premits the State, in the larger interests of

society to so restrict that fundamental right that a reasonable, but delicate balance is maintained on a legal fulcrum between individual liberty and

social security. The slightest deviation from or displacement or infraction or violation of the the legal procedure symbolised in that fulcrum, upsets

the balance, introduces error and aberration and vitiates its working. This symbolic balance therefore has to be worked with utmost care and

attention. Viewed in that perspective, the requirement as to the filing of the counter-affidavit by the proper person cannot be treated as an empty

formality. This obligation stems from the well-settled principle that once a Rule Nisi is issued on habeas corpus motion, by the Court, the onus is on

the State to show that the liberty of the detenu has been taken away in accordance with procedure established by law, and that the safeguards

provided in Article 22 and in the Act, have not been transgressed or by -passed.

Whenever there is executive invasion on personal liberty, the Court has to weigh in golden scales whether the personal liberty is to be placed at a

high pedestal regardless of the social cost involved in the released of a possible renegade. Observations to similar effect were made by the

Supreme Court in Smt. Icchu Devi Choraria Vs. Union of India (UOI) and Others, . Judged in this background, the question is whether the

detention as directed in the instant case is one where the procedural sinews suffered from any weakness to warrant interference.

8. In view of the aforesaid constitutional mandate, the factual position has to be tested on the touchstone of promptitude in dealing with the

representation. Certain dates are to be noticed for that purpose. The order of detention is dated 1-3-1999 and in execution of the order, the

detenu was arrested and detained in custody on 8-3-1999. Grounds of detention were furnished to him on 9-3-1999. Representation was made

by the detenu on 20-3-1999 to the second respondent-Principal Secretary, Home (SSA) Department through the Superintendent of Central

Prison, Thiruvananthapuram - fourth respondent. The representation was received by the addressee on 22-3-1999. On 23-3-1999, a letter was

sent to the sponsoring authority calling for its views which were received on 9-4-1999 after despatch on 7-4-1999. The approved order of the

letter of rejection was drafted and communicated to the detenu on 28-4-1999. During the period from 9-4-1999 to 23-4-1999, the matter was

examined with reference to the views received from the sponsoring authority. In between clarifications were sought for from sponsoring authority

and received on several occasions. To avoid delay, sponsoring authority was contacted over telephone. The Central Government disposed of the

representation on 15-4-1999. So far as the action taken between 9-4-1999 to-23-4-1999 is concerned, the same is alleged by the detenu to be

the period of inaction by the detaining authority. The counter-affidavit filed by respondents 1 and 2 reveal that only after the receipt of all the relevant materials from the sponsoring authority necessary for the purpose of consideration of the representation made by the detenu, the reply was communicated. It is to be noted that there is no prescribed time limit for disposal of a representation. What is mandated while dealing with personal liberty protected under Article 21 is that there shall not be any lethargic inaction and if any period is pleaded to be without action, it has to be explained by the concerned authority as to what action was taken and if there is inaction, that would invalidate the order of detention. In each case that has to be actually determined is whether there was any period of inaction without justifiable reasons. What is "reasonable expedition" is depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it does not cover the delay due to negligence, callous inaction, avoidable red-tapism and unduly protracted procrastination. (See : Sabir Ahmed Vs. Union of India (UOI), and Aslam Ahmed Zahire Ahmed Shaik Vs. Union of India and Others, . A Constitution Bench of the apex Court in K.M. Abdulla Kunhi and B.L. Abdul Khader Vs. Union of India (UOI) and Others and State of Karnataka and Others, observed that time imperative for consideration can never be absolute or obsessive.

9. In the case at hand, we find that the authorities acted with requisite promptitude in dealing with the representation filed by the detenu. That being the position, the contention that there has been imprisonment due to delay in disposal of representation is not acceptable.

10. Strong reliance has been placed by learned counsel for the petitioner on the decisions of Apex Court reported in Mrs. Venmathi Selvam Vs.

State of Tamil Nadu and Another, and S.M. Jahubar Sathik Vs. State of Tamil Nadu and Others, to contend that merely calling for views from the

sponsoring authority without justifiable reason cannot be a ground for keeping the matter pending. What has to be actually determined is whether

calling for views was justifiable or was a mere bureaucratic step without concern for the personal liberty of the detenu. On a perusal of the

records produced, it is abundantly clear that the views were called for with a view to test the correctness of the assertions made and to make a

detailed analysis of the background facts. That being the position, the aforesaid two decisions of the apex Court are not applicable to the facts of present case.

The Original Petition fails. It is accordingly dismissed.