

(1986) 04 GUJ CK 0015
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Jaswantsingh Purensingh and Another

RESPONDENT

Date of Decision : 24-04-1986

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 167, 167, 57
Penal Code, 1860 (IPC) — Section 120B, 222, 223, 225
Terrorist and Disruptive Activities (Prevention) Act, 1985 — Section 17(5), 17(5)(b) ,
17(6), 3, 4

Citation : (1987) 1 GLR 255

Hon'ble Judges : B.S. Kapadia, J

Bench : Single Bench

Judgement

B.S. Kapadia, J.—The present application is filed by the State against the order passed by the learned City Sessions Judge, Ahmedabad, on 16th April, 1986 in Criminal Revision Application No. 107 of 1986. By the said order the learned City Sessions Judge has allowed the revision application and set aside the order dated 7-4-1986 passed by the learned Metropolitan Magistrate, Court No. 4 at Ahmedabad, in connection with the Crime Register No. 161 of 1986 of Kagdapith Police Station insofar as it relates to Jaswantsingh Purensingh, the opponent No. 1 here. By the said order it was further ordered by the learned City Sessions Judge that on Jaswantsingh furnishing a bond in the sum of Rs. 10,000/-with one solvent surety in the like amount, he shall be released on bail.

2. It may be stated that the facts of the case have been elaborately stated by the learned City Sessions Judge in his judgment and hence, it would not be necessary to state the facts in detail. However, short facts which are necessary for the purpose of deciding this revision application may be stated as under:

3. Jaswantsingh, the opponent No. 1 herein, has been arrested by the Police of Ahmedabad attached to Kagdapith Police Station on April 6, 1986 in connection with the offences registered at C.R. No. 161 of 1986 at Kagdapith Police Station. The offences registered at the said C.R. are the offences punishable under

Sections 222, 223, 225, 120B read with 114 I.P.C. as also Sections 3 & 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1985 (hereinafter referred to as the Terrorist Act). The Police produced Jaswantsingh before the learned Metropolitan Magistrate Court No. 4 at Ahmedabad and requested to handover him on remand in police custody for 60 days. The learned Metropolitan Magistrate by his order dated 7-4-1986 directed to handover Jaswantsingh and other two persons with whom we are not concerned, in the police custody on remand for a period of 20 days. Against the said order of the learned Magistrate Kartarsingh Purensingh, the brother of the opponent No. 1 Jaswantsingh, filed the Criminal Revision Application No. 107 of 1986 before the learned City Sessions Judge, praying for setting aside the order of remand passed by the learned Magistrate and further praying that Jaswantsingh should be ordered to be released on bail.

4. One Harjindersingh (ciJinda is alleged to be a terrorist, who has committed a number of terrorist activities in Delhi and various parts of Punjab. At Vatva in Ahmedabad, a Bank robbery was committed and this Jinda was arrested by the Police in connection with that Bank robbery. After his arrest from time to time he was being produced before the learned Chief Judicial Magistrate at Narol. Said Jinda was lodged in Sabarmati Central Prison and from there he was being produced before the learned Chief Judicial Magistrate, Narol from time to time,

5. On April 3, 1986, Jinda was required to be produced before the learned Chief Judicial Magistrate, Narol. On that day the Jail authorities handed him over to the police party headed by Head Constable Anwar Khan who had with him Police Constables Ramji and Bharatsinh, for being produced in the Court of the learned Chief Judicial Magistrate at Narol. Jinda was accordingly produced before the said Magistrate in the earlier part of the day and as the matter was adjourned, Jinda was again required to be remanded to judicial custody in Sabarmati Central Prison. On that day, surprisingly, unusual practice was adopted and the police party and Jinda from Narol Court came in an auto-rickshaw. The police party ostensibly wanted Jinda to be taken to Sabarmati Prison for lodging him there. When the police party and Jinda travelling in the rickshaw came near Maniar Petrol Pump near Chandola lake where there are situated Hotel Sher-E-Punjab and some other hotels and where some fruit vendors and other vendors also do their business, the auto-rickshaw was stopped. The police party consisting of the above three persons and Jinda entered the Sher-E-Punjab Hotel and there three policemen ordered for food for themselves, while Jinda also ordered food for himself. Food was served to three policemen, but before the items ordered by Jinda came to be served to him, Jinda came at the counter of the Hotel and Jinda had some talks with Jaswantsingh, who was sitting on the counter. Jaswantsingh gave some money to Jinda for purchasing fruits and under the pretext of purchasing fruits Jinda went to the fruit-lorry which was parking across the road, keeping the three policemen, who were consuming food, in the hotel and after ordering for certain fruits Jinda ran away.

6. Thereafter, the aforesaid Crime Register No. 161 of 1986 has been filed in the Kagdapith Police Station. The said case is under investigation.

7. The learned Metropolitan Magistrate after perusing the copy of the case diary as well as the police papers passed the aforesaid order of remand. The learned City Sessions Judge rightly addressed the question as to whether Jaswantsingh should be allowed to remain in police custody for the purpose of investigation. However the learned City Sessions Judge has stated in para-4 of his judgment, that after having gone through the order of the learned Metropolitan Magistrate by which he has granted police remand of Jaswantsingh, and after considering the matter from all possible angles was convinced that the learned Magistrate has passed the said order merely mechanically and that the learned Magistrate has not cared to go through the diary of investigation in the case. The main reasons therefore are given in paras-10, 11 & 12 of the judgment of the learned City Sessions Judge.

8. The learned Public Prosecutor submits that the observations made by the learned City Sessions Judge that there is not even a word anywhere in the police papers in the form of any statement of any witness with regard to the allegation that even before April 3, 1986, whenever Jinda was being taken to Narol Court, he used to contact this Jaswantsingh at Hotel Sher-E-Punjab and he used to talk to Jinda and thus he had come in contact with Jaswantsingh, is incorrect.

9. It may be stated that the learned City Sessions Judge has pronounced the judgment on 16-4-1986 and Mr. M.B. Ahuja, the learned advocate appearing for the opponents states that the matter was heard on 14-4-1986 and thereafter the judgment was delivered by the learned City Sessions Judge after studying the papers for one day.

10. Mr. J.U. Mehta the learned PP appearing for the State points out that the aforesaid observations made by the learned City Sessions Judge are contrary to the entries in the case diary and police papers and he has also pointed out that there was the case diary of 8th April 1986, wherein the statement of Jaswantsingh himself was recorded and on perusal of the said statement, it is clear that Jaswantsingh himself has stated to the affect that before VA months Jinda was brought in Vatva Bank robbery case at about 10-30 a. m. in the Police Mobile Van and he had gone to see him. According to him, he had also asked Jinda as to what was the cause for looting the Bank. He had also stated that Jinda was speaking in Hindi and Punjabi. When that is so, the above observation that there is not even any word in the police papers with regard to the allegation that even before April 3, 1986, Jinda used to contact Jaswantsingh at Hotel Sher-E-Punjab and he used to talk to Jinda, is contrary to the entries made in the police papers and case diary.

11. Similarly, Mr. J.U. Mehta was at pains to point out the observation made by the learned City Sessions Judge that there is nothing in the police papers to show that Jinda's relatives had been accommodated by Jaswantsingh for their stay in

Bombay Hotel and he submitted that the said observation is also wrong. It may be stated that on this point Mr. Mehta, from the police papers, has pointed out the statement of one Gulam Hussein Rasulbhai, who is the Manager of the Bombay Hotel. The said statement is of 5th April 1986. He had spoken about two Sardarjis who had come and demanded room and that Jaswantsingh i.e. the present opponent No. 1 has recommended said Punjabis. Accordingly, room No. 6 of Bombay Hotel was given to them. According to him, the name of one of them was Indrajit Thakarsingh and that relevant entry No. 1495 was made in the Hotel Register. According to him, they vacated the said room on the next day i.e. on 14-2-1986. Again the room was given and another entry of 1496 was made for the purpose. It appears that the learned City Sessions Judge has inadvertently overlooked this statement. It may be mentioned that there is already reference about the statement of Gulam Hussein Rasulbhai in the case diary of 5th April 1986. In that view of the matter, the observation made by the learned City Sessions Judge that there is nothing in the police papers to show that Jaswantsingh had arranged for the stay of the said two Sardarjis in the Bombay Hotel, is contrary to the police papers and the entries made in the case diary.

12. There was also allegation with regard to Jaswantsingh that he allowed Jinda to have telephone calls to somebody from his Hotel. The learned City Sessions Judge observed that there is nothing in the police papers for this allegation also. It is submitted that this observation is also wrong and contrary to police papers.

13. With regard to the specific allegation that on April 3, 1986, after Jinda met Jaswantsingh at Hotel Sher-E-Punjab, Jaswantsingh contacted three different parties on telephone, Mr. J.U. Mehta, the learned P.P. has pointed out the statement of Police Constable Bharatsinh Chatrasinh Vaghela, which was recorded on 6-4-1984. The said statement is to the effect that Jinda had talked to Sardarji, who was putting on red turban for about, 10 to 15 minutes and thereafter he made some telephone calls. After some time another Sardarji came in the Hotel and he set in the Counter. On perusal of the case diary also, it appears that there is a mention about this entry of recording the statement of Police Constable Bharatsinh on 6-4-1986. The said statement specifically mentions about, the talk between Jaswantsingh and Jinda and the telephonic talk.

14. Thus, all the three grounds which are mentioned by the learned City Sessions Judge are contrary to the record. It appears that the learned City Sessions Judge has casually referred to the case diary without referring to the statements mentioned therein. The learned City Sessions Judge would not have made such observations, if there was a careful perusal of the police papers, entries in the Bombay Hotel's Register, etc.

15. It is important to note that the learned City Sessions Judge in para-9 of his judgment refers to the statements of two witnesses recorded as late as on April 12, 1986. The said statements are of Ghanshyam Babubhai Solanki and Madhusudan. The said persons also speak about giving of money by the person

putting on red turban and some talk with the person who had put on sky-colour jabba, escorted by three policemen and they also speak of giving orders for lunch and that when the policemen started eating, the person who was with the police got up and went near the counter of the hotel and the person putting on red turban gave him some money and again he came to the policemen and told them that he would come after purchasing the fruits and that he had some talk with the person putting on red turban for about 10 minutes. They also speak about the person going for purchasing fruit to the fruit-lorry and that thereafter he was not found.

16. From the above entries in the case diary as well as the police papers, it is clear that the observations made by the learned City Sessions Judge were not justifiable as they were made without carefully perusing the entire police papers. On the contrary, it appears that the learned Metropolitan Magistrate had carefully perused the police papers and had passed the order of remand of Jaswantsingh.

17. At the time when the matter reached hearing, I just asked the Public Prosecutor Mr. J.U. Mehta, as to what is the progress made after the order was passed by the learned City Sessions Judge on 16-4-1986, Mr. Mehta pointed out that for a few days in the beginning the investigating officers were busy with the matter of anticipatory bail of Mr. B.K. Vaghela, the jailer and thereafter the statements of one Motibhai Khushalbhai Pandya, Head Constable (Buckle No. 3697) have been recorded on 17-4-1986. Said Motibhai stated that on 16-2-1986 he was going with Jinda and they halted the vehicle at Sher-E-Punjab Hotel and Jinda and Jaswantsingh had a talk, but he did not hear what was the actual talk between the two. Mr. Mehta further pointed out that they have further recorded the statements of one Vijay alias Lala on 20-4-1986. Said Vijay was one of the co-accused, who was also taken to Narol Court along with accused Jinda on 3-4-1986. According to him, at the time when they were going to Narol Court, when the vehicle came near the Sher-E-Punjab Hotel, some currency notes folded in circular manner were inserted in the Van where Jinda was sitting. Thus, Mr. Mehta states that the investigation is in progress. Mr. Mehta has also pointed out that they have recorded the statements of one Sabirkhan Abdulkhan on 22-4-1986 and that still they have to hold the identification parade and other investigation. Under the circumstances, it appears that remand of the opponent No. I Jaswantsingh is fully justified.

18. It may be stated that the Police papers were also tallied with the relevant entries made in the case diary. Mr. Ahuja for the opponents submitted that copy of the entries in the case diary was produced before the learned Metropolitan Magistrate and that it was also considered by the learned City Sessions Judge and that very copy should be called for with a view to ascertain as to whether there is any interpolation or otherwise in the case diary. Accordingly, the copy of the case diary which was produced in the learned Metropolitan Magistrate's Court was called for. On perusal thereof I found that it was the carbon copy of the original one. The pages also tallied and all the entries upto 6-4-1986 which

are considered earlier were also found in the copy of the said case diary. Hence, there is no doubt that the copy of the case diary which was produced before the learned Metropolitan Magistrate also contained the entries with regard to the statements of 5th & 6th April, 1986.

19. The learned Public Prosecutor has submitted that the observation that if on such simple facts (so as far Jaswantsingh is concerned) the personal liberty is curtailed and that would be curtailing his liberty in violation of the Constitutional guarantee of personal freedom is also wrong. He submits that the aforesaid observation has been made without considering all the police papers. It is true that the learned City Sessions Judge would not have made such observations if all the facts which are brought to my notice in this revision application from police papers were brought to his notice. The learned City Sessions Judge has rightly observed that law is jealous of the liberty of the subject and that the detention of the subject should not be ordered except on well founded reasons and that too when law permits that.

20. It may be stated that u/s 57 of the Criminal Procedure Code, law permits the detention of the persons arrested without warrant for reasonable period but not exceeding 24 hours in absence of special order of the Magistrate u/s 167 of the Criminal Procedure Code. The provision of Section 167 of the Criminal Procedure Code are to be read as supplementary to those contained in Section 57 of the Code. By the provisions of Section 167 it is intended to prevent the possible abuse by the police of their powers in trying to make discoveries of crime by means of duress, terror or wrongful confinement. The principle that accused is entitled to demand that justice is not delayed is embodied by the introduction of the new provisions in Section 167 of the Code of Criminal Procedure. The object of Section 167 of the Criminal Procedure Code is to see that the person arrested by the police is brought before a Magistrate with the least possible delay in order to enable the latter to judge if such person has to be further kept in police custody and also to enable such person to make any representation he may wish to make in the matter. This section also provides that in certain cases detention in police custody of the arrested person may be permitted so that the police may complete the investigation.

21. Here in the present case, from what is discussed earlier, it is clear that the accused is arrested by the police, he was brought before the Magistrate, the investigation could not be completed within 24 hours of his arrest and that there are grounds for believing that the accusation or information against the present petitioner is well founded and that his detention in police custody was necessary for completing the investigation. The order of remand passed by the learned Magistrate was, therefore, legal and proper and in accordance with the provisions of Section 167 of the Criminal Procedure Code. Hence his detention cannot be said to be in violation of Constitutional guarantee of his personal freedom under Article 21 of the Constitution of India, particularly when Section 167 of the Criminal Procedure Code is not held to be ultra vires the fundamental rights or

the Constitution of India. Hence, above observation of the learned City sessions Judge is also wrong.

22. In this view of the position on the factual aspects, Mr. Ahuja the learned Advocate appealing for the opponents submits that in view of the provisions of the Terrorist Act, the learned Metropolitan Magistrate would not have jurisdiction to pass the order for remand. He points out that under the provisions of Section 12 of the Terrorist Act, only the Designated Court can take cognizance of the offence under the Terrorist Act. "Designated Court." has been defined as the Court constituted u/s 7 of the Terrorist Act. Section 7 provides that Designated Court shall be presided over by a Judge to be appointed by the State Government with the concurrence of the Chief Justice of the High Court. The qualification of the Judge is also prescribed under Sub-section (4) of said section, that a person shall not be qualified for appointment as a Judge or an additional Judge of a Designated Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State. Referring to these provisions Mr. Ahuja submits that the learned Metropolitan Magistrate was not a Sessions Judge or Additional Sessions Judge and, therefore, he cannot preside over the Designated Court. In my view, the whole argument is fallacious. It may be stated that Metropolitan Magistrate has not passed the order of demand as a Designated Court. The whole argument of Mr. Ahuja is, therefore, misconceived.

23. On the contrary, Sub-section (2) of Section 17 of the Terrorist Act provides for certain charges in Section 167 of the Criminal Procedure Code, which is the only section for remand of the accused in Police custody. The only change that has been made is as under:

the reference in Sub-section (i) thereof to "Judicial Magistrate" shall be construed as a reference to Judicial Magistrate or Executive Magistrate." "the reference in Sub-section (2) thereof to "fifteen days", "ninety days" "sixty days" wherever they occur, shall be construed as references to "sixty days", "one year" and "one year" respectively.

It is therefore, clear that provisions of Section 167 of the Criminal Procedure Code would equally apply to the offences under the Terrorist Act. Section 167 of the Criminal Procedure Code inter alia provides as a mandatory duty to produce the accused in a case where investigation is not completed within 24 hours fixed by Section 57 of the Criminal Procedure Code before the nearest Judicial Magistrate along with the copy of the entries in the diary of the case. Sub-section (1) of Section 167 uses the words "Judicial Magistrate" which would as per the Amendment made in Section 17(2) of the Terrorist Act include the words "Judicial or Executive Magistrate". Therefore, it is clear that though the Judicial Magistrate or Executive Magistrate may not be the Presiding Judge of the Designated Court, still however, he would have power to authorise detention of the accused in the custody of the police.

24. On this point, Mr. Ahuja places reliance on the judgment of the Supreme

Court in the case of State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another, . In the said case the question arose as to whether the Special Judge under the Criminal Law Amendment Act can exercise the powers conferred on a Magistrate u/s 167 of the Criminal Procedure Code to authorise detention of the accused in the custody of the police. The Supreme Court after considering the relevant provisions of Sections 156, 157, 173 and 193 of the Criminal Procedure Code and the various other provisions of the Criminal Law Amendment Act, observed that if a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail, it will lead to an anomalous situation. The Supreme Court also considered the definition of the word "Magistrate" given in Section 32 of the General Clauses Act which means a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. The Supreme Court has held in the said case that if the context otherwise requires the word "Magistrate" may include Magistrates who are not specified in the section. The aforesaid decision is not useful in the present case inasmuch that the question before the Supreme Court was not that the learned Metropolitan Magistrate was not a Magistrate empowered to authorise detention of the accused in police custody u/s 167 of the Criminal Procedure Code for the offences under the Terrorist Act. In that view of the matter, I do not find any merit in this contention raised by Mr. Ahuja.

25. The next contention raised by Mr. Ahuja is that u/s 16(1) of the Terrorist Act this Court will not have jurisdiction to entertain the revision application. It is important to note that what is provided in Section 16(1) is that if an appeal lies as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court, it shall lie to the Supreme Court both on facts and on law and, therefore, the High Court will not have jurisdiction. Here the question is whether the orders passed by the learned Magistrate and the learned City Sessions Judge in revision are the orders passed by the Designated Court or not. It is interesting to note that even in the revision application which was filed by the brother of Jaswantsingh before the learned City Sessions Judge was also addressed to the City Sessions Judge at Ahmedabad and not to the Designated Court. As stated earlier, the Metropolitan Magistrate has not passed the order as Designated Court. Similarly, the learned City Sessions Judge, who has passed the order in revision application is also not passed the order as Designated Court, it may be stated that even the case is under investigation and so far the charge-sheet is not filed and the learned City Sessions Judge as a Designated Court has not even taken the cognizance of the case u/s 12 of the Terrorist Act. In that view of the matter, the argument that because of the provisions of Section 16(1) of the Terrorist Act, this Court would not have jurisdiction to hear the revision application filed by the state, has no merit.

26. The next contention raised by Mr. Ahuja is that the learned City Sessions Judge has rightly passed the order for releasing the opponent No. 1 Jaswantsingh

on bail. It is significant to note that the learned City Sessions Judge has given no reason whatsoever for the purpose of enlarging the accused on bail. The learned City Sessions Judge has simply reversed the order of remand passed by the learned Metropolitan Magistrate. Realising this position, Mr. Ahuja submits that there are implied reasons for releasing the opponent No. 1 on bail. At this juncture it is important to note that whenever any person accused of an offence punishable under the provisions of the Terrorist Act, Sub-section (5) of Section 17 of the said Act steps in. Sub-section (6) of Section 17 provides for the limitation on granting of bail specified in Sub-section (5) are in addition to the limitations under the Code or any other law for the time being in force of granting of bail. Therefore, whenever any person accused of any offence punishable under the Terrorist Act has to be released on bail, there is a condition as per Section 17(5) of the said Act that the Court is to be satisfied to the effect that there are reasonable grounds to believe that the person concerned is not guilty of any offence and that he is not likely to commit any offence while on bail. When it is so stated in Clause (b) of Sub-section (5) of Section 17 of the Act, it means that the learned Judge has to record the reasons for his satisfaction that there are reasonable grounds for believing that the person concerned is not guilty of such offence. Here in this case, the learned City Sessions Judge has not recorded any reason for his satisfaction as required u/s 17 (5)(b) of the Terrorist Act and, therefore, that order also requires to be set aside.

27. However, it may be stated at this juncture that the learned Metropolitan Magistrate has passed the order for remand of the opponent No. 1 Jaswantsingh for 20 days and on or before the expiration of that period the accused-Jaswantsingh would be at liberty to make an application for bail to the proper court and the said court will consider the application according to law and in the light of the observations made hereinabove.

28. In view of what is stated above the revision application is allowed.

29. The, order passed by the learned City Sessions Judge, Ahmedabad in Criminal Revision Application No. 107 of 1986 on 16th April, 1986 setting aside the order of remand passed by the learned Metropolitan Magistrate, Court No. 4, Ahmedabad, on 7-4-1986 and releasing the accused Jaswantsingh on bail, is hereby set aside and the order of remand passed by the learned Metropolitan Magistrate is hereby restored. Rule is accordingly made absolute.