

(1983) 03 BOM CK 0017

In the Bombay High Court

Case No : Criminal Writ Petition No. 748 of 1982

Yahya Ali Ahmad Fahem

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 30-03-1983

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3

Citation : (1983) 2 BomCR 84 : (1983) 85 BOMLR 188

Hon'ble Judges : S.N. Khatri, J; R.A. Jahagirdar, J

Bench : Division Bench

Advocate : C.J. Sawant, instructed by Hooseini Doctor and Co, for the Appellant; M.R. Kotwal, Public Prosecutor, for the Respondent

Judgement

R.A. Jahagirdar, J.—This petition seeks to challenge an order passed by the Government of Maharashtra on 29th September, 1982 Detaining the petitioner u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, hereinafter referred to as "the COFEPOSA Act." The order was executed on the same day. Also on the same day the grounds of detention were supplied to the petitioner in accordance with law. This petition has been filed on 3rd November, 1982 challenging the said order of detention.

2. Before considering the contentions raised by Mr. Sawant, appearing in support of the petition, it would be profitable to briefly refer to the grounds of detention on which the order of detention has been passed. The communication containing the grounds of detention has been annexed as Exh. A to the petition. In paragraph (a) of the said communication the circumstances in which the petitioner arrived at Bombay by Yemen Airways have been mentioned. When he so arrived he was carrying only on hand bag. On examination he was found to be carrying in a concealed manner one tape recorder. He was asked as to whether he had any gold, wristwatches or drugs in his possession and the reply given by the petitioner was in the negative. However, on examination it was found that he

was carrying with him foreign currency equivalent to Indian Rs. 58, 875. It was also found that he was wearing one cloth bundle tightly around his waist. When that was searched, it was found to contain 109 gold sovereigns totally weighing 872 gms. The value of this gold was Rs. 87,200 at international market rate and Rs. 1.44,752 at the local market rate.

3. In paragraph (b) of the communication it has been mentioned that the petitioner was taken to Colaba area where he identified the shop premises of M/s. Salim Brothers at Ormiston Road near Taj Mahal Hotel. The petitioner told the Customs authorities that the two persons who were there were the persons who were to receive gold and foreign currency. Names of these persons were given as Mohammed Salim and Mohammed Hassan Salim. The search of the shop premises resulted in the seizure of foreign currency of U.S. Dollars 2,800 which has been found concealed in a brown coloured spectacle case for which Mohammed Salim referred to above could not give any satisfactory explanation.

4. In paragraph (c) of the communication under which the grounds of detention were informed to the petitioner, his statement recorded u/s 108 of the Customs Act has been referred to. It has been mentioned that in that statement the petitioner has stated that on 11th June, 1982 he had arrived from Sana'a (Yemen) by Yemen Airways and on search being made of his person the contraband which has been referred to in paragraph (a) was seized. Paragraph (d) of the communication refers to the statements made by the petitioner that on his earlier trip to Bombay he had come in contact with one Indian National who had his shop near St. James Hotel and who was to purchase gold from the detenu at the rate Rs. 1100 per sovereign. Subsequent paragraphs of the communication refer to the statement of Mohammed Salim Abdul Rahiman wherein the said Mohammed Salim has denied having any transaction with the petitioner. However, the said Mohammed Salim has mentioned that on two earlier occasions the petitioner had gone to Mohammed Salim's shop and tried to purchase shawls against gold coins which the petitioner was carrying Mohammed Salim refused to deal with the petitioner or to sell the shawls against the gold coins offered by the petitioner.

5. After considering all the aforesaid material the Government had come to the conclusion that the detenu attempted to smuggle into India gold coins and foreign currency by concealing them on his person and that it was necessary to detain him under the provisions of the COFEPOSA Act in order to prevent him from indulging in such prejudicial activities in future. It is this order of detention passed on the above-mentioned grounds that is the subject-matter of challenge in this petition.

6. Mr. Sawant contends that it is not the case of the Customs authorities or the Detaining Authority that the petitioner is a regular smuggler or has indulged in smuggling activities on more than one occasion. As the affidavit-in-reply of the Customs authority shows, the petitioner had come to the adverse notice of the Customs authorities for the first time on 11th June, 1982. According to Mr.

Sawant, all the material which was produced before the detaining authority shows that this was a single, solitary and an isolated act, if at all, of smuggling committed by the petitioner and such single act cannot provide a live link or connection with the order of detention passed in the instant case. It is only when a person indulges in similar acts or same acts on more than one occasion justifying an inference that he is habitually or regularly doing a prohibited act that an order of detention u/s 3 of the COFEPOSA Act can legitimately be passed.

7. In support of his contention Mr. Sawant has relied upon a judgment of this Court in 1 Vinodkumar K. Kotai v. H.R. Deshpande and others, (Criminal Application No. 471 of 1980 by Sawant and Pendse, JJ.). This judgment considered the case of a person who was arrested by the Customs Officers at Ajmer on 22nd August, 1979. There are certain observations in that judgment which apparently support the contention of Mr. Sawant that a solitary instance of smuggling cannot be the basis of a proper detention order. Having gone through the entire judgment we notice that the Division Bench set aside the order of detention in that case on several grounds. One was that it was a solitary incident and it was of September 1978. The second ground was that this incident came to the notice of the authorities in August 1979. The detention order itself in that case has been passed in January 1980. It was mentioned in the grounds of detention that the petitioner before the Court in that case had indulged in smuggling activities pursuant to a conspiracy. The Division Bench found that the material before the detaining authority did not show any connection of the detenu before it with the conspiracy. The Division Bench was also further impressed by the fact that the detenu before them had not played any role other than that of a carrier. Considering all these facts and circumstances it was held by the Division Bench that the order of detention was not justified.

8. We may at this stage refer to another judgment of Chandurkar, J., as he then was, (with Kurdukar, J.) delivered on 24th September, 1980 in Rabindranath Tiwari v. C.R. Mulherkar and others Criminal Application No. 1119 of 1980. In this judgment the judgment of Sawant and Pendse, JJ., in Vinodkumar K Kotai's case was examined and noticing the observations made in that judgment it was held that decision was given on facts. It was also pointed out:

"Ultimately it has to be said that the decision must be read as one given on facts and it cannot be said that it lays down a legal proposition that any detenu who is detained in connection with the conspiracy to smuggle wrist watches referred to in the detention order could not be detained on the basis of the material before the Detaining Authority."

We are in respectful agreement with the observations made by Chandurkar and Kurdukar, JJ, that judgment of Sawant and Pendse, JJ, does not lay down a proposition that a single act of smuggling cannot form a proper basis of detention order.

9. On the other hand in Shahul hamid Ismail Shabendray Petal v. R.D. Pradhan,

80 Bom. L.R. 440, it has been held that though the Court has to be vigilant to see that isolated offences are not exploited by the executive authority for clamping preventive detention insouciantly to by-pass the normal judicial process, it is not unreasonable to detain a person for one single incident if that demonstrates his potentiality for continuing criminality and indicates previous practice and expertise. We are in respectful agreement with these observations. In case of smuggling where an act of smuggling consists of bringing contraband in concealed manner the necessary inference will be that the person was indulging in a prohibited activity with full knowledge and open eyes of the prohibited nature of the act. If this is so, then that act though a single one detected by the authorities is indicative of the fact that he is capable of repeating the same in future. In other words, as the Detaining Authority in the affidavit-in-reply before us has pointed out, from such an act an inference can reasonably be drawn that the petitioner is likely to repeat the prohibited act as to warrant his detention. If an order of detention is passed for a single act which shows previous preparation and full knowledge on the part of the person indulging in an act of the prohibited nature, it could be aid that the order is passed on a reasonable prognosis of the future behaviour of such person. We are, therefore, unable to accept the contention of Mr. Sawant that a single act cannot provide a valid ground for an order of detention under the COFEPOSA Act.

10. Mr. Sawant thereafter proceeded to invite our attention to an averment made in the petition that the petitioner had stated in his statement to the Customs authorities that the had come to India for medical check-up. It has also been mentioned in a paragraph of the petition that the petitioner is suffering from severe abdominal pain and has gone blind in one etc. He has come to India for medical check-up ad treatment. According to Mr. Sawant, this material does not seem to have been placed before the Detaining Authority or at any rate it does not seem to have been considered by him. Mr. Sawant says that when such a material is not placed by the sponsoring authorities before the detaining authority, his subjective satisfaction is seriously impaired. It is obligatory upon the sponsoring authority to place before the Detaining Authority all the material that is likely to affect the subjective satisfaction of the Detaining Authority while passing the order of detention. In support of this proposition Mr. Sawant relied upon a judgment of the Supreme Court in *Ashadevi v. K. Shivraj* AIR 1979 S.C. 447. In our opinion, this decision of the Supreme Court is of no help to Mr. Sawant at all, In *Ashadevi*'s case the order of detention was based on the detenu's confessional statement made before the Customs Officers. Subsequently, the confessional statement was retracted by the detenu at the first available opportunity while he was in judicial custody. The retracted confession was no placed before the Detaining Authority who had before him earlier confessional statements. It was held, therefore, that retracted confessions would have definitely affected the subjective satisfaction of the detaining authority. Since the retracted confession had not been placed before the Detaining Authority, there was no proper formation of the subjective satisfaction.

11. Before us, however, the facts are totally different. There is no question of any retracted confession before us. Moreover, the detaining authority has mentioned in his affidavit-in-reply that the statement in which the petitioner has mentioned about his visit to India for medical check-up has been fully considered by him. He has also denied that he had not taken into consideration any material which would have affected his subjective satisfaction. The second ground urged in support of the petition must also fail.

12. The third contention by Mr. Sawant was that the petitioner is suffering bad health and his condition is also serious. Therefore, his continued detention must be held to be illegal and he should be set at liberty forthwith. It has not been shown to us that we have powers to release the detenu on the ground that he is not keeping good health at the time of our passing the order. In *Sheoraj Prasad Yadav Vs. State of Bihar and Others*, the Supreme Court has pointed out that such a matter is one for the Government to consider. The facts before the Supreme Court in *Sheoraj Prasad Yadav's* case showed that one of the grounds of detention was connected with an agitation. It was pointed out to the Supreme Court that the agitation had been withdrawn and, therefore, there was no justification for the continued detention of the detenu. The Supreme Court observed that :

"We would like to observe that there seems to be justification in the petitioner's grievance that he is being unnecessarily detained even after the agitation had been withdrawn and there is no likelihood of his indulging in acts prejudicial to the maintenance of supplies and services essential to the community. But this is a matter which is not within our domain to decide. It is for the State Government to consider the question as to whether the continuance of detention of the petitioner is necessary or not."

13. However, we are constrained to observe that if we had the power to release the petitioner on the ground of ill-health we would have unhesitatingly done so. We may mention that on 18th January, 1983 when the petitioner was brought to the Court at the time of the hearing of the petition before Kurdukar and Parekh, JJ., they were informed by both the advocates that the petitioner was unwell and in fact was lying in the Court premises. It was directed that the petitioner be sent to J.J. Hospital in Bombay under police escort for treatment. It was also recommended that the doctors in the hospital should give him further treatment. Until he was fit to be discharged, he was to be kept in the hospital itself. This Court thereafter passed an order on 15th March, 1983 that the petitioner should be detained in Bombay Central Prison until further orders from the Court. He had been brought to Bombay Central Prison from the hospital pursuant to the order passed on 18th January, 1983. When the petitioner was called to the Court on 25th March, 1983 at 11 a.m. we observed him in the Court and we had no difficulty in noticing that the petitioner's health was in a bad shape and he was sitting in the Court in an almost collapsing position. Mr. Kotwal, the learned Public Prosecutor, appearing for the State, agreed with the observation that we

have made of the petitioner and told us that he would himself bring this fact to the notice of the authorities concerned who will thereafter pass the necessary orders. Accordingly, this petition was kept back till 28th March, 1983 on which day we were informed that an order releasing the petitioner on parole had been passed but the details of the order were not available. Today a copy of the order has been made available for our inspection and we notice that unfortunately the order for parole is subject to several conditions which are patently harsh considering the fact that the petitioner is a foreign national and that he is having ill-health. In the first place to require him to get surety for a sum of Rs. 20,000 is itself unreasonable. We were told by Mr. Sawant, appearing for the petitioner, that the petitioner was willing to deposit a sum of Rs. 20,000 but this condition has not been incorporated in the order for parole. Moreover the condition requiring him to report to the Additional Commissioner of Police is also, in our opinion, unduly harsh. After seeing the condition of the petitioner in the Court-room we re of the opinion that he would not be in a position to report to the Additional Commissioner of Police every day. Finding that he is not able to comply with this condition the petitioner has not been able to avail of the order for release on parole passed on 26th March, 1983. We strongly recommend that his matter shall be examined at higher level immediately and the order releasing the petitioner may be passed subject to the condition that he will leave this county at the earliest opportunity. In the result, the petition must fail. Rule is discharged. We direct that the petitioner shall continue to be kept at Bombay itself till the Government takes a decision on our recommendation.