Golam Hussain Alias Gama

Vs

The Commissioner of Police Calcutta and Others

Writ Petition No. 1977 of 1973

(H. R. Khanna, V. R. Krishna Iyer JJ)

15.03.1974

JUDGMENT

KRISHNA IYER, J. -

1. A few issues of some moment, in the context of civil liberties, have been argued in this application for habeas corpus by Shri Mukherjee as amicus curiae. The facts are disquieting, at least for the reason that the petitioner, an aged ailing man around 74, has been under detention since 1973 and, previous to if, had been facing a criminal prosecution which ended in a discharge on the date the detention order was clamped down on him; and Counsel pressed the poignant circumstance that the ultimate order of Government dated September 28, 1973 merely confirms the detention, being unlimited in duration and unspeaking on the terminus ad quam for the incarceration.

2. The relevant facts may be stated before discussing the highlights of the arguments. The Commissioner of Police, Calcutta, passed the initial order of detention dated July 19, 1973 on the petitioner, Golam Hussain alias Gama, under Section 9 (1)(a)(ii) read with sub-section (2) of the Maintenance of Internal Security Act, 1971 (Act 26 of 1971) (hereinafter referred to as 'the Act'). The grounds which induced the detaining authority to pass the order were communicated the same day. They have been set out by the State as annexure to the affidavit filed in opposition to the petition and read thus :

> 1. On 8-10-72 at about 22.25 hrs., you along with your associates Achche Lal Shaw of 1. Manickotolla Bazar Lane, Satya Narayan Jaiswal of 123/2. Acharya Prafulla Chandra Road, and others, all being armed with bombs, soda-water bottles created a great disturbance of public order on Gouri Shankar Lane in front of premises No. 8 by hurling bombs indiscriminately with a view to attack one Jiban Paul of 8 Gouri Shankar Lane and his group in retaliation to an earlier quarrel that took place with the said Jiban Paul at 8, Gouri Shankar Lane with your associates Satya Narayan Jaiswal and others. The incident terrorised the locality and threw out of gear the normally life-stream of the residents of the said locality amounting to police order.
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> 2. On 9-11-72 sometimes between 04.45 hrs. you along with your associates Ratish Pradhan alias, Laltu of 23/1A. Abinash Kaviraj St., Benode Kr. Jaiswal of 348 Gula Ostagar Lane and others all being armed with brickbats, soda-water bottles, bombs, poles, created a great disturbance of public order on Gouri Shankar Lane and Abinash Kaviraj Street by hurling soda-water bottles, brickbats indiscriminately with a view to overawe the organisers of the Kalipuja that took place in front of 8 Gouri Shankar Lane and thereby to terrorise the locality. As a result the lights of the above

puja pandal were damaged. This was in sequel to an incident that took place earlier at about 04.30 hrs. when your associates Benode Kumar and others threw beer bottles at the Kalipuja pandal at 8, Gouri Shankar Lane where some females were then dancing, which was then protested by the local people and the organisers of the said puja.

And if left free and unfettered you are likely to continue to disturb maintenance of public order by acting in a similar manner as aforesaid.

3. As required by the statute, the fact of detention was communicated to the State Government which in turn reported to the Central Government. The case was placed before the Advisory Board on August 13, 1973 and when the representation of the detenu was received it was duly, considered and negatived by the State Government which thereafter made it over to the Advisory Board. After adverting to the facts, the Board advised continuance of the detention on September 21, 1973. The consequential order confirming the detention was made by the State Government on September 28, 1973 and communicated to the detenu by the middle of October, 1973. We see no statutory shortcoming in the time sequence set out above. But other grounds of attack have been levelled against the order which deserve a closer look.

4. Shri Mukherjee urged that although two criminal cases were stared in connection with the two incidents constituting the grounds for the detention the petitioner's name was not even mentioned in the first information report, and he was produced before the Magistrate only on July 5, 1973, and so the order based on those accusation was too irrational to be bona fide. The Commissioner of Police who passed the detention order has stated in his affidavit that there were cases connected with the incidents of October 8 and November 9, but the detenu could not be arrested until July 4, 1973. It is not denied that the petitioner's name was not in the First Information Report, but he was apprehended later on the basis of evidence gathered during the investigation of the criminal case. The Commissioner admits that the detenu was discharged but the Court "as no witness dared to depose against the detenu in open Court". According to him "the said order of discharge was made on the prayer of the police on July 19, 1973", and thereafter the petitioner was preventively detained. Could such an order by castigated as a mala fide and oblique resort to the inscrutable order of detention when the prospects became bleak ? This charge has been repudiated by the Commissioner on oath and we are not able to hold with the petitioner that merely because the detaining authority has chosen to pass the order on the discharge of the petitioner by the Court for want of evidence, the order is bad in law. The branch of jurisprudence bearing on prohibitory detention has been crystallised by now and it is no longer a valid contention that because the accused has been discharged in a criminal case the ground of charge cannot be relied upon by the appropriate authority for passing an order of detention. The former relates to the punitive branch of the criminal law and relates to the past commission, the latter to the preventive branch of social defence and protects the community from future injury. Whether we like it or not, this branch of jurisprudence, as interpreted by this Court, has made it futile for a detenu to urge that because the grounds of detention have been the subject matter of criminal cases which have ended in discharge, therefore the order of detention is mala fide. The basis imperative of proof beyond reasonable doubt does not apply to the 'subjective satisfaction' component of imprisonment for reasons of internal security. To quarrel with such a proposition is to challenge the wisdom of Parliament. Of course, we can visualise extreme cases where a Court has held a criminal case to be false and a detaining authority with that judicial pronouncement before him may not reasonably claim to be satisfied about prospective prejudicial activities based on what a Court has found to be baseless. But the present case where the order of discharge is made purely for want of evidence on the score that

witnesses were too afraid to depose against a desperate character cannot come under this exceptional category.

5. Another submission, equally an exercise in futility, made before us is that there has been a long interval of nine months between the criminal incidents of October and November, 1972, and the detention order of July, 1973. Counsel hopefully relied on a recent decision of this Court in Lakshman Khatik v. State of West Bengal ((1974) 4 SCC 1 : 1974 SCC (Cri) 289) and an earlier decision in Rameshwar Shaw v. District Magistrate Burdwan ((1964) 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LJ 257). It is true that there must be a live link between the grounds of criminal activity alleged by the detaining authority and the purpose of detention, namely, inhibition of prejudicial activity of the species specified in the statute. This credible chain is snapped if there is too long and unexplained an interval between the offending acts and the order of detention. Such is the ratio of proximity in Lakshman Khatik (supra). No authority, acting rationally, can be satisfied, subjectively or otherwise, of future mischief merely because long ago the detenu had done something evil. To rule otherwise is to sanction a simulacrum of a statutory requirement. But no mechanical test by counting the months of the interval is sound. It all depends on the nature of the acts relied on, grave and determined or less serious and corrigible, on the length of the gap, short or long, on the reason for the delay in taking preventive action, like information of participation being available only in the course of an investigation. We have to investigate whether the causal connection has been broken in the circumstances of each case. If the detaining authority takes the chance of conviction and, when the Court verdict goes against it falls back on its detention power to punish one whom the Court would not convict, it is an abuse and virtual nullification of the judicial process. But if honestly finding a dangerous person getting away with it by overawing witnesses or concealing the commission cleverly, an authority thinks on the material before him that there is likelihood of and need to interdict public disorder at his instance he may validly direct detention. The distinction is fine but real. In the present case, the acts are serious being bomb hurling and brick-bat throwing in public places creating panic. The involvement of the petitioner is discovered only during the investigation of the offences. The witnesses are sacred away from deposing. The Commissioner swears that in these special circumstances he did form the satisfaction requisite for ordering preventive detention. No ground exists for dismissing this statement as sham or fictitious. It is one thing to say that a mere subjective satisfaction is sufficient to deprive a person of a fundamental freedom; it is another to reject that satisfaction as specious and non-existent. Parliament makes the law and is responsible for it; the Court only applies it, as it must. We have, therefore, to reject the plea that because the criminal case has failed the detention must be bad. M. S. Khan v. C. C. Bose ((1972) 2 SCC 607 : 1973 SCC (cri) 35), Ashim Kumar v. State of West Bengal ((1973) 4 SCC 76 : 1973 SCC (Cri) 723) and Sahib Singh Duggal v. Union of India ((1966) 1 SCR 313 : AIR 1969 SC 340 : 1966 Cri LJ 305) are but three among many cases taking this view. We follow these precedents.

6. The next serious contention of Shri Chatterjee (sic) is that an order of detention which does not specify a period is violative of Section 12 of the Act. We may reproduce the relevant provisions which are of ancient vintage, being wholly or substantially in pari materia with earlier corresponding preventive detention sections. Nor is the position of law canvassed for res integra. Sections 12 and 13 of the Maintenance of Internal Security Act, 1971, as amended, read as follows :

12. (1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

#(2) * * * *##

13. The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 shall be twelve months from the date of detention or until the expiry of the Defence of India Act, 1971, whichever is later :

Provided that nothing contained in this Section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.

> Section 1(3) of the Defence of India Act, 1971, laid down the duration of that Act and said that that Act shall remain in force for the duration of the proclamation of emergency and a period of six months thereafter. Section 13 of the MISA, as amended, thus provided that the maximum period of detention under the Act shall be twelve months from the date of detention or until the expiry of a period of six months after the cessation of the proclamation of emergency, whichever is later.
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> 7. The Court recently dismissed a similar argument in these words in Suna Ullah Bhut v. State of J & K ((1973) 3 SCC 60 : 1973 SCC (Cri) 138) (at scc page 62, paras 7 and 8) :
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> It is urged that the failure of the State Government to specify the period of detention introduces an infirmity in the detention of the petitioner. This contention, in our opinion, is without any force. According to sub-section (1) of Section 12 of the Act, in any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. Section 13 of the Act specifies the maximum period of detention. According to that Section, the maximum period for which a person may be detained in pursuance of any detention order, which has been confirmed under Section 12, shall be two years from the date of detention. It is further provided that nothing in the Section shall affect the power of the Government to revoke or modify the detention order at any earlier time. It is, in our opinion, difficult to infer from the language of Section 12 of the Act that the State Government while confirming the detention order should also specify the period of detention. All that the Section requires is that if the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of the person, the Government may confirm the detention order. There is nothing in the Section which enjoins upon the Government to specify the period of detention order. The concluding words of sub-section (1) of Section 12, according to which the Government may continue the detention of the person concerned for such period as it thinks fit, pertain to and embody the consequences of the confirmation of the detention order. It is, however, manifest that the period for which a person can be detained after the confirmation of the detention order is subject to the limit of two years, which is the maximum period of detention for which a person can be detained, vide Section 13 of the Act.
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> Apart from the above, we are of the opinions that it is not always practicable and feasible for the State Government at the time of confirming the detention order to specify the period of detention. The continued detention of the detenu, subject to the maximum period prescribed by the Act, depends upon a variety of factors and the

State Government would have to take into account all the circumstances including fresh developments and subsequent events in deciding whether to keep the detenu in detention for the maximum period or to release him earlier. It has accordingly been provided in sub-section (2) of Section 13 of the Act that the State Government have the power to revoke or modify the detention order at any time earlier than the expiry of two years from the date of detention.

8. The leading case, if we may say so, is Dattatreya Moreshwar Pangarkar v. State of Bombay (1932 SCR 612 : AIR 1952 SC 181 : 1952 Cri LJ 955). The majority held that an order of detention under a substantially like provision was not invalid merely because the order did not contain the period of imprisonment. Mahajan, J., as he then was held a contrary view. But even the majority was split on their construction of the Section. Das, J., as he then was, read the Section to imply no obligation to write into the order the duration, even though it may be desirable. The learned Judge observed : (SCR pp. 619-20, 621-22)

It is said that the Section should be construed irrespective of whether it occurs in a temporary statute or a permanent one, and it is urged that if the statute were a permanent one the section, on the aforesaid interpretation would have permitted an indefinite detention. The answer is given by Mahajan, J., in the following passage in his judgment in S. Krishnan v. The State of Madras (1951 SCR 621 : AIR 1951 : SC 301 : 52 Cri LJ 1103) at page 639 with which I concurred :

It may be pointed out that Parliament may well have though that it was unnecessary to fix any maximum period of detention in the new statute which was of a temporary nature and whose own tenure of life was limited to one year. Such temporary statues cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have enacted and nothing further can be done under them. The detention of the petitioners therefore is bound to come to an end automatically with the life of the statute and in these circumstances Parliament may well have thought that it would be wholly unnecessary to legislate and provide a maximum period of detention for those detained under this law.

For all I know, such drastic and extensive power to continue the detention as long as it may think fit may not be given by Parliament to the executive Government in a permanent statute. But if it does think fit to do so, it will not be for the Court to question the knowledge, wisdom or patriotism of the legislature and to permit its dislike for the policy of the law to prevail over the plain meaning of the language used by the Legislature. Apart from this consideration, there is a period specified in the sub-section itself, for as soon as the appropriate Government will cease to think fit to continue the detention it will revoke the detention order under Section 13 and the period of detention will automatically come to an end.

If the specification of the period of detention is not at all sacrosanct and the appropriate Government may nevertheless continue the detention as long as it thinks fit to do so, why is the specification of a period to be regarded as virtually or at all necessary ? So far as the detenu is concerned his detention will not be any more definite and less irksome if it is open to the appropriate Government to continue the detention by an indefinite number of orders made from time to time until the expiry of the Act itself by appellant of time in the case of a temporary statute or by its repeal in the case of a permanent Act. It is said that if we insist on a specification of a definite period when the confirmatory order is made and thereafter each time the period of detention is extended then the appropriate Government will have to apply its mind to the case of the detenu before it will make an order for further continuation of the detention, but that if we say that no time need be specified, the

appropriate Government will lose sight of the case and the detenu will be detained indefinitely. I do not see why we should impute such dereliction of duty to be appropriate Government; but even if we do so and insist on the specification of the period of detention we shall perhaps be driving the appropriate Government to fix the longest permissible period of detention ending with the expiry of the Act itself and then to lose sight of the case of the detenu. That, I apprehend, will do no good to the detenu.

In any event, the considerations of hardship urged upon us may make it desirable that a period of detention should be fixed but this cannot alter the plain meaning of the language of the Section.

9. Patanjali Sastri C.J. concurred. However, Mukherjee, J. struck a different note : (SCR pp. 628 and 629)

The question now is whether the omission to the period of further detention while confirming the detention order under Section 11(1) of the Preventive Detention Act makes the detention illegal ? The point is not free from doubt, but having regard to the fact that the new Preventive Detention Act is a temporary statute which was to be in force only up to the 1st April, 1952, and has only been recently extended to a further period of six months and no detention under the Act can continue after the date of expiry of the Act, I am inclined to hold that non-specification of the further period in an order under Section 11(1) of the Act does not make the order of detention a nullity. If no period is mentioned, the order might be taken to imply that it would continue up to the date of the expiration of the Act itself when all detentions made under it would automatically come to an end. Of course, the appropriate Government is always, at liberty to terminate the order of detention earlier, if it considers proper, in exercise of its general powers under Section 13 of the Act.

If is perfectly true that an order for detention for an indefinite period is repugnant to all notions of democracy and individual liberty, but the indefiniteness in the case of an order make under Section 11(1) of the Preventive Detention Act is in a way cured by the fact that there is a limit set to the duration of the Act itself, which automatically prescribes a limit of time beyond which the order cannot operate. In my opinion, Section 11(1) of the Preventive Detention Act does contemplate that a period should be mentioned during which the further detention of the detenu is to continue and the Government should see that no omission occurs in this respect, but I am unable to hold that this omission alone would make the order a nullity which will justify us in releasing the detenu.

Chandrasekhara Aiyar, J. concurred.

10. The undercurrent of judicial unease at loss of citizen's liberty because the Executive subjectively opined that way is evident in the pages of the report, but the brooding feeling that the preventive detention legislation was a short-lived statute and all imprisonment without trial would terminate at a near date was writ large in all the opinions. After all, civil liberty ordinarily ends where detention without trial begins and commitment to the rule of law receives a rude shock where a permanent statute authorises long term gaol confinement. That is why Courts have been strict even on procedural steps. Mathew, J., recently observed in Prabhu Dayal v. District Magistrate, Kamrup ((1974) 1 SCC 103, 114 : 1974 SCC (Cri) 18) (at page 114, para 21) :

The facts of the case might induce mournful reflection how an honest attempt by an authority charged with the duty of taking prophylactic measure to secure the maintenance of supplies and services essential to the community has been frustrated by what is popularly called a technical error. We say and we think it is necessary to repeat, that the gravity of the evil to the community resulting

from anti-social activities can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personl liberty is largely the history of insistence on observance of procedure. Observance of procedure has been the bastion against wanton assaults on person liberty over the years. Under our Constitution the only guarantee of personl liberty for a person is that he shall not be deprived of it except in accordance with the procedure established by law. The need today for maintenance of supplies and services essential to the community cannot be over-emphasized. There will be no social security without maintenance of adequate supplies and services essential to the community. But social security is not the only goal of good society. There are other values in a society. Our country is taking singular pride in the democratic ideals in personal liberty. It would indeed be ironic if, in the name of social security, We would sanction the subversion of this liberty. We do not pause to consider whether social security is more than personal liberty in the scale of values. For, any judgment as regards that would but a value judgment on which opinions might differ. But whatever be its impact on the maintenance of supplies and services essential to the community, when a certain procedure is prescribed by the Constitution to the laws, for depriving a citizen of his personal liberty, we think it our duty to see that procedure is rigorously observed. However strange this might sound to some ears.

11. The basic feature of the Act, as distinguished from its per-decessor, is that is no longer a temporary law and even the duration of the detention can be distant and considerable. We have misgivings about these anti-personal freedom facts but regard hopefully the presence and use of the power to revoke the detention on a review at any time. Moreover, there is no reason to think that this extraordinary power will be used indiscriminately or inordinately by a democratic Government. A tenable interpretation that a detention order of prolonged and unspecified duration has to be abandoned for the time not merely because of the pressure of precedents but because we are assured by the State's Counsel that the fulfilment of the imperative obligation of the State to review from time to time the changing social situation and the individuals criminal potential, tipping the scales in favour of enlargement of the detenu, is taking place. No responsible Government should or would be irresponsive to the claim of citizen's freedom and the argument that detention without defined duration is ipso jure invalid cannot be sustained.

12. Shri Chatterjee (sic) took up the further position that the detention in the case on hand was founded on prevention of public disorder while the acts imputed to the petitioner ex facie were aimed at a particular person, and not the public generally. Lohia's (Ram Manohar Lohia v. State of Bihar, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608) case and other rulings were said to reinforce this stance. The law is plain and the decided case are concordant. A criminal act hitting a private target such as indecent assault of a woman or slapping a neighbour or knocking down a pedestrian while driving, may nos. Shake up public order. But a drunk with a drawn knife chasing a woman in a public street and all women running in panic, a Hindu or Muslim in a crowded place at a time of communal tension throwing a bomb at a personal enemy of the other religion and the people, all scared, fleeing the area, a striking worker armed with a dagger stabbing a blackleg during a bitter strike spreading terror-these are invasions of public order although the motivation may be against a particular private individual. The nature of the act, the circumstances of its commission, the impact on people around and such like factors constitute the pathology of public disorder. We cannot isolate the act from its public setting or analyse its molecules as in a laboratory but take its total effect on the flow of orderly life. It may be a question of the degree and quality of the activity, of the sensitivity of the situation and the psychic response of the involved people. To dissect further is to defeat the purpose of social defence which is the paramount purpose of preventive detention.

13. Another argument, rather flimsy, was made that a corrigendum reading 'public order' in the place of 'police order' was not communicated to the detenu. It is not so and merits no consideration. One or two other points too trivial to be seriously noticed, were also mentioned but we ignore them.

14. Basically, we must realise the unpleasant truth that the new jurisdiction of preventive detention by executive flat founded on subjective satisfaction and jejune judicial protection is an erosion of a great right. We may repeat what this Court in different context recently observed in Mohd. Subrati v. State of West Bengal ((1973) 3 SCC 250, 256 : 1973 SCC (Cri) 245) (at page 256 para 8) :

It must be remembered that the personal liberty of an individual has been given on honoured place in the fundamental rights which our Constitution has jealously protected against illegal and arbitrary deprivation and that this Court has been entrusted with a duty and invested with a power to enforce that fundamental right.

The seriousness of the step must be appreciated by Government and continuous check-up on the need to prolong the prison life of the citizen made. The final cure for prejudicial activities threatening the survival of the community is not executive shut-up of all suspects in prison for how long one is kept guessing. Such a strategy may alienate and embitter men who should be weaned away and won over. In the present case, a septuagenarian, allegedly sickly, is confined in jail for an unspecified period. It may well be that his private enemy on whom be threw a bomb is not there at all. It may also be that the detenu has altogether changed his outlook, as many well-known terrorists have turned marvels of saintliness. History will, we hope, serve the Administration as reminder of unwitting misuse while exercising near-absolute power.

15. We dismiss the petition.

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