Dulal Roy

Vs

The District Magistrate Burdwan and Others

Writ Petition No. 428 of 1974

(V. R. Krishna Iyer, R. S. Sarkaria JJ)

15.01.1975

JUDGMENT

SARKARIA, J. –

1. Dulal Roy, the petitioner challenges the order, dated August 21, 1972, of his detention made by the District Magistrate, Burdwan under Section 3 of the Maintenance of Internal Security Act, 1971 (hereinafter called the Act). The order states that it is necessary to detain him with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the community.

2. The grounds of detention communicated to the detenu run as under :

1. On July 21, 1972 at 1 a.m. you with your associates Kartick Karmaker and others committed theft of electric wire from Tower Nos. 23 and 24 situated near Dhangachha village and by such act you caused stoppage of electric supply which is essential for maintenance of supplies and services to the community, in Memari area and its vicinity.

2. On July 29, 1972 at 2 a.m. you with your associates committed theft of Tower Members from Tower Nos. 246, 247, 248 situated on the field near Dewandighi, P. S. Burdwan and by commission of such theft the towers were likely to fall resulting in stoppage of supply of electricity which is essential for maintenance of supplies and services to the community, in Calcutta area and its suburbs.

3. In connection with the above thefts, two cases, one on July 21, 1972 and the other on August 1, 1972, under Section 379, Penal Code were registered with the police. The petitioner was not named in the F.I.R. His complicity was detected in the course of investigation. He was consequently arrested on August 3, 1972 and sent up before the Judicial Magistrate. After further investigation, the police submitted a final report and the petitioner was discharged in both the cases on September 3, 1972. On the same day, he was taken into custody pursuant to the impugned order of detention.

4. Mr. A. K. Gupta appearing as amicus curiae for the petitioner contends that the impugned order has been passed to subvert the process of the ordinary penal law, as a colourable exercise of jurisdiction. It is stressed that on August 21, 1972 when the detention order was passed, the petitioner was already in custody as an undertrial. In the absence of anything in the counter affidavit showing that his custody was going to terminate soon, proceeds the argument, it was not reasonably possible for the authority to be satisfied that the petitioner might indulge in prejudicial activities unless he was detained. It is urged that the detaining authority never applied its mind to satisfy itself

with regard to this imperative requirement of Section 3 and consequently the order of detention is illegal. To highlight the casualness of the authority in taking the impugned action, Counsel has pointed out that the counter-affidavit has not been filed by the District Magistrate who had made the impugned order. In support of these contentions, learned Counsel has relied upon Rameshwar Shaw v. D. M. Burdwan ((1964 4 SCR 921 : AIR 1964 SC 334 : (1964) 1 Cri LG 257), Noor Chand Sheikh v. State of W. B. (1975) 3 SCC 306 : 1974 SCC (Cri) 914) and the recent judgment of this Court in Sri Lal Shaw v. State of W. B. ((1975) 3 SCC 306 : 1974 SCC (Cri) 914)

5. Mr. Chatterjee, learned Counsel for the respondent-State submits that the mere fact that the petitioner was on the date of the detention order in judicial custody did not stand in the way of the detaining authority being satisfied about his propensity to act prejudicially in future after his release from judicial custody. It is emphasised that the authority must have been aware that the petitioner was likely to be released shortly as in fact he was released by the Judicial Magistrate on September 3, 1972 i.e. about 13 days after the making of the detention order. Reference, in this connection, has been made to Kartic Chandra Guha v. State of W. B. ((1975) 3 SCC 490 : 1975 SCC (Cri)292).

6. Section 3 of the Act provides that the Central Government or the State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to . . . (iii) the maintenance of supplies and services essential to the community, it is necessary so to do, make an order directing that such person be detained. It will be seen that the satisfaction of the authority as to the inclination of such person to act in any prejudicial manner indicated in inclination of such person to act in any prejudicial manner indicated in sub-clauses (1) and (iii) of Section 3(1)(a) is the sine qua non for making an order of his detention. The scheme of the section presupposes that on the date of the order of detention or in the near future, the person sought to be detained has or will have freedom of action. If a person therefore is serving a long term of imprisonment or is in jail custody as an undertrial and there is no immediate or early prospect of his being released on bail or otherwise, the authority cannot legitimately be satisfied on the basis of his past history or antecedents that he is likely to indulge in similar prejudicial activities after his release in the distant or indefinite future. There must be a proximate nexus between the preventive action and the past activity of the detenue on which it is founded.

7. This Court has time and again emphasised that where in a habeas corpus petition a rule nisi is issued, it is incumbent upon the State to satisfy the Court that the liberty of the detenue has been taken away strictly in accordance with law and due compliance with the constitutional requirements of Article 22(5) of the Constitution. The best informed person, therefore, to file the counter-affidavit in response to rule nisi is the authority who made the detention order under Section 3 of the Act. In Shaik Hanif v. State of W. B ((1974) 1 SCC 637 : SCC (Cri) 292)., it was pointed out that the failure to furnish the counter-affidavit of the authority who had passed the order of detention where mala fides or extraneous considerations are attributed to it, "may assume the shape of serious infirmity leading the court to declare the detention illegal".

8. This observation equally holds good in a case where the detention order is exposed to the risk of attack on the ground of being a colourable exercise of jurisdiction.

9. While it is true, as an abstract legal proposition, that an order of preventive detention under the Act may be validly passed against a person in jail custody on the same facts on which he is being prosecuted for a substantive offence in a court, such an order of detention is more easily vulnerable - than the one against a person not in such custody - to the charge that without there being any basis whatever for the satisfaction of the detaining authority, which is a condition precedent for taking

action under Section 3, the power has been misused as a cloak solely for the purpose of punishing the detenue for the substantive offence for which he was being prosecuted, by subverting and circumventing the penal law and irksome court procedure. To make the detention order immune against such an attack, the detaining authority in its counter-affidavit must particularise all the material circumstances on the basis of which he was satisfied as to the necessity of the preventive action despite the detenue being already in jail custody and having no freedom of action on the date of the detention order. In the present case this has not been done. No counter-affidavit has been filed by the person who had made the impugned order. Even the Deputy Secretary who had filed the counter after gathering some information from the record, does not disclose all the material facts from which it could be rationally possible for the detaining authority to predicate that if the impugned order was not made against the petitioner, though in judicial custody, he could be able to indulge in the prejudicial activities indicated in the impugned order. There is no averment whatever that the charges against the petitioner were true but the evidence collected against the petitioner was deficient, or, for reasons, other than the charge being groundless, the prosecution of the petitioner for substantive offences was foredoomed to failure. The circumstances in which the petitioner was discharged by the Judicial Magistrate have not been set out. A bare statement that a "final report" was submitted by the police is neither here nor there. Such a report could have been made by the police in any of the situations referred to in Section 169, 170, and 173 of the Code of Criminal Procedure, 1898. Section 169 envisages two different situations in which an accused person can be released. One is where there is not sufficient evidence against him. The other is when no reasonable ground or suspicion is revealed by the investigation in regard to his being concerned in the commission of the offence. Such a release can be made by the investigating officer himself without sending the accused before a Magistrate. Section 170 contemplates a situation where there is sufficient evidence or reasonable ground to justify the forwarding of the accused under custody for trial to a Magistrate. It is Section 173 that provides for a final report, popularly known as police challan or charge-sheet, which is submitted in the prescribed form after completion of the investigation. The counter-affidavit is silent with regard to the nature of this police report and the situation in which the petitioner was discharged. It does not say whether this report had reference to deficiency or sufficiency of evidence or groundlessness of the charge against the petitioner.

10. Mr. Chatterjee submits that since the petitioner was about 13 days after the impugned order, in fact, discharged by the Judicial Magistrate, it should be presumed that his discharge was due to paucity of evidence and not on account of the charge being baseless.

11. We are afraid no such conjecture can be drawn when the liberty of a citizen is at stake. The counter-affidavit apart, we asked Mr. Chatterjee if he could show us any official record to support his contention. Counsel was unable to do so. He however, submitted that if a sufficiently long adjournment was granted, he would be able to furnish a better and comprehensive affidavit of the officer who had passed the impugned order, clarifying all these obscurities. The case was instituted on a letter dated August 24, 1974 from the detenue. Rule nisi was issued on October 3, 1974 for November 25, 1974. On the latter date no counter affidavit was produced, and on the request of the State Counsel an adjournment was granted to enable the respondents to file the return. In spite of this the counter filed is neither clear and complete, nor by the best informed person. We are therefore, not disposed to put a further premium on this casualness and laxity on the part of the respondent.

12. The grounds of detention related to two incidents of theft simpliciter in respect of which the petitioner could easily be prosecuted under the penal law. In the absence of any explanation or appellant his discharge and as to why the making of the preventive order was deemed necessary

even while he was in jail custody and had no freedom of action, the conclusion is inescapable that the impugned order had been passed mechanically and as a colourable exercise of jurisdiction.

13. In the view that it is incumbent on the detaining authority in such cases to disclose to the Court all the material circumstances on which its subjective satisfaction is based, we are fortified by the observations of this Court in Noor Chand Sheikh v. State of W. B. (supra) wherein A. C. Gupta, J. speaking for that Bench said : [SCC pp. 308-309 : SCC (CRI) pp. 916-917, paras 5-6]

We do not think it can be said that the fact that the petitioner was discharged from the criminal cases is entirely irrelevant and of no significance; it is a circumstance which the detaining authority cannot altogether disregard. In the case of Bhut Nath Mete v. State of W. B. ((1974) 1 SCC 645 : 1974 SCC (Cri) 300) this Court observed : [SCC p. 657 : SCC (CRI) p. 312, para 20]

. . . detention power cannot be quietly used to subvert, supplant or to substitute the punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom the ordinary law would take care of, merely because it is irksome to undertake the inconvenience of proving guilt in court is unfair abuse.

If, as the petitioner has asserted, he was discharged because there was no material against him and not because witnesses were afraid to give evidence against him, there would be apparently no rational basis for the subjective satisfaction of the detaining authority. It is for the detaining authority to say that in spite of the discharge he was satisfied, on some valid material, about the petitioner's complicity in the criminal acts which constitute the basis of the detention order. But, as stated already, the District Magistrate, Malda, who passed the order in this case has not affirmed the affidavit that has been filed on behalf of the State.

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Apart from the question whether the explanation is satisfactory, the fact remains that in this case there is nothing to show that there was any rational material for the subjective satisfaction of the authority who passed the order of detention. Therefore, we find it difficult in the circumstances of this case to reject the contention that the order of detention was passed mechanically and was a colourable exercise of power conferred by this Act.

14. The ration of Kartic Chandra Guha v. State of W. B. (supra), cited by Mr. Chatterjee does not advance his case. There, the District Magistrate who had passed the detention order had clearly explained and disclosed on affidavit all the material circumstances on which his satisfaction was based, and further averred :

Having regard to the activities of the detenue as disclosed in the grounds of detention and having regard to the possibility of (his) being enlarged on bail, I was satisfied that the detenue should be detained under the Act.

15. In the present case, there is nothing in the counter-affidavit to show that on August 21, 1972, the date of the detention order, the petitioner was about to be released on bail or discharged for deficiency of evidence or difficulty of its production in court. Nor is there any averment that the District Magistrate was otherwise satisfied from credible information received that the charges against the detenue were true.

16. In the light of what has been said above, we would quash the impugned order, make the rule

absolute and direct the release of the petitioner.

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