Kailash and Another

Vs

State of U. P.

Criminal Appeal No. 22 of 1975

(CJI Y. V. Chandrachud, R. S. Sarkaria, O. Chinnappa Reddy JJ)

12.09.1978

JUDGMENT

TULZAPURKAR, J. -

1. On September 29, 1978 the detenu was directed to be released forthwith on the detention order being set aside and we had stated that we would give our reasons for our order later which we do presently

2. By a detention order passed on January 4, 1978 under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as "COFEPOSA") the detenu Gopal Ghermal Mehta was detained by the Additional Chief Secretary to the Government of Gujarat (respondent 1) with a view to preventing him from engaging in transporting smuggled goods. The grounds of detention were served upon him on the same day, i.e. on January 4, 1978. Briefly stated the grounds disclosed the following material against the detenu : On receipt of certain information on December 12, 1977 by the Customs Officers of Ahmedabad, the said officers had kept a watch for a Fiat Car GTI-6020 and the said car with five occupants was intercepted in the early hours of December 13, 1977 near Naroda Railway Crossing and the occupants (the detenu and four others) were taken to the Customs Divisional Office, Paldi, Ahmedabad for examination. The detenu and the other four occupants of the car denied that they were carrying any smuggled gold or prohibited articles, but on search of one of the occupants Sheveram Atmaram Chandwani two cloth bags were recovered from him, in one of which there were 27 gold bars of foreign marking weighing 19 (sic) tolas valued at Rs. 2,16,000 (sic) and in the other there were 18 pieces of gold bearing 'Trishul' mark valued at Rs. 1,94,400. Chandwani in his statement before the Customs Officers stated that the two bags which he was carrying on his person belonged to the detenu who was dealing in silver and gold in Udaipur and that he was merely a carrier who used to receive remuneration of Rs. 100 per trip from the detenu. Two statements of the detenu were recorded by the Customs Officers on December 13 and 14, 1978, in which he corroborated the version of Chandwani but added that the entire quantity of foreign marked gold and the 'Trishul' marked gold belonged to one Prem of Chandni Chowk, Delhi, for and on whose behalf he was carrying the gold from Delhi to Udaipur and from Udaipur to Ahmedabad for disposing it of to two persons, namely, Poonamchand Laxmanji and Bhagubhai in Ahmedabad. The detenu also stated that this had been going on for about six to eight months and that he had made five to six trips in a month and on each such trip he used to carry 2.5 to 3 kgs. of gold. He further admitted that the Fiat Car in question had been purchased for this purpose for Rs. 15,000 which money had been provided by Prem. He further stated that after disposal of the gold belonging to Prem at Ahmedabad he used to carry the sale proceeds to Prem and account for the same at the time of the next transaction between him and Prem.

3. Counsel for the petitioner (being the wife of the detenu) did not dispute that the aforesaid material disclosed in the ground was prima facie sufficient to show the detenu's involvement in the racket of smuggling gold, namely, transporting smuggled gold from Delhi to Udaipur and from Udaipur to Ahmedabad but she challenged the detention order on the ground that procedural safeguards had not been followed vitiating the requisite satisfaction on the part of the detaining authority under Section 3(1). It appears that when the interrogation to the detenu was going on while he was in custody of the Customs Officials, Smt. Devyantiben Sha, an Advocate of the detenu addressed a letter as also a telegram, both dated December 14, 1977, making a grievance about the wrongful restraint and illegal custody of the detenu by the Customs Officers beyond 24 hours and expressing apprehension that the detenu had been so detained with a view to obtain confessional statements against his will. The receipt of the letter was disputed but the Assistant Collector of customs admitted the receipt of the telegram from the Advocate on December 15, 1977. By his reply dated December 15, 1977 sent to the Advocate, the Assistant Collector denied the allegations made in the telegram. Admittedly on December 14, 1977, the Advocate had gone to the Customs Office and had sought permission to remain present at the time of the interrogation of the detenu but her request was not exuded to as the Customs Officers were of the view that there was no provision in law permitting an Advocate to remain present at the time of interrogate. Further on this occasion the Advocate was told that the detenu will be produced before the Magistrate at 5.30 p.m. on that very day and, therefore, she waited in the Magistrate's Court up to 5.30 p.m. to obtain bail for the detenu but as the detenu was not produced, the Magistrate declined to pass any order on the bail application. On December 15, 1977 the detenu was produced before the Magistrate who remanded him to customs custody for five days in spite of opposition by the Advocate. On December 20, 1977 the detenu was again produced before the Magistrate and even on this occasion bail we refused but the detenu was remanded to judicial custody permitting further interrogation by Custom Officers. ON December 22, 1977 while he was in judicial custody the detenu was interrogated by Customs Officers and his statement was recorded on that day but the detenu refused to sign the same and instead made an endorsement that his earlier statements dated December 13 and 14, 1977 and the facts stated therein were not correct. In other words, in his statement dated December 22, 1977 the detenu had resiled from his earlier confessional statements and had squarely repudiated the facts stated therein. On January 3, 1978 the Advocate of the detenu made another application for getting him released on bail as the period of remand was to expire on January 4, 1978 and that application was fixed for hearing on January 6, 1978 but on January 4, 1978 itself while the detenu was in judicial custody the Additional Chief secretary to the Gujarat Government (respondent 1) passed the impugned order under section 3(1) of the "COFEPOSA" and the detenu was detained thereunder.

4. The aforesaid detention was challenged by the appellant (wife of the detenu) before the Gujarat High Court under Article 226 of the Constitution by filing special criminal application 20 of 1978 seeking a writ of habeas corpus for the release of the detenu principally on the ground that there was complete non-application of mind on the part of the detaining authority (respondent 1) to the attendant circumstances in which the confessional statements of the detenu - on which the detention order was mainly based - were recorded, particularly the vital facts that transpired during the interrogation as also those that followed the recording of those statements. It was contented that apart from the apprehension expressed in the Advocate's telegram that the detenu detenu was being detained with a view to obtain his confessional statements under duress, the said confessional statements had actually been retracted by the detenu at the first available opportunity when he was in judicial custody on the ground that these had been involuntarily extorted from him and that such retraction of the confessional statements was not intimated to the detaining authority and was not considered by it before passing the impugned detention order and as such for want of considering

such vital act the subjective satisfaction of the detaining authority got vitiated and the impugned order was liable to be set aside. The High Court, however, rejected the said contention as also the other contentions urged on behalf of the appellant (the wife of the detenu) and dismissed the said application on May 29, 1978. Against this dismissal the present appeal has been preferred.

5. Counsel for the petitioner contended before us that the High Court had clearly erred in taking the view that since the contents of the telegram dated December 14, 1977 expressing the apprehension had been made known to the detaining authority it could not be said that this material aspect of the case had been kept back from the detaining authority. It was pointed out that the mere expression of an apprehension that confessional statements might be extorted was different from the actual obtaining of the statements under pressure of which a complaint had been made by the detenu in his statement recorded on December 22, 1977 wherein the earlier statements had been completely retracted and it was urged that the fact that there was such retraction of the confessional statements by the detenu at the first available opportunity was not communicated or placed before the detaining authority when it considered the question of passing the impugned order. Counsel further contended that instead of considering whether these acts were vital enough to require the application of mind by the detaining authority, the High Court went on to record findings of fact to the effect (i) that it could not be said that the detenu was in illegal custody; (ii) that the confessional statements could not have been extracted under compulsion, and (iii) that the said statements were not obtained under duress and in doing so the High court clearly acted in excess of jurisdiction and contrary to the well-established principles applicable to the issue of habeas corpus in preventive detention case. In any case it was for the detaining authority to apply its mind to these aspects before deciding to issue the impugned order. Counsel further contended that it was undisputed that the Advocate was not allowed to be present nor allowed to be consulted during the interrogation in spite of request having been made in that behalf which clearly showed that the detenu was under duress and not a free person. In any event, Counsel contended, the satisfaction of the detaining authority must be regarded as vitiated inasmuch as these vital facts, namely, (i) that during interrogation in spite of request neither the presence nor the consultation of the Advocate was permitted, (ii) that in spite of intimation to the Advocate in that behalf, the detenu was not produced before the Magistrate at 5.30 p.m. on December 14, 1977 and (iii) that the confessional statements had been squarely retracted by the detenu on December 22, 1977 at the first available opportunity while he was in judicial custody - all of which had a material bearing and would have influenced the mind of the detaining authority one way or the other - were neither placed before nor considered by the detaining authority before passing the detention order on January 4, 1978 and, therefore, the impugned order was liable to be set aside. We find considerable force in these contentions urged by counsel for the appellant before at.

6. It is well-settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. In Sk. Nizamuddin v. State of West Bengal ((1975) 3 SCC 395 : 1975 SCC (Cri) 21 : AIR 1974 SC 2353) the order of detention was made on September 10, 1973 under Section 3(2)(a) of MISA based on the subjective satisfaction of the District Magistrate that it was necessary to detain the petitioner with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the community and this subjective satisfaction, according to the grounds of detention furnished to the petitioner, was founded on a solitary incident of theft of aluminium wire alleged to have been committed by the petitioner on April 14, 1973. In respect of this incident of theft a criminal case was filed inter alia

against the petitioner in the Court of the Sub-Divisional Magistrate, Asansol, but the criminal case was ultimately dropped as witnesses were not willing to come forward to give evidence for fear of danger to their life and the petitioner was discharged. It appeared clear on record that the history-sheet of the petitioner which was before the District Magistrate when he made the order of detention did not make any reference to the criminal case launched against the petitioner, much less to the fact that the prosecution had been dropped or the date when the petitioner was discharged from that case. In connection with this aspect this Court observed as follows :

> We should have thought that the fat that a criminal case is pending against the person who is sought to be proceeded against by way of preventive detention is a very material circumstance which ought to be placed before the District Magistrate. That circumstance might quite possibly have an impact on his decision whether or not to make an order of detention. It is not altogether unlikely that the District Magistrate may in a given case take the view that since a criminal case is pending against the person sought to be detained, on order of detention should be made for the present, but the criminal case should be allowed to run its full course and only if it fails to result in conviction, then preventive detention should be resorted to. It would be most unfair to the person sought to be detained not to disclose the tendency of a criminal case against him to the District Magistrate.

It is true that the detention order in that case was ultimately set aside on other grounds but the observations are quite significant. These observations were approved by this court in Suresh Mahato v. The District Magistrate, Burdwan ((1975) 3 SCC 554 : 1975 SCC (Cri) 120 : AIR 1975 SC 728). The principle that could be clearly deduced from the above observations is that if material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal. After all the detaining authority must exercise due care and caution and act fairly and justly in exercising the power of detention and if taking into account matters extraneous to the scope and purpose of the statute vitiates the subjective satisfaction and renders the detention order invalid then failure to take into consideration the most material or vital facts likely to influence the mind of the authority one way or the other would equally vitiate the subjective satisfaction and invalidate the detention order.

7. In the instant case admittedly three facts were not communicated to or placed before the detaining authority before it passed the impugned order against the detenu, namely, (i) that during interrogation of the detenu, in spite of request, neither the presence nor the consultation of the Advocate was permitted; (ii) that in spite of intimation to the Advocate in that behalf the detenu was not produced before the Magistrate on December 14, 1977 and (iii) that the confessional statements were squarely retracted by the detenu on December 22, 1977 at the first available opportunity while he was in judicial custody; the first two had a bearing on the question whether the confessional statements had been extorted under duress from detenu or not, while the third obviously was in relation to the confessional statements which formed the main foundation of the impugned order and as such were vital facts having a bearing on the main issue before the detaining authority. As regards the first this Court in Nandini Satpathy's (Nandini Satpathy v. P. L. Dani, (1978) 2 SCC 424 : 1978 SCC (Cri) 236) case has observed in para 63 of the judgment thus :

Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The

Miranda decision has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

In this case the request to have the presence / consultation of a lawyer was turned down owing to some misconception of the legal position but that apart, the fact that such a request was made and refused ought to have been intimated to the detaining authority. Further, in passing the detention order the detaining authority obviously based its decision on the detenu's confessional statements of December 13 and 14, 1977 and, therefore, it was obligatory upon the Customs Officers to report the retraction of those statements by the detenu on December 22, 1977 to the detaining authority, for, it cannot be disputed that the fact of retraction would have its own impact one way or the other on the detaining authority before making up its mind whether or not to issue the impugned order of detention. Questions whether the confessional statements recorded on December 13 and 14, 1977 were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu on December 22, 1977 was in the nature of an after-thought, were primarily for the detaining authority to consider before deciding to issue the impugned detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it must be held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the impugned detention order invalid and illegal. For these reasons we set aside the impugned detention order.

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