

Smt. Rekhaben Virendra Kapadia

Vs

State of Gujarat and Others

Criminal Appeal No. 105 of 1978

(D. A. Desai, P. S. Kailasam, A.D. Koshal JJ)

07.11.1978

JUDGMENT

KAILASAM, J. –

1. After hearing the arguments we allowed the appeal on October 5, 1978 and directed that the detenu be set at liberty forthwith indicating that the detailed judgment would follow. We now proceed to give reasons for our order.
2. This appeal is preferred by the wife of one Virendra Ramniklal Kapadia, a detenu, by special leave against the judgment of the High Court of Gujarat at Ahmedabad dismissing the writ petition for the issue of a writ of habeas corpus.
3. On September 22, 1974 the District Magistrate, Surat, directed the detention of the detenu under Section 3(1)(a)(i) and Section 3(2) of the Maintenance of Internal Security Act, 1971. The detenu was supplied with the grounds of detention on September 27, 1974. The detention order passed under the Maintenance of Internal Security Act was cancelled on December 9, 1974 and the detenu was released. On February 7, 1977 by an order under Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA) in the name of Governor, the Under Secretary to Government, respondent 2, directed that it was necessary to detain the detenu with a view to preventing him from engaging in transporting smuggled goods. On the same day by another order issued under Section 5 of the COFEPOSA the second respondent directed that the detenu shall be detained in the Ahmedabad Central Prison. A declaration under Section 12A, sub-section (2) was also passed on the same day by the 2nd respondent stating that it was necessary to detain the detenu for dealing effectively with emergency. In pursuance of the above orders the detenu has been detained in the Ahmedabad Central Prison after he surrendered on July 4, 1977. The grounds of detention were supplied to him on July 6, 1977. On August 2, 1977 a declaration under Section 9 of the COFEPOSA was passed by the 4th respondent stating that he was satisfied that the detenu is likely to engage in transporting smuggled goods in the areas around Baleswar and Sachin-Gabheni Road in the State of Gujarat which are areas highly vulnerable to smuggling as defined in Section 9 of the COFEPOSA.
4. The High Court negated all the contentions raised on behalf of the detenu and held that the order of detention was validly made.
5. Mr. Ram Jethmalani, the learned Counsel for the appellant, raised various contentions. The first contention raised by him is that the order passed under Section 9 by the 4th respondent is bad because on the face of it, it discloses that the satisfaction arrived at by him is mechanical and

without application of his mind. As the detention is continued beyond the period of one year only by virtue of the order made under Section 9 the detenu is entitled to be set at liberty if the order is found to be invalid. On hearing the learned Counsel for the appellant and Mr. Phadke on behalf of the State, we are satisfied that the contention on behalf of the detenu has to be accepted. Before dealing with this point we would just mention the other grounds raised by the learned Counsel for the appellant.

6. It was submitted that the order passed under Section 3 is invalid as the authority did not apply its mind. The detenu was released on December 19, 1974 and from that date till February 7, 1977 when the order of detention was passed nothing has been disclosed to implicate the detenu in any fresh activity. As the order was based on the activities of the detenu in 1973 and 1974 before the detenu was released, the order of detention cannot be sustained. It was next submitted that the detenu was not furnished important material which must have influenced the detaining authority. Lastly, it was submitted that the grounds given are vague and even after a careful reading of the grounds, it is not clear as to whether the grounds referred in the incidents that took place in 1973 and 1974 only or to activities subsequent to his release in December, 1974. As we are upholding the challenge of the learned Counsel for the appellant on the validity of the order passed under Section 9(1) of the COFEPOSA we refrain from dealing with any of the other contentions.

7. The order dated August 2, 1977 passed by B. B. Gujral, Additional Secretary to the Government of India, the 4th respondent, under Section 9(1) of the COFEPOSA is marked as Annexure 'G'. It runs as follows :

Whereas Virendra Ramniklal Kapadia alias Kumar has been detained on July 4, 1977 in pursuance of Order No. SB. IV/PSA. 2876. 87(i), dated February 7, 1977 of the Government of Gujarat with a view to preventing him from engaging in transporting smuggled goods.

AND WHEREAS I, the undersigned, specially empowered in this behalf by the Central Government, have carefully considered the material bearing on the matter in my possession;

NOW, THEREFORE, I, the undersigned, specially empowered by the Central Government, hereby declare that I am satisfied that the aforesaid Virendra Ramniklal Kapadia alias Kumar engages and is likely to engage in transporting smuggled goods in the areas around Baleshwar and Sachin-Gabhani Road in the State of Gujarat, which are areas highly vulnerable to smuggling as defined in explanation to Section 9(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

In paragraph 3 respondent 4 declared that he is satisfied that the detenu engages and is likely to engage in transporting smuggled goods in vulnerable areas as defined in explanation to Section 9(1) of the COFEPOSA. It was submitted that there is no material on record on which the 4th respondent could have been satisfied that the detenu "engages and is likely to engage in transporting smuggled goods". The impugned order refers to the order of detention dated February 7, 1977 of the Government of Gujarat. The order of February 7, 1977 refers to the consideration of the Government of Gujarat as to whether the detention is necessary for dealing effectively with the emergency referred to in sub-section (2) of Section 12-A of the Act and states that on a consideration of the materials the Government of Gujarat was satisfied on the basis of information and material in its possession that it was necessary to detain the said person for dealing effectively

with the said emergency. In exercise of its powers under sub-section (2) of Section 12-A the Government declared that it is necessary to detain the detenu for dealing effectively with the said emergency. On the same date the grounds on which the detention was ordered were ordered were sent to the detenu through the Superintendent of the jail. The ground that is alleged against the detenu in paragraph 1 of the order is as follows :

1. As per the intelligence gathered by the Customs Officers, you were an associate of a notorious smuggler Mohmed Kutchi of Surat; that you were engaged in piloting smuggled goods loaded in trucks from the place of landing to the place of storage. (underlining ours)

Two incidents are given : one relating to an incident on August 6, 1974 and the other to an incident on August 25, 1974. It is further stated that the Customs Officers contacted one Kantilal Amratlal Thakkar, who was working as accountant of Mohmed Kutchi. Kantilal Amratlal Thakkar in his statement on November 7, 1976 stated that the detenu was under the employment of the aforesaid Mohmed Kutchi and was getting a salary of Rs. 5000 p.m. for arranging landing of contraband goods. Kantilal further disclosed that in the year 1973 the detenu had accompanied one Mohmed Bilal with foreign currency. Reference is also made to the statements recorded from one Mohmed Bilal Haji Usangani on November 8, 1976 and November 9, 1976 before the Customs Officers wherein it was stated that the detenu was one of the trusted men of the aforesaid Mohmed Kutchi and always remained with him and used to help Mohmed Kutchi in managing his smuggling activities. The statement also referred to the detenu helping his uncle Vinod Sakarlal Kapadia in delivery of smuggled fabrics. The statement of one Ramchandra Sahadeva Rajbhar is also referred to. According to the statement dated October 11, 1976 it was stated that the detenu remained present along with one Umar Ibrahim Billimoria and his gang at Kadodra/Kamraj near poultry farm where trucks loaded with camouflaged consignments were being fed with smuggled cargo. A reading of these grounds makes it clear that the incidents referred to relate to the years 1973 and 1974 and that due to examination of three persons Kantilal Amratlal Thakkar, Mohmed Bilal Haji Usangani and Ramchandra Sahadeva Rajbhar, fuller particulars regarding the activities of the detenu came to be known. Prima facie it appears that the information which the Customs authorities received related to the activities of the detenu in 1973 and 1974. Mr. Phadke, the learned Counsel appearing on behalf of the State, submitted that the statement shows that the activities of the detenu after 1974 were also included in the grounds furnished for detention. In order to satisfy ourselves as to whether the statement related to incidents after 1974, we perused the statements made by all the three persons referred to. It is very clear that the statements do not relate to any incidents after 1974 but only to the activities of the detenu in 1973 and 1974. In the affidavit filed by the 4th respondent, Additional Secretary to the Government of India, it is stated in paragraph 5 of his affidavit that he considered the detention order, grounds of detention relating to the detenu as well as the report in respect of the detention order by the State Government under Section 3(3) and was personally satisfied that the detenu Virendra Ramniklal Kapadia alias Kumar engages and is likely to engage in transporting smuggled goods, Mr. P. M. Shah, Under Secretary to the Government of Gujarat, in paragraph 10 of his affidavit stated that "fresh material showing the involvement of the detenu in the activity of transporting smuggled goods was collected by the customs authorities and therefore it was open to

the State Government to pass a fresh order of detention. Further, he stated : "As pointed out in the grounds material indicating the involvement of the detenu in the incidents of August 6, 1974 and August 25, 1974 and his close association with Shri. Mohmed Kutchi, a notorious smuggler, came to be known in October, November and December, 1976 I say that the material on the basis of which the detenu was earlier detained was scanty and no new material indicating involvement of the detenu as alleged against him came to the light till October, 1976". The case for the State appears to be that they regarded the material on the basis of which the detenu was earlier detained was scanty and fuller particulars came to light in October, 1976 indicating involvement of the detenu in the incidents of August 6, 1974 and August 25, 1974. This would indicate that for the fresh order of detention the basis was availability of fuller details regarding incidents on which the earlier detention was ordered. It is seen that the High Court also proceeded on the basis that further information obtained in October, November, 1976 related to the incidents in the years 1973 and 1974. The High Court observed :

It is no doubt true that some of the activities attributed to the detenu were of August, 1974. However, the ground that the detenu was in regular employment of one Mohmed Kutchi, who is a notorious smuggler and who is also under detention, and which fact has been disclosed from the statement of one Kantilal Amratlal Thakkar recorded on November 7, 1976, clearly indicates the connection of the detenu with the said notorious smuggler. The other statements, which have brought home the involvement of the detenu with the aforesaid Mohmed Kutchi and which also attribute the prejudicial activity to the detenu, were recorded somewhere in October and November, 1976.

We are unable to read the above passage as meaning that reliance was placed on fresh incidents relating to the detenu after December, 1974. The detenu was detained on September 22, 1974 and was released on December 9, 1974. Further information about the activities of the detenu during the period 1974 obviously before his arrest on September 22, 1974 came to light in October and November, 1976. But it is seen that the fresh order of detention under the COFEPOSA was not passed till February 7, 1977. If the authorities were in possession of any activities of the detenu after his release on December 9, 1974 action would have been taken. It is only the statements that were recorded in October and November, 1976 which held the authorities to pass the fresh order of detention on February 7, 1977. We have seen from the statements recorded in October and November, 1976 that no incident that took place after 1974 has been referred to.

8. The High Court observed that it cannot be urged that reasonable nexus between the prejudicial activity and the purpose of detention has been snapped by the time-lag rendering the impugned order of detention as one without genuine satisfaction of the detaining authority. Whether the time-lag between August, 1974 and February, 1977 is enough to snap the reasonable nexus between the prejudicial activity and the purpose of detention would depend upon the facts of the case. It may be that a person in the position of a detenu who was a driver of a well-know smuggler on a pay of Rs. 5000 p.m. and who was taking part in clearing the smuggled goods may satisfy the authority that he is likely to continue in his activities in the future and as such would justify his detention. In *Gora v. State of West Bengal* ((1975) 2 SCR 996) this Court after referring to the earlier decisions held that the test of proximity is not a rigid or mechanical test to be blindly applied by merely counting the number of months between the offending acts and the order of detention. The question is whether the past activities of the detenu are such that the detaining authority can reasonably come to the conclusion that the detenu is likely to continue in his unlawful activities. If the detaining authority

in this case had come to the conclusion taking into account the past activities of the detenu that he is likely to continue to indulge in such activities in future there would be no justification for this Court to interfere. It is quite likely that persons who are deeply involved in such activities as smuggling can cause a reasonable apprehension in the minds of the detaining authority that they are likely to continue in their unlawful activities. In this case, the 4th respondent who passed an order under Section 9(1) has not stated that he is satisfied that the detenu is likely to engage in transporting all smuggled goods. What he has stated is that the detenu "engages and is likely to engage in transporting smuggled goods". There was no material before the 4th respondent for coming to the conclusion that the detenu "engages" in transporting smuggled goods. To this extent we have to accept the contention of the learned Counsel for the appellant that there is no material for coming to the conclusion that the detenu was "engaging" himself in the unlawful activities. The detenu has been under detention from July 4, 1977 and the period of detention permissible under Section 3 is only one year. Section 9(1) enables the authority to make a declaration which would have the effect of extending the period of detention to two years from the dated of detention by virtue of amendment to Section 10 by Amending Act 20 of 1976. As we have found that the order under Section 9(1) has not been validly made and as the detenu has been in detention for more than one year his continuance in detention is not sustainable. In the circumstances, we allow the petition.

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