

Hussainara Khatoon and Others (III)

Vs

Home Secretary, State of Bihar, Patna

Writ Petition No. 57 of 1979

(P. N. Bhagwati, A. P. Sen JJ)

26.02.1979

ORDER

1. The Government of Bihar has filed before us to note containing the proposed clarification of paragraph 2(e) of the Government Order dated February 9, 1979, pursuant to the suggestion made by us in our order dated February 19, 1979. This Clarification states in Paragraph 1 that where the police investigation in a case has been delayed by over two years, the Superintendent of Police will see to it that the investigation is completed expeditiously and final report or charge-sheet is submitted by the police as quickly as possible and the responsibly to ensure this has been laid personally on the Superintendent of police. We are glad to note that the State Government has responded to our suggestion but we are not at sure about whether it is enough merely to provide that the investigation would be completed expeditiously and the final report to charge-sheet submitted as quickly as possible. We are of the view that reasonable time limit should be set by the State Government within which these steps should be taken, so that no further delay is occasioned in the submission of the final report or charge-sheet. We fail to see how any police investigation can take so long as two years and if police investigation cannot be completed within two years, then there must be something radically wrong with the police force in the State of Bihar. It appears that there are a number of cases where police investigation has not been completed for over two years and persons have been in Jail as undertrial prisoners for long periods. This is a shocking state of affairs so far as the administration of law and order is concerned. We would therefore, suggest that in those, cases where police investigation has been delayed by over two, years, the final report of charge-sheet and must be submitted by the police within a further period of three months and if that is not done, the State Government might well withdraw such cases, because if after a period of over two years plus an additional period of three months, the police is not able to file a charge-sheet, one can reasonably assume that there is no case against the arrested persons.

2. The Government of Bihar has also filed a counter-affidavit made by Mr. Mrinmaya Choudhury, Assistant Inspector General of Prison (1), Bihar setting out the particulars in regard to 18 undertrial prisoners who have been ordered to released by us in their personal bond. The particulars given in this counter-affidavit make distressing reading. It appears from this counter-affidavit make very distressing reading. It appears from this counter-affidavit that there are quite a few women prisoners who are in jail without even being accused of any offence, merely because they happen to be victims of an offence or they are required for the purpose of giving evidence or they are in "protective custody". The expression 'protective custody' is euphemism calculated to disguise what is really and in truth nothing but imprisonment. It is an expression intended to appease the conscience. It cannot be gainsaid that women who have been kept in jail under the guise of 'protective custody' have suffered involuntary deprivation of liberty for long periods without any fault on their part. We may point out that this so-called 'protective custody' is nothing short of a

blatant violation of personal liberty guaranteed under Article 21 of the Constitution, because we are not aware of any provision of law under which a woman can be kept in jail by way of 'protective custody' or merely because she is required for the purpose of giving evidence. The Government in a social welfare State must set up rescue and welfare homes for the purpose of taking care of women and children who have nowhere else to go and who are otherwise uncared for by the society. It is the duty of government to protect women and children who are homeless or destitute and it is surprising that the Government of Bihar should have come forward with the explanation that they were contained to keep women in 'protective custody' in jail because a welfare home maintained by the State was Shut down. We direct that all women and children who are in the jails State of Bihar under 'protective custody' or who are in jail because their presence is required for giving evidence or who are in victims of offence should be released and taken forthwith to welfare homes or rescue homes and should be kept there and properly looked after.

3. We also find the counter-affidavit that Bhola Mahto was in jail from November 23, 1968 until February 16, 1979 when he was released on his personal bond pursuant to the directions given by us by our order dated February 5, 1979. He is accused in a case under Sections 363 and 368 of the Indian Penal Code and he was committed to the Court of Session on September 13, 1972 but his sessions trial has not yet commenced. It is amazing that a sessions trial of a person committed to the Court of Session as far back as September 13, 1972 should not have even commenced for about seven years. We direct that the Sessions Judge, Patna should forward to this Court through the High Court of Patna an explanation as to why the sessions trial of Bhola Mahto has not yet commenced. This is also a matter to which we would invite the attention of the High Court of Patna. The same may be said also of Ram Sagar Mistry who was admitted in jail on March 28, 1971 and committed to the Court of Session on June 28, 1972 on a charge under Section 395 of the Indian Penal Code but whose trial has not yet commenced before the Court of Session though a period of more than six years has elapsed since the date of his commitment and period of eight years the date of his imprisonment.

4. The counter-affidavit shows that Babloo Rai who is reported to be Naxalite is in jail since May 15, 1975. He is alleged to be involved in five cases which are set out in the counter-affidavit. So far as he is concerned, it will be open to him make an application to the Magistrate before whom he is produced, for being released in bail or on his personal bond and the Magistrate will deal with his application in accordance with the broad guide-lines laid by us in our judgment dated February 12, 1979.

5. We are not at all sure on reading the counter-affidavit whether the undertrial prisoners whose particulars are given there, are being produced periodically before the Magistrate as required by the proviso to Section 167(2) of the Code of Criminal Procedure, 1973. We should like to know from the government in a proper affidavit to be filed before us on or before the government in a proper affidavit to be filed before us on or before March 3, 1979 whether these undertrial prisoners were periodically produced before the Magistrate in compliance with the requirement of the proviso to section 167(2). The proviso to Section 167(2) says that the Magistrate may authorise the detention of the accused person beyond the period of 15 days if he is satisfied that adequate grounds exist for doing so. We hope and trust that in these cases the Magistrates concerned did not act mechanically but applied their mind and satisfied themselves that adequate to time over a period varying from to ten years, though we fail to see how the Magistrates could possibly have been satisfied about the existence of adequate grounds for remanding these persons to judicial custody for such a long periods of time ranging from two or ten years for the purpose of police investigation. This is also a matter which we would like the High Court of Patna to consider after making a detailed inquiry.

6. The Government of Bihar has also filed before us a list giving particulars of the undertrial prisoners who are confined in 17 jails in Bihar for more than 18 months as on February 1, 1979. The chart shows that there are undertrial prisoners confined in these jails for long periods of time and sometimes even exceeding the maximum punishment which could be awarded to them even if they guilty of the offences charged against them. To take an example, we find at Item 30 one Lambodar Gorain has been in Ranchi Jail since June 18, 1970 for an offence under Section 25 of the Arms Act for which the maximum punishment is two years, with the result that the he has been in jail as an undertrial prisoner for 8 1/2 years for an offence for which even if convicted, he could not have been awarded more than two year's imprisonment. There are many such cases in the chart, but it is not possible to identify them easily from the chart because the chart contains a large number of names undertrial prisoners. We would, therefore, direct the Government of Bihar to submit to us on or before March 3, 1979 a revised chart showing yearwise break-up of the particulars of the undertrial prisoners in these jails after dividing them broadly into two categories, one of minor offences and the other of major offences.

7. Our attention has also been dawn to Section 468 of the Code of Criminal Procedure, 1973 which in sub-section (1) provides that except as otherwise provided elsewhere in the Code, no court shall take cognizance of offence of the category specified in Sub-section (2) after the expiry of the period of limitation and under sub-section (2) the period of limitation provided is six months, if the offences is punishable with fine only, one year if the offences is punishable with imprisonment for a term not exceeding one year or three years if the offence is punishable with imprisonment for a term not exceeding one year but not exceeding three years. It would, therefore, be seen that the undertrial prisoners against whom charge-sheets have been filed by the police within the period of limitation provided in sub-section (2) of Section 468 cannot be proceeded against at all and they would be entitled to be released forthwith as their further detention would be unlawful and in violation of their fundamental right under Article 21. We, therefore, direct the Government of Bihar to scrutinise the case of undertrial prisoners charged with offence which are punishable with the fine only or punishable with imprisonment for a term not exceeding one year or punishable with imprisonment for a term exceeding one year but not exceeding three years and release such of them who are not liable to be proceeded against by reason of the period of limitation having expired. This direction shall be carried out by the Government of Bihar within a period of six weeks from today and compliance reports containing particulars shall be submitted to this Court, first at the end of four weeks and then at end of the next two weeks.

8. We also find from Section 167(5) of the Code of Criminal Procedure, 1973 that if in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence, unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary. We are not at all sure whether this provision has been complied with, because there are quite a few cases where the offences charged against the undertrial prisoners are trial as summons cases and yet they are languishing in jail for a long number of years far exceeding six months. We therefore, direct the Government of Bihar to inquire into these cases and where it is found that the investigation has been going on for a period of more than six months without satisfying the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary, the Government of Bihar will release the undertrial prisoners, unless the necessary orders of the Magistrate the obtained within a period of one month from today. We would also request the High Court to look into this matter and satisfy itself whether the Magistrates in Bihhar have been

complying with the provisions of Section 167(5).

9. We adjourn the hearing of the writ petition to March 5, 1979 and on that date, we shall proceed to hear and dispose of the writ petition on merits on the various questions arising for determination.

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