Ayya Alias Ayub

Vs

State of U. P. and Another

Writ Petition (Criminal) No. 210 of 1988

(Rangath Misra, M. N. Vankatachaliah JJ)

25.11.1988

JUDGMENT

VENKATACHALIAH, J. –

1. By this writ petition under Article 32 of the Constitution, the detenu-Ayya alias Ayub, son of Babu Khan, residence No. 100, Khernagar, P.S. Delhi Gate, Meerut - challenges the order of detention dated February 28, 1988 passed by the District Magistrate, Meerut, ordering the detention of the petitioner under Section 3(2) of the National Security Act, 1980, on the said authority's satisfaction that such detention is necessary with a view to preventing petitioner from acting in a manner prejudicial to the maintenance of the "public order". At the time of the passing of the order, petitioner was already in judicial custody in connection with a criminal prosecution arising out of the incident referred to in one of the grounds of detention.

2. Section 3(2) of the Act provides, inter alia, that the Central Government or the State Government, may make an order with respect to any person for purposes of preventing him from acting in a manner prejudicial to the maintenance of the public order. The sub-section provides for detention on certain other grounds which are not germane to the present matter as the avowed object of the impugned detention is in relation to, and for the persons of, the maintenance of public order. Section 5-A of the Act also provides that where a person had been detained on two or more grounds, such order shall be deemed to have been made separately on each of such grounds. The object of Section 5-A is that if any of the grounds is found to be vague, non-existent, not relevant, not connected with the detenu or is invalid for any other reason whatsoever, it should be open to the detaining authority to support the detention order on such ground or grounds as may not be so vitiated.

3. We have heard Shri R. K. Garg, learned senior counsel for the petitioner and Shri Yogeshwar Prasad, learned senior counsel for the detaining authority.

4. Shri Garg strenuously contended that the impugned detention is an instance of a demonstrable abuse of power and the grounds are wholly ultra vires of the power to detention in that - quite apart from the falsity of the allegations and other legal infirmities - the grounds, even assuming to be true, are incapable in law of producing the satisfaction of any apprehension in regard to the maintenance of the public order. The grounds, at the worst, learned counsel contends, do no more than to suggest a possible 'law and order' situation and not a 'public order' situation. The detention, it is urged, is also vitiated by a non-application of mind by an omission to consider material capable of influencing the satisfaction.

5. Shri Yogeshwar Prasad, however, sought to support the order of detention, relying upon the

records of the proceedings and the affidavit filed by the detaining authority. The concerned police officer have also filed their counter-affidavits.

6. In order to appreciate the contentions urged at the hearing, it is necessary to advert to the three grounds on which the satisfaction on the part of the detaining authority for the need for the detention was reached. They are :

> (1) That on February 6, 1988 at Ghursal Mor, near Jamaniya Bagh RTO Road, P.S. Railway Road at 3.50 p.m. you along with your other companions stopped Mini Bus No. DSO 9278 and you immediately started breaking the glass screens of the bus with an iron rod and your companions hurled brick-bats at the glasses of the bus and extended abuses to the driver. On being told about above incident by Shri Chandrapal, driver of Mini Bus, Shri Anil Gautam made a written complaint on the basis of which a report No. 8 of non-congnizable offence was registered u/s 504, 427, of IPC. Your aforesaid misdeed caused fear and terror among the common public and in this way you committed an act which is prejudicial to the maintenance of public order.
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> (2) That, on February 13, 1988 at about 11.45 p.m. in front of Faize-e-Aam Inter College, Meerut on the open road you along with your other companions displayed 'gundaism' and stopped Bus No. U.S.N./8377 which was going from Medical College to City Station and you had broken the glass screens of the said bus and abused Shri Balram the driver and Vipin the conductor of the bus, which caused fear and terror among the general public. On the basis of the information given by Shri Anil Gautam the Report No. 15 for non-congnizable offence u/s 427, 504 of IPC was registered at P.S. Delhi Gate. In this way you acted in such a manner which is prejudicial to the maintenance of public order.
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> (3) That, on February 18, 1988 near Caltex Petrol Pump on Delhi-Muzzafar Nagar Road at about 9.10 o'clock at night you along with your other three companions reached at the book stall situated at the aforesaid petrol pump, and holding him by neck you pulled Shri Anil the book seller and you, with intent to kill him, gave blows of knife on his neck and chest and you also assaulted with knife on other parts of his body, because of which the nearby shops were closed down due to fear and terror caused by you and the people were alarmed. You committed the above misdeed because on December 30, 1987 at about 7.00 p.m. you had teased a girl who was the daughter of an Army officer, while she was buying a magazine from the aforesaid book stall and this was objected by Mr. Anil but you did not refrain from teasing the girls, then Anil had beaten you. On which you and your companions threatened Mr. Anil that this enmity will be too expensive for him. On the basis of a written information given by Mr. Brij Mohan, Crime No 59 under Section 307 IPC was registered against you which, after the death of injured Anil in the hospital, was converted into an offence under Section 302 of IPC and this offence is under investigation. Your aforesaid misdeed had caused fear and terror among the general public and in this way you have committed an act which is re-judicial to the maintenance of public order.

At present you are confined in District Jail, Meerut, and you are trying to get released on bail and there is every possibility of you being released on bail.

7. Shri Garg submitted that the first two grounds which, even according to the detaining authority, constitute non-cognizable offences negate the re-quisite degree or gravity of the activity which could reasonably be said to be productive of a "public order" situation. The adhered activities are liable to be dealt with in accordance with the ordinary law of the land and that in both the cases a certain Anil Gautam was the complainant and the attack was against the bus belonging to him, it being incidentally suggested that the driver and the conductor of the bus were also "abused". It was not a part of the grounds, says learned counsel, that there were passengers in the bus at the time and the conduct of the petitioner caused a scare amongst them. The inference drawn by the detaining authority, that the activities referred to in grounds (1) and (2) did create a "public order" situation is therefore, contends counsel, vitiated by a lack of rational nexus between the activity attributed to the petitioner and a "public order" situation. Learned counsel submitted that the satisfaction to be reached by the detaining authority, subjective though it be must rest on material which is capable in law of producing the satisfaction and the concept of "public order" is what law understands and recognises as such and not what the detaining authority misunderstands it to be.

8. In regard to the third ground of detention, learned counsel said, the petitioner was taken into custody at 8.00 p.m. on February 18, 1988 and that the wireless message sent at 8.07 p.m. by the Mobile Van to the Circle Police Officer and the Superintendent of Police had specifically referred to the attack on Anil Gautam and had clearly omitted to mention the name of the petitioner and the alleged witnesses. Shri Garg submitted that the allegations that the attack on Anil Gautam at 9.10 p.m. that day, as now asserted in ground (3) would stand disproved if the original "Log Book" recording the wireless messages had been produced. He submitted the sheaf of loose sheets purporting to be "Log Book" produced before this Court was not the original "Log Book". These loose sheets, it is urged, had been discarded by the learned Sessions Judge who had since granted bail to the petitioner. Learned counsel submitted that the object of the present detention was avowedly to render nugatory the benefit of the bail. Shri Garg relied upon the pronouncement of this Court in Ramesh Yadav v. Distt. Magistrate, Etah ((1985) 4 SCC 232 : 1985 SCC (Cri) 514 : air 1986 SC 315) to contend that if the detention is ordered because the detaining authority was apprehensive that in case the detenu was released on bail he would carry on his criminal activity, it would not be a proper exercise of the power to detain.

9. Shri Garg submitted that at 12.30 a.m. that very night, on February 18, 1988 a certain Mirazuddin acting on behalf of the petitioner, had sent a telegram to the Senior Superintendent of Police, Meerut, complaining that the petitioner had been taken away by the police at 8.00 p.m. earlier that night. Shri Garg submitted that this document which improbabilised petitioner"s participation in the incident alleged at 9.10 p.m. that night ought to have been placed before and considered by the detaining authority and a non-consideration of this document vitiated the order of detention for non-application of mind.

10. Shri Yogeshwar Prasad submitted that the three acts attributed to the detenu had serious adverse effect on the even tempo of life in the locality and produced a "public order" problem and that the detention fully satisfied all the procedural safeguards.

11. Personal liberty protected under Article 21 of the Constitution is held so sacrosant and so high in the scale of constitutional values that this Court has shown great anxiety for its protection and wherever a petition for writ of hebeas corpus is brought up, it has been held that the obligation of the detaining authority is not confined just to meet the specific grounds of challenge but is one of showing that the impugned detention maticulously accords with the procedure established by law. Indeed the English courts a century ago echoed the stringency and concern of this judicial vigilance

in matter of personal liberty in the following words : (Thomas Pelham Dales' case, (1881) 6 QBD 376, 461)

Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.

12. It has been said that the history of liberty has largely been the history of observance of procedural safeguards. The procedural sinews strengthening the substance of the right to move the court against executive invasion of personal liberty and the due dispatch of judicial business touching violations of this great right is stressed in the words of Lord Denning : (FREEDOM UNDER THE LAW, Hamlyn Lectures, 1949)

Whenever one of the King's Judges takes his seat, there is one application which by long tradition had priority over all others. Counsel had but to say 'My Lord, I have an application which concerns the liberty of the subject' and forthwith the judge will put all other matters aside and hear it. It may be an application for a writ of habeas corpus, or an application for bail, but, whatever form it takes, it is heard first.

13. Personal liberty, is by every reckoning, the greatest of human freedoms and the laws of preventive detention are strictly construed and a meticulous compliance with the procedural safeguards, however technical, is strictly insisted upon by the courts. The law on the matter did not start on a clean slate. The power of courts against the harsh incongruities and unpredictabilities of preventive detention is not merely 'a page of history' but a whole volume. The compulsions of the primordial need to maintain order in society, without which the enjoyment of all rights, including the right to personal liberty, would lose all their meaning are the true justifications for the laws of preventive detention. The pressures of the day in regard to the imperatives of the security of the State and of public order might, it is true, require the sacrifice of the personal liberty of individuals. Laws that provide for preventive detention posit that an individual's conduct prejudicial to the maintenance of public order or to the security of State provides grounds for a satisfaction for a reasonable prognostication of a possible future manifestations of similar propensities on the part of the offender. This jurisdiction has been called a jurisdiction of suspicion; but the compulsions of the very preservation of the values of freedom, or democratic society and of social order might compel a curtailment of individual liberty. "To lose our country by a scrupulous adherence to the written law" said Thomas Jefferson "would be to be lose the law itself, with life, liberty and all those who are enjoying with us; thus absurdly sacrificing the end to the means". This is, no doubt, the theoretical justification for the law enabling preventive detention.

14. But the actual manner of administration of the law of preventive detention is of utmost importance. The law had to be justified by the genius of its administration so as to strike the right balance between individual liberty on the one hand and the needs of an orderly society on the other. But the realities to executive excesses in the actual enforcement of the law have put the courts on the alert, ever-ready to intervene and confine the power within strict limits of the law both substantive and procedural. The paradigms and value judgments of the maintenance of a right balance are not static but vary according as the "pressures of the day" and according as the intensity of the imperatives that justify both the need for and the extent of the curtailment of individual liberty. Adjustments and readjustments are constantly to be made and reviewed. No law is an end in itself. The "inn that shelters for the night is not journey's end and the law, like the traveller, must be ready

for the morrow".

15. As to the approach to such laws which deprive personal liberty with out trial, the libertarian judicial faith has made its choice between the pragmatic view and the idealistic or doctrinaire view. The approach to the curtailment of personal liberty which is an axiom of democratic faith and of all civilised life is an idealistic one, for loss of personal liberty deprives a man of all that is worth living for and builds up deep resentments. Liberty belongs what corresponds to man's inmost self. Of this idealistic view in the judicial traditions of the free world, Justice Douglas said : (See "On Misconception of the Judicial Function and the Responsibility of the Bar", Columbia Law Review, Vol. 59, p. 232)

Faith in America is faith in her free institutions or it is nothing. The Constitution we adopted launched a daring and bold experiment. Under that compact we agreed to tolerate even ideas we despise. We also agreed never to prosecute people merely for their ideas or beliefs .....

16. Judge Stanley H. Fuld of the New York Court of Appeals said : (Quoted by Justice Douglas, id. at p. 233)

It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic-liberty. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees.

It was a part of the American judicial faith that the Constitution and Nation are one and that it was not possible to believe that national security did require what the Constitution appeared to condemn.

17. Under our Constitution also the mandate is clear and the envoy is left under no dilemma. The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security, public order, disruption of national; economic discipline etc., being envisaged as a necessary evil to be administered under strict constitutional restrictions.

18. In Icchu Devi Choraria v. Union of India ((1980) 4 SCC 531 : 1981 SCC (Cri) 25 : AIR 1980 sc 1983) Bhagwati J. spoke of this judicial commitment : (AIR p. 1988 : SCC p. 538, SCC (Cri) p. 32, para 5)

The court has always regarded personal liberty as the most precious possession of mankind and refused to tolerate illegal detention, regardless of the social cost involved in the release of a possible renegade.

This is an area where the court has been most strict and scrupulous in ensuring observance with the requirements of the law, and even where a requirement of the law is breached in the slightest measure, the court has not hesitated to strike down the order of detention ...

19. In Vijay Narain Singh v. State of Bihar ((1984) 3 SCC 14 : 1984 SCC (Cri) 361 : AIR 1984 SC 1334) Justice Chinnappa Reddy, J. in his concurring majority view said : [AIR p. 1336 : SCC p. 19, SCC (Cri) p. 366, para 1]

.... I do not agree with the view that "those who are responsible for the national security or for the maintenance of public order must be the sole judge of what the national security or public order requires". It is too perilous a proposition. Our Constitution does not give a carte blanche to any organ of the State to be the sole arbiter in such matters ... There are two sentinels, one at either end.

The legislature is required to make the law circumscribing the limits within which persons may be preventively detained and providing for the safeguards prescribed by the Constitution and the courts are required to examine, when demanded, whether there has been any excessive detention, that is, whether the limits set by the Constitution and the legislature have been transgressed.

20. In Hem Lall Bhandari v. State of Sikkim ((1987) 2 SCC 9 : 1987 SCC (Cri) 262 : AIR 1987 SC 762, 766) it was observed : [SCC p. 14, SCC (Cri) p. 267, para 12]

It is not permissible, in matters relating to the personal liberty and freedom of a citizen, to take either a liberal or a generous view of the lapses on the part of the officers.

21. There are well recognised objective and judicial tests of the subjective satisfaction for preventive detention. Amongst other things, the material considered by the detaining authority in reaching the satisfaction must be susceptible of the satisfaction both in law and in logic. The tests are the usual administrative law tests where power is couched in subjective language. There is, of course, the requisite emphasis in the context of personal liberty. Indeed the purpose of public law and the public law courts is to discipline power and strike at the illegality and unfairness of government wherever it is found. The sufficiency of the evidentiary material or the degree of probative criteria for the satisfaction for detention is of course in the doming of the detaining authority.

22. To lose sight of the real and clear distinction between the "public order" and "law and order" might lead, in the process of obliteration of their outlines, to the impermissible engrafting of the latter on the former.

23. In the present case, we are not, however, impressed with the submission of Shri Garg that the detention was solely for the purpose of rendering nugatory the order of bail, the grant of which the detaining authority had then considered quite imminent. It is true that if the only ground or justification for the detention is the apprehension that the detenu was likely to be enlarged on bail, the detention might be rendered infirm. Shri Garg relied upon the following observations in Ramesh Yadav case ((1985) 4 SCC 232 : 1985 SCC (Cri) 514 : AIR 1986 SC 315) : (AIR p. 316 : SCC p. 234, SCC (Cri) p. 516, para 6)

On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail be would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an undertrial prisoner was likely to get bail an order of detention under the National Security Act should not ordinarily be passed.

But, where, as here, there are other grounds, the reference by the detaining authority to the prospects of grant of bail could be no more than an emphasis on the imminence of the offensive activities of the detenu. Even a single instance of activity tending to harm "public order" might, in the circumstances of its commission, reasonably supply justification for the satisfaction as to a legitimate apprehension of a future repetition of similar activity to the detriment of "public order". Likewise, without merit, is the contention as to the impermissibility of an order of detention being made against a person already in judicial custody. Even if a prosecution against a person fails or bail is granted an order of detention could be passed drawing the satisfaction therefore from the facts

and circumstances involved in the criminal proceedings. An offender might secure an acquittal by intimidating witnesses. It all depends upon the circumstances of each case. But it is necessary for the detaining authority to resist the temptation to prefer and substitute, as a matter of course, the easy experience of a preventive detention to the more cumbersome one of punitive detention. In Vijay Narain Singh case ((1984) 3 SCC 14 : 1984 SCC (Cri) 361 : AIR 1984 SC 1334) this Court said : (AIR p. 1345 : SCC pp. 35-36, SCC (Cri) pp. 382-83, para 32)

It is well settled that the law of preventive detention is a hard law and therefore it should be strictly construed. Care should be taken that the liberty of a person is not jeopardized unless his case falls squarely within the four corners of the relevant law. The law of preventive detention should not be used merely to clip the wings of an accused who is involved in a criminal prosecution ... When a person is enlarged on bail by a competent criminal court, great caution should be exercised in scrutinising the validity of an order of preventive detention which is based on the very same charge which is to be tried by the criminal court.

24. However, we are persuaded to the view that the contention of Shri Garg that, the first two grounds which pertain to the commission of non-cognizable offences have no rational nexus relatable to the maintenance of public order is to be accepted. It is true that the acts themselves, in relation to their effect on public order, which might otherwise be free from the vice of affecting public order might assume a sinister colour and significance from the circumstances under and the manner in which they are done. What might be an otherwise simple "law and order" situation might assume the gravity and mischief of a "public order" problem by reason alone of the manner or circumstances in which or the place at which it is carried out. These are graphically dealt with by Hidayatullah, J. in Ram Manohar Lohia v. State of Bihar (AIR 1966 SC 740 : 1966 Cri LJ 608) In the present case the alleged attacks were directed against the same individual, a certain Anil Gautam, and, even according to the police, they constituted merely offences of a non-cognizable nature. In the facts of the case, it is difficult to impart to these acts, which were liable to be dealt with under the ordinary laws of the land, a "public order" dimension within the meaning of and for purposes of the extraordinary law of preventive detention.

25. So far as the third ground is concerned it is no doubt a serious charge. The victim is the same Anil Gautam. The Sessions Court has since enlarged the petitioner on bail. It is alleged that the attack, in the manner in which the petitioner on bail. It is alleged that the attack, in the manner in which it was made, spread tremors of fear in the neighbourhood and the shop-keepers in the vicinity pulled down their shutters.

26. On the contrary, petitioner avers that he had been taken into custody earlier at 8.00 p.m. and his alleged presence at the scene of occurrence, which admittedly took place at 9.10 p.m., was wholly imaginary and concocted. The police version is that the arrest was made only at 10.00 a.m. the next day. These matters are to be decided at the sessions trial. We cannot decide them here. It is not also necessary to go into the controversy about the wireless message or the genuineness of the "Log Book" recording the message. The Inspector General of Police, Meerut Zone and the Home Secretary have stated in their affidavits that the extant practice is to keep the "Log Book" in the form of loose sheets stapled together. The practice might perhaps require improvement; but it is not necessary to say that the sheets produced are not genuine. Learned Sessions Judge at the time of grant of bail did not however, accept them as the original "Log Book".

27. It is equally unnecessary to decide whether the telegram dispatched by Mirazuddin was at 12.30 midnight on February 18, 1988 or as suggested by the respondents at 12.30 afternoon on February

19, 1988. It is extremely probable that it was sent not at 12.30 midnight as claimed by the petitioner, but only at 12.30 afternoon on February 19, 1988 as suggested by Shri Yogeshwar Prasad. But it cannot be disputed that such a telegram was sent. This telegram asserts, for whatever it was worth, that petitioner was taken into custody at 8.00 p.m. on February 18, 1988. The contention of Shri Garg is that the non-consideration of this telegram, which had a bearing on the complicity or otherwise of the petitioner in the alleged offence vitiates the detention for non-application of mind. The detaining authority in its affidavit says :

> Deponent is not in a position to say about the facts of the telegram. It might have been given in pesh-bandi.

28. What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the detaining authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material; but in the facts of the case the omission to consider the material assumes materiality.

29. In the result, for the foregoing reasons, the writ petition is allowed, the order of detention impugned in the Petition quashed and the petitioner is directed to be set at liberty forthwith, unless he is held in custody pursuant to any other order under any lawful authority. No costs.

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