

BOMBAY HIGH COURT

Maledath Bharathan Malyali

Vs.

The Commissioner of Police

Criminal Appln. No. 1251 of 1949

(Chagla, C.J., Gajendragadkar and Dixit, JJ.)

08.02.1950

JUDGMENT

Chagla, C.J.

1. This is an application under Section 491, Criminal Procedure Code, and the facts that give rise to this application are very striking and very significant. A public meeting was held at Lal Baug on the evening of 8th May 1949. The meeting was held under the auspices of various organizations and it was in connection with a hunger-strike that had been undertaken by certain detenus on 2nd May 1949. After the public meeting broke up, a procession was organized and the procession marched from Lal Baug to the Delisle Road maidan. There was an order of the Commissioner of Police banning all processions in that locality after 7 p.m., and the procession was taken out in contravention of the order of the Commissioner of Police. The police tried to stop the procession, but the processionists insisted on going on; thereupon a lathi charge was made, the Police had also to resort to firing, and the processionists dispersed helter-skelter. Fortythree persons were arrested on the spot, and about twenty-two persons were arrested subsequently. The applicant before us is alleged to have been one of those persons who took part in the procession and who was arrested on the spot. An order was made against the applicant on 9th May 1949, by the Superintendent of Police to the effect that he had been arrested on 8th May 1949 under sub-sections (A-1) of Section 2, Bombay Public Security Measures Act, 1947, and he should be committed to jail custody for a period of 16 days from the date of arrest. Another order was made by the Commissioner of Police, who was then Mr. Chudasama, on 20th May 1949, under Section 2(1)(a) of the Act, directing that the applicant should be detained as the Commissioner was satisfied that he was likely to act in a manner prejudicial to public safety and the tranquillity of Greater Bombay, and the grounds for his detention were supplied by the Commissioner of Police on 25 June 1949; the grounds were that he did organize and participate in Greater Bombay in an unlawful processions of persons armed with daggers, lathis, bulbs containing acid and other missiles, and which procession committed acts of violence against

police officers, and that he was likely to organize and participate in Greater Bombay in such processions and commit acts of violence in such manner. Therefore, according to the Police Commissioner, he was likely to act in a manner prejudicial to the public safety and the tranquillity of Greater Bombay.

2. It appears - and I shall presently deal with this aspect of the case - that investigation with regard to the offence committed by the applicant of being a member of the unlawful assembly and of committing a breach of the order of the Commissioner of Police was commenced on the very day that the detenu was arrested; and although this investigation was commenced on that day and was continued thereafter, the applicant was not put up before any Magistrate and the charge sheet with regard to the offence was only presented to the Magistrate on 1st November 1949, and it was only for the first time on 12th December 1949, that the applicant was produced before a Presidency Magistrate. Now, the Criminal Procedure Code and the City of Bombay Police Act contain important safeguards in favour of a subject when he has been arrested and when investigation into the commission of an offence is being carried on by the police authorities. The first and the most important safeguard is that he must be produced before a Magistrate within 24 hours of his arrest, and it is only under an order of the Magistrate that he can be recommitted to custody, and from time to time he has got to be produced before the Magistrate and the Magistrate has got to be satisfied that for the purposes of investigation the accused should be committed to custody. In other words, once a person is arrested in connection with an offence, the whole investigation by the police is carried on under the supervision of the criminal Court. It is hardly necessary to emphasise how important and vital that safeguard is to the subject. The Police are not left at large to carry on the investigation in any manner they like; it is not left open to them to detain the accused as long as they like, but at every step of the investigation the criminal Court supervises the investigation and passes orders from time to time. It is also important to note that it is for the Magistrate to decide, if a bail application is made by the accused whether he should be enlarged on bail or should be recommitted to police custody. Therefore, we have this patent fact in this case, that although investigation into commission of the offence was being carried on from 8th May 1949, every safeguard under the Criminal Procedure Code was violated and not given effect to : the accused were never put up before a Magistrate, no remand applications were made and the accused were never given an opportunity to apply for bail if they so intended to do.

3. Now, it is necessary to consider, in the first place, under what circumstances this applicant came to be arrested in the order made by the Superintendent of Police on 9th May 1949, it is stated that the applicant was arrested on 8th May 1949, under sub-sections (A-1) of Section 2, Bombay Public Security Measures Act. Therefore, the position taken up by the Superintendent of Police was that the arrest of the applicant was under the Security Act and that he was arrested in the interest of public security. When we turn to the affidavit made by the Superintendent of Police in these proceedings, the position seems to be entirely different. In his affidavit made on 13th January 1950, the Superintendent, Mr. Parab, says : "On 8th May 1949 immediately after

the rounding up of persons from the unlawful procession, I attended the Delisle Road police-station. All the arrested persons were placed before me. I made enquiries. I questioned the Delisle Road police-officers and C.I.D. men who were present at the meeting held at Lalbaug Maidan where it was decided to take out a procession and who had accompanied the procession from Lalbaug Maidan to the place where the procession was stopped and arrests were effected I had satisfied myself that the persons arrested had been present at the meeting and had organised the procession. I therefore ordered them to be detained for a period of fifteen days." Therefore, it is clear on this averment in the affidavit of Superintendent Parab that the applicant was rounded up along with other persons and he was arrested in connection with the offence of carrying out an unlawful procession. After he was arrested, Superintendent Parab made enquiries and satisfied himself that he should be detained under the Security Act. Therefore, it is clear that the arrest must be attributed to the alleged commission of the offence and not to any satisfaction of the detaining authority that the detention of the applicant was necessary for the purposes of security. There is an affidavit also made by Mr. Billimoria, the present Commissioner of Police, and he says in para. 15 of his affidavit :

"In fact as admitted the detenu was not produced before a Magistrate and no remand application was made on his arrest since his arrest and detention was under the Bombay Public Security Measures Act."

It is, therefore, significant to note that the reason given by the Commissioner of Police why the detenu was not produced before a Magistrate and no remand application was made is that the arrest of the accused is to be attributed to the Security Act and not to the commission of an offence under the ordinary law committed on the evening of 8th May 1949. It is also unfortunate that the Commissioner of Police should have stated in his application that it was not correct to state that the investigation of the above case started from 8th May 1949. This statement is contrary to the evidence given by the investigating officer in the case pending against the applicant before the Presidency Magistrate, and in that evidence the investigating officer has clearly stated that the investigation of the offence commenced from 8th May 1949. It would also appear that a panchnama was made on that very day. We have, therefore, this clear position before us, that the applicant was arrested for having committed an offence under the Criminal law, that the investigation under the Criminal Procedure Code was started by the police authorities, and then he was detained by the Superintendent of Police and that detention was continued by the order made by the Commissioner of Police, with the result that the Police authorities thought it was no longer incumbent upon them to comply with the provisions of the Criminal Procedure Code and give effect to the safeguards provided therein and that the detenu need not be put up before a Magistrate for any remand application.

4. Now, the principles of law which apply to the facts which I have just stated are really not difficult to enunciate. An order of detention under the Security Act can only be justified in a Court of law provided it is made *bona fide* : an order of detention cannot be made for an ulterior

motive or for a collateral purpose. The detaining authority must only consider the objects for which the Act was passed, and the only consideration which must weigh with the detaining authority is public safety, maintenance of public order, and the preservation of peace and tranquility in the Province of Bombay. If in making the order his mind is influenced by any consideration extraneous to the Act, then the order would be bad and cannot be upheld. and the question that we have to consider in this case is whether in making the order the Commissioner of Police was influenced by any collateral purpose and whether any extraneous factor weighed on his mind when he made the order. When we speak of an order being made mala fide, it does not mean that we attribute to the detaining authority any improper motive. An order is made mala fide when there is malice in law although there may no malice in fact; and the malice in law is to be inferred when an order is made contrary to the objects and purposes of the Security Act or when the detaining authority permits himself to be influenced by considerations which he ought not to permit.

5. Now, on the facts of this case, can it be said that the detention order was made solely for the purpose of public security? and can it be said that the only thing which weighed with the detaining authority were those considerations which were legal and legitimate and within the ambit of the statute? In fact, the Police did carry on the investigation of the offence under the Criminal Procedure Code after the applicant was arrested under the Criminal law; and, in fact, the investigation was - if one might so call it - a secret investigation or an ex parte investigation without any reference to the criminal Court, as required by the Criminal Procedure Code. and all this was being done while the applicant was detained under the Security Act. In our opinion, on these facts, the only inference that can be drawn - and it is an irresistible inference - is that the purpose of detaining the applicant, or at least one of the purposes of detaining the applicant, was a collateral purpose, and that was to deprive him of his rights and safeguards under the Criminal Procedure Code and to carry on an investigation without the supervision of the Court.

6. The Advocate-General has relied on the fact that the order is made by the Commissioner because he was satisfied that the applicant was likely to act in future in a manner prejudicial to public safety and tranquillity; and the Advocate-General says that, whatever might have happened previously to the making of the order, namely, 20th May 1949, on 20th May 1949, the detaining authority was satisfied on the materials placed before him that the applicant was likely to act in a prejudicial manner. Now, it must be borne in mind that, on 20th May 1949 the investigation was still going on, and it was going on in a manner not warranted by the law. In the grounds furnished by the Commissioner of Police, one of the grounds is that the applicant committed an offence by participating in an unlawful procession; and it is from that fact that an inference is attempted to be drawn that in future he is likely to act in a similar manner. Therefore, it is impossible to say that, in arriving at the satisfaction which the law requires, the detaining authority never took into consideration the investigation which was pending and which was being carried on with regard to the commission of the offence by the applicant. This conclusion is further strengthened and supported by what the Commissioner of Police has stated in his

affidavit, to which we have already made reference, namely, that in his opinion he was not bound to produce the applicant before the Magistrate because his arrest and detention were under the Security Act. In our opinion, it is not permissible to the authorities, under the cloak and guise of the Public Security Measures Act, to override the ordinary criminal law of the land and to deprive the subjects of the safeguards provided under the law. If this was permissible, indeed a very serious situation would arise in this Province. It would mean that it would be open to the police to investigate into every cognizable case, without the safeguards provided by the law, by merely detaining the accused and then carrying on investigation secretly and without providing to the accused the protection which the law gives him. The Advocate General has contended that the Police authorities acted very fairly in putting up a charge sheet against the applicant and intending to have his case tried by the ordinary tribunals of the land although they had the power to detain the applicant indefinitely. In our opinion, this attitude of the detaining authority only gives to the applicant a rather illusory benefit, because it would be open to the detaining authority, even after the criminal Court had acquitted and discharged him, to continue to detain him under the provisions of the Security Act. In our opinion, the alternatives open to the police authorities are very clear. When an offence has been committed, the police authorities may investigate it, in which case they must comply with the provisions of the law with regard to investigation; or they may feel that the detention of the accused is more essential in the interests of the State, and what is more important is what he is likely to do rather than what he has already done, in which case it would be open to them to detain him under the Security Act. But they cannot pursue both the rights at the same time, because, on the facts of this case, it is apparent that these two rights are inconsistent and cannot be exercised at the same time: they cannot detain the applicant under the Security Act and at the same time carry on the investigation without providing the applicant with the safeguards to which he is entitled under the law. The authorities have laid down that the powers of the detaining authority are very wide under the law as it exists to-day. Government may detain a person even though the grounds clearly disclose that he could have been prosecuted under the ordinary criminal law with regard to those very grounds. The detaining authority may, as I pointed out earlier, detain a person although a criminal Court has acquitted him in respect of the very charge for which he is being detained under the Security Act. Therefore, in our opinion, when the detaining authority makes up his mind to detain a person who is alleged to have committed an offence, then the detaining authority has made his choice and it would not be permissible to him to investigate the offence while still keeping the person under detention and not complying with the provisions of the law with regard to investigation. Of course, it would be open to the detaining authorities to carry on an investigation into the offence provided they submit to the provisions of the law in this respect.

7. One of the persons who was arrested in connection with this procession and who was also detained made an application before another bench of this Court consisting of Bavdekar and Chainani, JJ. and the facts on which the learned Judges were called upon to decide whether the detention order was valid or not were identical with the facts of this case. and as we felt, with very great respect to that bench, that we could not come to the same conclusion as they did, this

Full Bench was constituted. Now, those two learned Judges accepted the facts which I have set out namely, that the applicant was arrested in connection with the offence, that the investigation into the offence commenced on 8th May 1949, and that no safeguard provided by the law with regard to investigation was given effect to; and yet, they came to the conclusion that, because there was evidence that the detaining authority had been satisfied as to the likely conduct of the applicant in future, the order of detention was a valid order. Now, in our opinion, once these facts were found, that while the applicant was under detention a secret investigation was carried on into the commission of the offence, then the only reasonable inference which the Court should have drawn was that the order was made for a collateral or ulterior purpose. We should also like to point out that Bavdekar, J., has taken the view that, even though an extraneous circumstance might have weighed upon the mind of the detaining authority, if in fact he was satisfied as required by the law, then that satisfaction was a good satisfaction and the order of detention must be upheld. With great respect, in our opinion that is not the correct position in law. If an extraneous circumstance influences the making of the order, then that order can never be said to have been made bona fide. Even if the detaining authority was satisfied, still, in the eye of the law, it was an order which was made for a collateral purpose, it was made mala fide, and it cannot be sustained.

8. Reliance has been placed by the Advocate General on a decision of a Division Bench of this Court in *Emperor v. Gajanan Krishna*¹, In that case, Lokur, J., expressed as his opinion that it was a fallacy to say that the right to prosecute a person under the ordinary criminal law and the right to detain him under the Defence of India Rules or the Ordinance are mutually exclusive. Now that particular observation must be read in the light of what the Court actually decided in that case, and the decision in that case was that, although a person had been acquitted of a certain offence, he could still be detained with regard to the very offence. and as Lokur, J., with respect, rightly points out, there may not be evidence which would justify a conviction and yet there may be materials placed before the detaining authority which might satisfy him as to the prejudicial conduct of the accused.

9. Our attention has also been drawn to an unreported decision of Sen and Jahagirdar, JJ., in *In re Manohar Mangesh Dalvi*, Crim. Appln. No. 18 of 1948, D/-4.2.1948 (Unrep.) (Bom). In that case, Sen, J., observed :

" . . . in a case where a trial is pending, the question arises whether the District Magistrate is justified in proceeding on the assumption, that is, in being 'satisfied,' that the allegation against the detenu is one that should be acted upon. He cannot be said to be satisfied unless he holds such belief. It seems to us that such belief is ordinarily unjustified in a case which is being or going to be tried regularly in a Court of law, that is, any reasonable person would suspend his judgment and await the verdict of the Court." With very great respect, this observation does not seem to be borne out by the state of the authorities or the correct position in law. As we have already pointed out, it would be open to the detaining authority, even where an offence has been committed, to fall back upon his

powers under the Security Act rather than prosecute the person for an offence under the ordinary law. It may be that, in that particular case, the legal evidence may not be sufficient and the detaining authority may not like to risk the decision of the criminal Court, and the circumstances with regard to the security of the State may be so overpowering that the detaining authority might feel that the person should be detained notwithstanding the absence of legal evidence to warrant a conviction.

10. Our attention has also been drawn to a decision of the Nagpur High Court in *Vimlabai Despande v. Emperor*², and we are happy to find that that Court has taken the same view as we have taken with regard to the position that arises when the detaining authority carries on an investigation contrary to the provisions of the Criminal law. In their considered judgment, Bose and Sen, JJ., point out (p. 17) :

"... if either the police or the Provincial Government desire an investigation into any offence, whether under the Penal Code or under the Defence of India Rules, then they are bound to conduct their enquiry in accordance with the provisions of the Criminal Procedure Code. They cannot call in aid their powers of detention and in the guise of exercising those powers conduct a secret investigation into a crime. If they have information that these detenus have committed crimes or offences, they are not bound to investigate into them. They can rest content with

¹47 Bom LR 669 : (AIR 1945 Bom 533 : 47 Cr LJ 297)

² AIR 1945 Nag 8 : (ILR (1945) Nag 6)

detaining them under Rule 26 or Rule 129 provided the matter falls within the ambit of those rules. But if they want an investigation they must proceed in accordance with the provisions of the Criminal Procedure Code. If they do otherwise it is a fraud upon the Act and their action is not taken in good faith."

They were dealing with Defense of India Rules 26 and 129, and we, with respect, entirely endorse these remarks, and, in our opinion, these remarks are equally applicable to the Bombay Public Security Measures Act.

11. We must, therefore, hold that the order of detention is bad, and direct that the applicant should be set at liberty immediately. The same result will follow in all the applications as the facts are identical with the application which we have dealt with.

12. The applicant is entitled to his costs in Criminal Application No. 1251 of 1949.

13. It was first contended by Mr. Jhaveri that the order was ultra vires of the new Constitution which came into force on 26th January 1950. The point was, however, ultimately not pressed by him.

14. Mr. Jhaveri has applied to us on behalf of the detenu In re Gul Kanti Zaveri, Cri. Appln. No.

1233 of 1949, which was disposed of by Bavdekar and Chainani, JJ., to which we have already made a reference. We have already held that we have no power of review of a habeas corpus application which has been rejected by this Court. But Government have the power to do justice, and we do ask Government in view of our decision in this case, also to release the applicant in that case, because the position in law, as far as that application is concerned, is exactly the same as in the case we have just disposed of.

Application allowed.