Dulal Roy vs The District Magistrate, Burdwan And ... on 15 January, 1975

Equivalent citations: 1975 AIR 1508, 1975 SCR (3) 186, AIR 1975 SUPREME COURT 1508, 1976 (1) SCC 879, 1975 2 CRI LT 487, 1975 CRI APP R (SC) 306, 1975 ALLCRIC 282, 1975 CURLJ 577, 1975 U J (SC) 576, 1975 SC CRI R 468, 1976 SCC(CRI) 215

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, V.R. Krishnaiyer

PETITIONER:
DULAL ROY

Vs.

RESPONDENT:
THE DISTRICT MAGISTRATE, BURDWAN AND ORS.

DATE OF JUDGMENT15/01/1975

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
KRISHNAIYER, V.R.

CITATION:
1975 AIR 1508 1975 SCR (3) 186
1975 SCC (1) 837
CITATOR INFO :
RF 1976 SC1207 (560)
C 1976 SC1945 (6,8)
RF 1980 SC1983 (4)
RF 1986 SC2177 (42)
RF 1990 SC1196 (9)

ACT:
Maintenance of Internal Security Act, 1971. Section 3-Passing of order of detention on the same facts while petitioner was in custody as an undertrial-Arrest and detention of petitioner as soon as he was discharged-Detention, if illegal.

HEADNOTE:

In connection with two incidents of theft, two cases, one on 21-7-72 and the other on 1-8-72, under sec. 379, Penal Code, were registered with the police. The petitioner was not named in the F.I.R. His complicity was detected' in the course of investigation. He was consequently arrested on 3-8-72 and sent up before the Judicial Magistrate. On 21-8-72 when the petitioner was in custody as an undertrial, and order of detention was made by the District Magistrate, the respondent, under Sec. 3 of the Maintenance of Internal Security Act, 1971, with a view to preventing him from acting in any manner prejudicial to the maintenance of supplies and services essential to the commodity. After further investigation, the police submitted a final report and the petitioner was discharged in both the cases on 3-9-72. On the same day, he was taken into custody pursuant to the order of detention which is impugned in the writ petition instituted by him on a letter dated August 24, 1974, from the jail.

It was contended that the order of detention has been made to subvert the process of ordinary penal law, as a colourable exercise of jurisdiction and was, therefore illegal.

Accepting the contention and making the rule absolute,

HELD:While it is true, as an abstract legal proposition that an order of preventive detention under the Act may be validly passed against a person in jail custody on the same facts on which he is being prosecuted for a substantive offence in a court, such an order of detention is more easily vulnerable-than the one against a person not in such custody-to the charge that without there being any basis whatever for the satisfaction of the detaining authority, which is a condition precedent for taking action under S. 3 the power has been misused as a cloak solely for the purpose of punishingthe detenu for the substantive offence for which he was being prosecutedby subverting and circumventing the penal law and irksome court procedure. To make the detention order immune against such an attack, the detaining authority in its counter-affidavit must particularise all the material circumstances on the basis of which he was satisfied as to the necessity of the preventive action despite the detenu being already in jail custody and having no freedom of action on the date of the detention order. In the present case this has not been done. No counter-affidavit has been filed by the person who had made the impugned order. Even the Deputy Secretary who has filed the counter after gathering some information from the record does not disclose all the material facts from which it would be rationally possible for the detaining authority to predicate that if the impugned order was not made against the petitioner, though in judicial custody-, he could be able to indulge in the prejudicial activities indicated in the impugned order. There is no averment whatever that the charges against the petitioner were true but the evidence

collected against the Petitioner was deficient, or, for reason other than the charge being groundless, the prosecution of the petitioner for substantive offences was foredoomed to failure. The circumstances in which the petitioner was discharged by the Judicial Magistrate have not been set out. A bare statement that a "final report" was submitted by the Police is neither here nor there. The counter-affidavit is silent with regard to the nature of this police report and the situation in which the petitioner was discharged. It does not say whether this report had reference to deficiency or 'sufficiency of evidence or groundlessness of the charge against the petitioner. [189E-H; 190R-B]

187

The grounds of detention relate to two incidents of theft simpliciter in respect of which the petitioner could easily be prosecuted under the penal law. In the absence of any explanation or apparent reason as to why his prosecution for the substantive offences resulted in his discharge and as to why the making of the preventive order was deemed necessary even while he was in jail custody and bad no freedom of action the conclusion is inescapable that the impugned order has been passed mechanically and as a colourable exercise of jurisdiction. [190H]

Noor Chand Sheikh v. State of West Bengal, AIR 1974. S.C. 2120 relied on.

Rameshwar Shaw v. District Magistrate Burdwan, [1964] 4 S.C.R. 921, Sri Lal Shaw v. State of West Bengal. Writ Petition No. 453/74 decided on 4-12-1974, and Kartick Chander Guha v. State of West Bengal, A.I.R. 1974 S.C. 2149, referred to.

The failure to furnish the counter-affidavit of the authority who had passed the order of detention where the order of detention is attached on the ground of being a colourable exercise of jurisdiction, "may assume the shape of serious infirmity leading the court to declare the detention illegal."' [189D]

Shaik Hanif v. State of West Bengal, A.I.R. 1974 S.C. 679 referred to.

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition No. 428 of 1974. Under Art. 32 of the Constitution of India. A. K. Gupta, for the petitioner.

G. S. Chatterjee, for respondents.

The Judgment of the Court was delivered by SARKARIA J.-Dulal Roy, the petitioner challenges the order, dated August 21, 1972, of his detention made by the District Magistrate, Burdwan under s.3 of

the Maintenance of Internal Security Act, 1971 (hereinafter called the Act). The order states that it is necessary to detain him, with a view to preventing him from acting in any manner prejudicial, to the maintenance of supplies and services essential to the community.

The grounds of detention communicated to the detenue run under :

> 1. On 21.7.72 at 1 a.m. you with your associates Kartick Karmaker and others' committed theft of Electric wire from Tower Nos. 23 and 24 situated near Dhangachha village and 'by such act you cause stoppage of electric supply which is essential for maintenance of supplies and services to the community, in Memari area and its vicinity.
>
> 2. On 29-7-72 at 2 a.m. you with your associates committed theft of Tower Members from Tower Nos. 246, 247, 248 situated on the field near Dewandighi, P. S. Burdwan and by commission of such theft the towers were likely to fall resulting in stoppage of supply electricity which is essential for maintenance of supplies and services to the community, in Calcutta area and its suburbs."
>
> In connection with the above thefts, two cases, one on 21-7- 72 ,-and the other on 1-8-1972, under s. 379, Penal Code were registered with the police. The petitioner was not named in the F.I.R. His complicity was detected in the course of investigation. He was consequently arrested on 3-

8-72 and sent up before the Judicial Magistrate. After further investigation, the police submitted a final report and the petitioner was discharged in both the cases on 3-9-

72. On the same day, he was taken into custody pursuant to the impugned order of detention.

Mr. A. K. Gupta appearing as amicus curiae for the petitioner contends that the impugned order has been passed to subvert the process of the ordinary penal law, as a colourable exercise of jurisdiction. It is stressed that on 21-8-72 when the detention order was passed, the petitioner was already in custody as an undertrial. In the absence ,of anything in the counter affidavit showing that his custody was going to terminate soon, proceeds the argument,, it was not reasonably possible for the authority to be satisfied that the petitioner might indulge in prejudicial activities unless he was detained. It is urged that the detaining authority never applied its mind to satisfy itself with regard to this imperative requirement of s. 3 and consequently the, order of detention is illegal. To highlight the casualness of the authority in taking ,the impugned action, Counsel has pointed out that the counter- affidavit has not been filed by the District Magistrate who had made the impugned order. In support of these contentions, learned Counsel has relied upon Rameshwar Shaw v. District Magistrate Burdwan(1) Noor Chand Sheikh v. State of West Bengal(2) and the recent judgment of 'this Court in Sri Lal Shaw v. State of West Bengal.(3) Mr. Chatterjee, learned Counsel for the Respondent-State submits that the mere fact that the petitioner was on the date of the detention order in judicial custody did not stand in the way of the detaining authority being satisfied about his propensity to act prejudicially in future after his release from judicial custody. It is emphasised that

the authority must have been aware that the petitioner was likely to be released shortly as in fact he was released by the Judicial Magistrate on 3-9-72, i.e. about 13 days after the making of the detention order. Reference, in this connection, has been made to Kartick Chander Guha v. State of West Bengal. (4) Section 3 of the Act provides that the Central Government or the State Government may if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to..... (iii) the maintenance of supplies and services essential to the community, it is necessary so to do, make an order directing that such person be detained. It will be seen that the satisfaction of the authority as to the inclination of such person to act in any prejudicial manner indicated in sub-clauses (i) to (iii) of s.3(1) (a) is the sine qua non for making an order of his detention. The scheme of the section presupposes that on the date of the order of detention or in (1)[1964] 4, S.C.R. 921. (2) A.I.R. 1974 S.C. 2120. (3) Writ Petition No. 453/74 decided on 4-12-1974. (4) A.I.R. 1974 S.C. 2149.

the near future, the person sought to be detained has or will have freedom of action. If a person therefore is serving a long term of imprisonment or is in jail custody as an undertrial and there is no immediate or early prospect of his being released on bail or otherwise, the authority cannot legitimately be satisfied on the basis of his past history or antecedents that he is likely to indulge in similar prejudicial activities after his release in the distant or indefinite future. There must be a proximate nexus between the preventive action and the past activity of the detenu on which it is founded.

This Court has time and again emphasised that where? in a habeas corpus petition a Rule Nisi is issued, it is incumbent upon the State to satisfy the Court that the liberty of the detenue has been taken away strictly in accordance with law and due compliance with the constitutional requirements of Article 22(5) of the Constitution. The best informed person, therefore, to file the counter-affidavit in response to Rule' Nisi is the authority who made the detention order under s. 3 of the Act. In Sheik Hanif v. State of West Bengal,(1) it was pointed out that the failure to furnish the counter-affidavit of the authority who had passed the order of detention where mala fides or extraneous considerations are attributed to it, "may assume the shape of' serious infirmity leading the court to declare the detention illegal".

This observation equally holds good in a case where the detention, order is exposed to the risk of attack on the ground of being a colourable exercise of jurisdiction. While it is true, as an abstract legal proposition, that an order of' preventive detention under the Act may be validly passed against a person in jail custody on the same facts on which he is being prosecuted for a substantive offence in a court, such an order of detention is more easily vulnerable than the one against a person not in such custody to the charge that without there being any basis whatever for the satisfaction of the detaining authority, which is a condition precedent for taking action under s.3, the power has been misused as a, cloak solely for the purpose of punishing the detenu for the substantive offence for which he was being prosecuted, by subverting 2nd circumventing the penal law and irksome court procedure. I To make the detention order immune against such an attack-, the detaining authority in its counter-affidavit must, particularise all the material circumstances' on the basis of which he was satisfied as to the necessity of the preventive action despite the detenu being already in jail custody and having no freedom of action on, the date of the detention order. In the present case this

has not been done. No counter affidavit has been filed by the person who had made the impugned' order. Even the Deputy Secretary who has filed the counter after gathering some information from the record, does not disclose all the material facts from which it could be rationally possible for the detaining authority to predicate that if the impugned order was not made against the petitioner, though in judicial custody, he could be able to indulge in the prejudicial activities indicated in the impugned order.

(1) A.I.R. 1974 S.C. 679;

There is no averment whatever that the charges against the petitioner were true but the evidence collected against the petitioner was deficient, or, for reasons other than the charge being groundless, the prosecution of the petitioner for substantive offences was foredoomed to failure. The circumstances in which the petitioner was discharged by the Judicial Magistrate have not been set out. A bare statement that a "final report" was submitted by the Police is neither here nor there. Such a report could have been made by the Police in any ,of the situations referred to in Sections 169, 170, and 173 of the Code of Criminal Procedure, 1898. Section 169 envisages two different situations in which an accused person can be released. One is ,when there is not sufficient evidence against him. The other is when no reasonable ground or suspicion is revealed by the investigation in regard to his being concerned in the commission of the offence. Such a release can be made by the investigating officer himself without sending the accused before a Magistrate. Section 170 contemplates a situation where there is sufficient evidence or reasonable ground to justify the forwarding of the accused under custody for trial to a 'Magistrate. It is s.173 that provides for , final report, popularly 'known as Police Challan or charge-sheet, which is submitted in the presc ribed form after completion of the investigation. The counter affidavit is silent with regard to the nature of this police report and the situation in which the petitioner was discharged. It does not say whether this report had reference to deficiency or sufficiency of eviden- ce or groundlessness of the charge against the petitioner. Mr. Chatterjee submits that since the petitioner was about 13 days after the impugned order, in fact, discharged by the Judicial Magistrate, it should be presumed that his discharge was due to paucity of ,evidence and not on account of the charge being baseless.

We are afraid no such conjecture can be drawn when the liberty ,of a citizen is at stake. The counter-affidavit apart, we asked Mr. Chatterjee if he could show us any official record to support his contention. Counsel was unable to do so. He however, submitted that if a sufficiently long adjournment was granted, he would be able to 'furnish a better and comprehensive affidavit of the officer who had passed the impugned order, clarifying all these obscurities. The case was instituted on a letter dated August 24, 1974 from the detenu. Rule Nisi was issued on October 3, 1974 for November 25, 1974. 'On the latter date no counter affidavit was produced, and on the request, of the State Counsel an adjournment was granted to enable the Respondents to file the return. Inspite of this the counter filed is neither clear and complete nor by the best informed person. We are therefore, not disposed to put a further premium on this casualness and laxity on the part of the Respondent.

The grounds of detention relate to two incidents of theft simpliciter in respect of which the petitioner could easily be prosecuted under the penal law. In the absence of any explanation of

apparent reason as to why his prosecution for the substantive offences resulted in his discharge and as to why the making of the preventive order was deemed necessary even while he was in jail custody and had no freedom of action, the conclusion is in escapable that the impugned order has been passed mechanically and as a colourable exercise of jurisdiction.

In the view that it is incumbent on the detaining authority in such cases to disclose to the court all the material circumstances on which its subjective satisfaction is based, we are fortified by the observations of this Court in Noor Chand Sheikh v. State of 'West Bengal, (supra) wherein A. C. Gupta J. speaking for that Bench said "We do not think it can be said that the fact that the petitioner was discharged from the criminal cases is entirely irrelevant and of no significance; it is a circumstance which the detaining authority cannot altogether disregard. In the case of Bhut Nath Mate v.

State of West Bengal(1) this Court observed :

> ". . . detention power cannot be quietly used to subvert, supplant or to substitute the punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom the ordinary law would take care of, merely because it is irksome to undertake the inconvenience of proving guilt in court is unfair abuse."

If, as the petitioner has asserted, lie was discharged because there was no material against him and not because witnesses were afraid to give evidence against him, there would be apparently no rational basis for the subjective satisfaction of the detaining authority. It is for the detaining authority to say that in spite of the discharge he was satisfied, on some valid material, about the petitioner's complicity in the criminal acts which constitute the basis of the detention order. But, as stated already, the District Magistrate, Malda, who passed the order in this case has not affirmed the affidavit that has been filed on behalf of the State.

Apart from the question whether the explanation is satisfactory, the fact remains that in this case there is nothing to show that there was any rational material for the subjective satisfaction of the authority who passed the order of detention. Therefore, we find it difficult in the circumstances of this case to reject the contention that the order of detention was passed mechanically and was a colourable exercise of the power conferred by the Act."

The ratio of Kartik Chandra Guha v. State of West Bengal (supra), cited by Mr. Chatterjee. does not advance his case. There, the District Magistrate who had passed the detention order had clearly explained and disclosed on affidavit all the material circumstances on which his satisfaction was based, and further averred (1) A.I.R. 1974 S.C. 806.

> "Having regard to the activities of the detenu as disclosed in the grounds of detention and having regard to the possibility of (his) being enlarged on bail, I was satisfied that the detenu should be detained under the Act."

In the present case, 'there is nothing in the counter- affidavit to show that on 21-8-1972, the date of the detention order, the petitioner was about to be released on bail or discharged for deficiency of evidence or difficulty of its production in court. Nor is there any averment that the District Magistrate was otherwise satisfied from credible information received that the charges against the detenu were true.

In the light of what has been said above, we would quash the impugned order, make the rule absolute and direct the lease of the petitioner.

V.M.K. Petition allowed.