Supreme Court of India
Gopalanachari vs State Of Kerala on 12 November, 1980
Equivalent citations: 1981 AIR 674, 1981 SCR (1)1271
Author: V Krishnaiyer
Bench: Krishnaiyer, V.R.

PETITIONER:
GOPALANACHARI

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT12/11/1980

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
PATHAK, R.S.
REDDY, O. CHINNAPPA (J)

CITATION:
1981 AIR 674 1981 SCR (1)1271

ACT:
Code of Criminal Procedure-Section 110-Scope of-Court must insist on specificity or facts.

HEADNOTE:
In a letter addressed to one of the Judges of this Court (V. R. Krishna Iyer, J.) the petitioner complained that he had been illegally detained under section 110, Cr. P. C. In response to this Court's notice the Superintendent of Sub-Jail stated that the petitioner was "a well known habitual prisoner" of the Kerala State and was known as "thief Gopalan".

In his reply the detenu stated that being unable to see or hear because of his extreme old age of 71 years he was staying in his house in his native place and that one night a policeman took him from his house in a van to the police station saying that he had to inquire something from him and after putting him in the lock up for 10 days produced him before the Court as a person having been arrested the previous night. He further stated that the charge against him was that on the night patrol one night a policeman found him hiding in a verandah of a shop and that on being asked his name and address he gave one name first and another name a little later and that on inquiry it was found that he was

an ex-criminal not to be let free.

Allowing the petition. .

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HELD: In the interests of justice proceedings against the petitioner must be dropped. Section 110 cannot be permitted to pick up the homeless and the have-nots as it did under British subjection because today to be poor is not a crime in this country. [1274F]

Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi v. Union of India [1978] 1 SCC 248 this Court in clearest terms strengthened the rule of law vis-a-vis the personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable not vagarious, vague and arbitrary. [1274G]

The constitutional survival of section 110 depends on its obedience to Art. 21. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at section 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g) namely "by habit a robber", "by habit a receiver of stolen property", "habitually protects or harbours thieves", "habitually commits or attempts to commit or abets the commission of .. " "is so desperate and dangerous as to render his being at large without security hazardous to the community'. Expressions like these cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow

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does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference that by confirmed habit which is second nature - the counter-petitioner is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. [1275 G-H, 1276 E-G]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 350 of 1980. (Under Article 32 of the Constitution)

M. M. Abdul Khoder, V. M. Tarkunde and EMS Enam for the. Petitioner.

V. J. Francis for the Respondent.

The Judgment of the Court was delivered by KRISHNA IYER, J.-The lament of the petitioner, Gopalanachari, a septuagenarian languishing in a Kerala prison, is that in his case the law has become lawless and justice has fallen as the first casualty, a lot shared by several other prison-mates. He wrote a letter dated nil to one of us (Krishna Iyer, J) complaining of illegal detention under s. 110 Criminal Procedure Code (for short, the Code) where upon the jurisdiction of this Court was invoked and the following order was made:

> Shri M. M. Abdul Kader Senior Advocate with Mr. E. M. Sardul Enarn, Advocate-on-Record will be appointed as amicus curiae for the petitioner.
>
> Issue Show Cause Notice to the respondent state with a direction that the State shall furnish the total number of prisoners in the Sub-Jail Kottayam, who are now kept in custody under s. 110 Cr. P. C. and give further particulars as to how long they have been in prison on this score and whether the hearing of the cases under s. 110 Cr. P. C. is over. The Superintendent of the Jail will further furnish the number of prisoners in prison who are above seventy years old and below 25 years.
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> Copy of the Notice will be served on advocate amicus curiae as well as on Shri V. J. Francis, Advocate for the State. order will also be issued to the Superintendent of the Jail apart from the State. Post the matter on 2nd April, 1980.

Even here we may state that Shri M. M. AbdulKader, Senior Advocate assisted by Shri E. M. Sadrul Enam, Advocate-on-Record, has rendered help as amicus curiae and enabled the court to set human rights in perspective in a s. 110 situation. Shri Tarkunde also, as intervener, has helped the court which, incidentally strengthens the current of participative justice since leading members of the bar and public organisations in the field taking part in the court process in the shape of assistance in the cause of justice lends reality to the democracy of judicial remedies.

The State, in response to the notice, put in a statement that in the Sub Jail at Kottayam there are as many as six prisoners detained under s. 110 cf the Code. Apparently, they have been suffering incarceration for several months, the petitioner himself having been in Jail iron 23-2-1980. It is added by the Superintendent, Sub Jail that the petitioner "is well-known habitual prisoner of the Kerala State.. he is known as 'Kallan Gopalan' " i.e., thief Gopalan. In pathetic contrast to this stigmatising generalisation that the petitioner is a well-known 'habitual' we find the averment in the petition of the detainee that he has been falsely implicated without any regard for human rights. His averments which have not been specifically contested may well be extracted:

> The case charged against me by the Kottayam Arpukkara . Police in the Ettumanur Court is on night patrol, found hiding in the varanda of a shop, on asking the name and address: answered the name as Shankunni of Pala; on again questioning answered as Krishnan Kutty of Pankunnari. and again on questioning, arrested on doubt as a "K. D." on the Pathanam Thitta Police Station and on enquiry it is found

> that the person is an ex-criminal and not to be free; and for that, to obtain bail for two years, this is the charge against the person, submitted by the Police before the court.
>
> I am 71 years old. My native place is Pathanamthitta of Kottayam District. While I was living in my house having loss of eyesight and hearing power due to old age, a Police man known to me earlier, saw me on a road near my house, saying that he has to enquire something, taken me in a van to Arpukkara Police Station, after putting me in the lock-up for ten days produced me before the Court after making the record as having arrested me on the previous night of producing me before the Court.
>
> But, it is such a position that if the bail alongwith the Bond as aforesaid is not furnished for a period of two years, I have to be inside the Jail for the said period.
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> I submit before your Honour that I have much pain and agony that without considering that I am 71 years old and have difficulties due to that, and without seeing or giving remedy keeping me in the jail on such a fabricated case.

There is no indication even in the statement put in by the Superintendent that there has been any conviction by a criminal courts as yet. The cases are pending, apparently without any sense of urgency and oblivious to the fact that for several months the petitioner has been deprived of his personal liberty even at the advanced age of 70.

If men can be whisked away by the Police and imprisoned for long months and the court can keep the cases pending without thought to the fact that an old man is lying in cellular confinement without hope of his case being disposed of, Art. 21, read with Arts. 14 and 19 of the Constitution, remain symbolic and scriptural rather than a shield against unjust deprivation. Law is not a mascot but a defender of the faith. Surely, if law behaves lawlessly, social justice becomes a judicial hoax.

A closer look at s. 110 of the Code in the setting of peril to personal liberty thus becomes a necessity in this case. Counsel for the State, Shri Francis, amicus curiae Shri Abdul Kader and Senior Advocate Shri Tarkunde, agreed that unless the preventive power under s. 110 were prevented from pervasive misuse by zealous judicial vigilance and interpretative strictness; many a poor man, maybe cast into prison by sticking the label of 'habitual' or by using such frightening expressions as 'desperate', 'dangerous' and 'hazardous to the community'. Law is what the law does, even as freedom is what freedom does. Going by that test, s. 110 cannot be permitted in our free Republic to pick up the homeless and the have-nots as it did when under British subjection because to-day to be poor is not a crime in this country. George Bernard Shaw, though ignorant of s. 110, did sardonically comment that "the greatest of evils and the worst of crimes is poverty".

Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi case(l) this Court in clearest terms strengthened the rule of law vis a vis personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable, not vagarious, vague and arbitrary: -

> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-
>
> arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.(l) The principles and procedures are to be applied which, in . any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play . in action". Nor do we wait for directions from Parliament. The . common law has abundant riches; there may we find what Byles, J., called "the justice of the common law". Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ..... To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 arc available.

The constitutional survival of s. 110 certainly depends on its obedience to Art. 21, as this Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at s. 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber....", "by habit a receiver of stolen property....", "habitually protects or harbours thieve....", "habitually commits or attempts to commit or abets the commission of .... ", "is so desperate and dangerous as to render his being at large without security hazardous to the community". These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom upto a period of three years, must be scrutinised by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically commit them to prison and Art. 21 is for them a freedom under total eclipse in practice. Courts are guardians of human rights. The common man looks upon the trial court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial judges must remember, This Court in Hoskot's case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under s. 110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the trial magistrates to discharge their duties,

when trying cases under s. 11(), with great responsibility and whenever the counter-petitioner is a prisoner give him the facility of being defended by counsel now that Art. 21 has been reinforced by Art. 39A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference - that by confirmed habit, which is second nature, the counter-petitioner . is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in . the coils of s. 110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the casuality. After all, the judicial process must not fail functionally as the protector of personal liberty.

Indeed, several commissions, spread over decades, and even the Central Law Commission, in some of its reports, disclosed the presence in our midst of many habitual economic offenders and chronic corporate Criminals who, perhaps, may not be on the wanted list of the Police under s. 110 of the Code although their dangerous activities may prove a hazard to the health and wealth of nation. Referring to a similar situation in American Society, Ralph Nader in his introduction to a well documented book titled "America Inc." has observed:

> In no clearer fashion has the corporation held the law at bay than in the latter's paralysis toward the corporate crime wave. Crime statistics almost wholly ignore corporate or business crime; there is no list of the ten most wanted corporations; the law afford no means of regularly collecting data on corporate crime; and much corporate criminal behaviour (such as pollution) has not been made a crime because of corporate opposition. For example, willful and knowing violations of auto, tire, radiation, and gas pipeline safety standards are not considered crimes under the relevant statutes even if lives are lost as a result. The description of an array of corporate crimes in this forthright book reveals a legal process requiring courage, not routine duty, by officials to enforce the laws against such out rages. The law is much more comfortable sentencing a telephone coin box 'thief to five years than sentencing a billion - dollar price- fixing executive to six weeks in jail. In one recounting after another, the authors pile up the evidence towards one searing conclusion-that corporate economic, product, and environmental crimes dwarf other crimes in damage to health, safety and property, in confiscation of theft of other people's monies, and in control of the agencies which arc supposed to . stop this crime and fraud. And it all goes on year after year by blue-chip corporate recidivists.

Why ? It is easy to answer-"power". But that is the beginning, not the end, of understanding.(l) True, American conditions are different from Indian conditions and these observations may not have necessary application to our societal situation. The point of Ralph Nader has, however, some relevance.

Let us allay misunderstandings. We are clear in our mind that prevention is better than cure, in criminal law as in medicines especially when there is judicial supervision. Society cannot be left at the mercy of predators and bandits who, like wild beasts, prey upon the weak and the innocent and become a menace to peace and security of society.

But personal liberty is a prized value and that is why we have insisted not merely upon the Police having to be careful before marching poor people into court under s. but the Court itself having to be gravely concerned about using preventive provisions against helpless persons, not on formal testimony readily produced to order as we have noticed in a recent case, but on convincing testimony of clear and present danger to society.

In the present case, the petitioner has been too long in prison, and we take it that no circumstances placed before us justify keeping him longer in custody. The trial magistrate will, having regard to the observations we have made, drop the proceedings in the interests of justice. The other prisoner above 70 years also should be enlarged right away (Kutty Thankappan, U.T. No. 665). We expect any Government which has any regard for human rights not to use s. 110 of the Code, torturesome fashion, against the weak and the poor merely because they belong to the 'have-not' class and can be easily apprehended as 'habitual' this or that or dangerous or desperate. We draw the attention of the State Government to the likely misuse of the preventive provisions and expect it to issue suitable instructions to the Police minions so that the law will be legitimated by going into action where it must strike and by being kept sheathed where there is no need for indiscriminate display. With these observations, we direct the release of the petitioner and Kutty Thankappan, U.T. No. 665 on their. Own bonds until formal orders are passed by the trial court in the regular criminal proceedings under s. 110 of the Code.

P.B.R. Petition allowed.