

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELATE JURISDICTION
CRIMINAL WRIT PETITION NO.4838 OF 2014

Mr.U.N.Tripathi for the petitioner
Mr.J.P.Yagnik, APP for State

ORAL JUDGMENT: (Per A.S.OKA, J.)

2 The first ground of challenge pressed into
service by the learned counsel for the petitioner is
delay in deciding the representation dated 28th
November 2014 made by the petitioner through his
Advocate against the impugned order. He pointed out

that the delay from 28th November 2014 to 4th December 2014 has not been explained by the State Government. He submitted that even the explanation which is sought to be put forward by the Detaining Authority is hardly a valid explanation for delay. The second submission canvassed by the learned counsel for the petitioner is based on clause (a) of paragraph 5 of the grounds of detention served to the petitioner. He pointed out that clause (a) records that the pistol and two live cartridges allegedly used by the petitioner in the commission of an offence were sent to the Ballistic Expert Forensic Laboratory at Kalina, Mumbai on 15th July 2014. He pointed out that even according to the case of the Detaining Authority, as on 17th October 2014 when the impugned order was passed, the report of the expert was awaited. He urged that the report was a vital document which could have influenced the subjective satisfaction of the Detaining Authority. In support of his contention, he relied upon a decision of the Apex Court in the case of Madhu Garg vs. Union of India and another¹. He also relied upon another decision of the Apex Court in the case of Raja Vs. State of Tamilnadu and others². In support of the said ground, he also relied upon the Judgment and Order dated 28th January 2013 passed in the Criminal Writ Petition No.3825 of 2012 Ismail Nasruddin Shaikh vs. Commissioner of Police, Solapur and others to which one of us (A.S.Oka,J.) is a party. His third ground of attack is based on reliance

1 2004 CR.L.J 4639

2 2005 SCC (Cri) 402

placed by the Detaining Authority in the grounds of detention on the in-camera statement of Witness `A'. He invited our attention to the grounds of detention. He urged that what is reproduced from statement of Witness `A' is completely erroneous as some of the statements which are ascribed to Witness `A' in the grounds do not find place in the in-camera statement of Witness `A' supplied to the petitioner. He submitted that this shows not only non application of mind but it also shows that extraneous material was relied upon by the Detaining Authority without supplying a copy of the material to the detainee.

3 The learned counsel for the petitioner submitted that the verification recorded of the Assistant Commissioner of Police of the in-camera statements of the Witnesses A and B is very vague. Even dates of verification are not disclosed in the verification statements. He pointed out that as regards Witness `B', in camera statement was recorded on 4th August 2014 based on the incident of April 2014. He would urge that both the in camera statements ought not to have been taken into consideration by the Detaining Authority.

4 The learned APP relied upon the affidavit of Shri V.M.Patil, the Deputy Secretary (Law), Home Department, Mantralaya, Mumbai. He also relied upon the affidavit of Shri Rakesh Maria, the Commissioner of Police, Mumbai (Detaining Authority).

5 We have carefully considered the submissions. The first ground urged is of delay in disposal of the representation. We have perused the affidavit of Shri V.M.Patil, the Deputy Secretary of Home Department, Mantralaya, Mumbai filed on behalf of the State Government. He has stated that the representation dated 28th November 2014 was received and processed on the same day. The Additional Chief Secretary (Home) agreed with the suggestion for calling the remarks of the Detaining Authority. The remarks were received from the Detaining Authority vide letter dated 4th December 2014. It is stated that the remarks on the representation of the detainee were forwarded to the Under Secretary on 4th December 2014 which were endorsed on 5th December 2014 and the same were forwarded to the Additional Chief Secretary (Home) on the same day. As the Additional Chief Secretary (Home) was in Nagpur for Winter Session of Vidhansabha, he considered the representation on 6th December 2014 and rejected the same which was communicated to the petitioner on 8th December 2014. There is a sufficient explanation from the Detaining Authority for delay in deciding the representation made by the petitioner from 4th December 2014 to 8th December 2014. It will be necessary to make a reference to the affidavit of Shri Rakesh Maria, the Commissioner of Police. We have carefully perused the said affidavit. In the paragraph 6, Shri Maria has stated thus:

"6....I say that the State Government had called for the parawise comments in respect

of the representation dated 28.11.2014 and the said letter was received by our office on 29.11.2014. After receipt of the same, it was given to Preventive Crime Branch to get details from the Sponsoring Authority same was forwarded on very same day and on very same day the Preventive Crime Branch had sent to the concerned Police Station i.e Andheri Police Station and same was received by them on 29.11.2014. On 30.11.2014 being Sunday was holiday, therefore the concerned Police Station had prepared the details and particulars in respect of the parawise comments on 1.12.2014 and same was forwarded to the Preventive Crime Branch on 2.12.2014 and after scrutiny by Preventive Crime Branch the said parawise comments reached my office on very same day which was perused by me and I found the same are correct. On 3.12.2014 I sent the same to the State Government which was received by them on 4.12.2014."

6 Though Authorities are under no obligation to explain every day's delay, we find that practically every day's delay has been explained by the Stage Government as well as the Detaining Authority. Thus, there is no merit in the said contention of delay in disposal of representation.

7 The second ground which is pressed into service by the learned counsel appearing for the Petitioner is ground (e). His grievance is that without waiting

for the report of the Ballistic Expert, the impugned order has been passed. He placed reliance on a decision of the Apex Court in the case of *Madhu Garg*. This was a case where an order of preventive detention was passed under Sub-Section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "the COFEPOSA Act"). The allegation made against the detenu in the grounds of detention was that he had exported a consignment by making a mis-declaration to the effect that it was of alloy steel forging whereas actually the same was of a metal scrap. In this case, the material forming a part of consignment was sent for chemical analysis. In this context, the Apex Court held that the order of detention passed by the Detaining Authority without waiting for the result of the chemical analysis is vitiated. In the facts of the case, the report of analysis was received subsequently. The report recorded that the samples were made up of the alloy steel.

8 The second decision relied upon by the learned counsel appearing for the Petitioner is of the Apex Court is in the case of *Raja vs. State of Tamil Nadu*. This was a case where an order of preventive detention was passed under Sub-Section (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982. One of the grounds on which subjective satisfaction was recorded by the

Detaining Authority was that the certain quantity of illicit arrack in a mud pot was being brewed on the riverside. The samples were taken by the police officer concerned at the time of the arrest of the detenu. However, rest of the arrack in the mud pot was destroyed. The Apex Court observed that factum of brewing of liquor is a relevant fact which is sought to be established by the Sponsoring Authority by production of destruction mahazar, a copy of which was placed before the Detaining Authority. A copy of the said document was not supplied to the detenu. Therefore, the Apex Court came to the conclusion that an opportunity of making effective representation against the order of detention was denied to the Petitioner.

9 As far as the judgment of this Court in the case of *Shri Ismail Nasruddin Shaikh* is concerned, in the grounds of detention, it was alleged that the detenu was indulging in illegal activities under the Essential Commodities Act, 1955 by indulging in black marketing of blue kerosene which is distributed only through the Public Distribution System. A reliance was placed on two offences registered against the Petitioner under Sections 3 and 7 of the said Act of 1955 and in-camera statements of two witnesses 'A' and 'B'. In relation to the first offence alleged against the detenu, the allegation that there was a seizure of 500 liters of blue kerosene from the detenu and that the report of the Chemical Analyzer showed that what was seized was blue kerosene. This was a case where

admitted position was that though seized liquid was sent to chemical analysis, the report was not placed before the Detaining Authority. In the facts of the case, when allegation was that there was a seizure of 500 liters of blue kerosene from the detenu, this Court observed that the report of the chemical analyzer would have been a vital documents and non-placement thereof vitiates the subjective satisfaction of the Detaining Authority.

10 Now, coming to the facts of the present case, we must make a reference to the allegations made in the grounds of detention and in particular paragraph 5. The learned counsel appearing for the Petitioner has invited our attention to the specific ground wherein it is stated that one pistol and two live cartridges used by the Petitioner in the offence complained of were sent for the examination of the Ballistic Expert. It will be necessary to make a reference to the relevant grounds of detention. Clause (ix) of paragraph 5(b) refers to the seizure of pistol and cartridges which were sent for examination of a Ballistic Expert. We have perused clause 5(b) of the grounds very carefully. Seizure is in connection with C.R. No.281 of 2014 registered with Andheri Police Station on 3rd June, 2014. The said offence is in relation to alleged incident dated 2nd June, 2014. The allegations made by the complainant have been narrated in Clause (i) of paragraph 5(b). Going by the said allegations, we find that it is not the case that any bullet was actually fired from the pistol allegedly possessed

by the Petitioner. The allegation is that the pistol was used to threaten the complainant and others. The subjective satisfaction of the Detaining Authority is based on the fact that the Petitioner used pistol to threaten the complainant. It is alleged that after passers-by assembled at the spot, he held the pistol in one hand and took out a chopper from his waist and threatened to kill the persons who were present there. Thus, it is not the case that pistol was used by the Petitioner by firing a bullet. It is not the case that even an attempt was made to fire a bullet from pistol. There was a material to show that the pistol was recovered at the instance of the detenu from his house. Therefore, by no stretch of imagination, the report of the Ballistic Expert can be said to be a vital document. Therefore, the contention based on failure to wait till the report of the Ballistic Expert deserves to be rejected. In the facts of the case, the report of the expert was not a vital document.

11 The third ground is that though in Clause (i) of ground 5(c), the Detaining Authority has reproduced the version recorded in in-camera statements of witness 'A', the Detaining Authority has reproduced something which is not stated by witness 'A'. The relevant part of the ground (c) in the Petition reads thus :-

"5. It is stated in paragraph 5(c)(1) of the grounds of detention as under : "you and

your associates have formed a gang and are moving around armed with deadly weapons in the localities of Azad Road, Nagardas Road, Gundavali, Andheri East, Mumbai and adjoining areas." Similarly, it is stated that "the Petitioner and his associates also commit robbery and criminal mischief and also extorted you and detained you on many occasions you have still continued your criminal activities" which are not found in witness A's statement at page No.415 of the compilation. This shows total non-application of mind of the detaining authority as well as considering extraneous material which is not stated by Witness A in his statement. The order of detention is illegal and bad in law, liable to be quashed and set aside."

12 We have carefully perused the statement of witness 'A'. He has specifically stated that the Petitioner and his associates move together by carrying weapons. In the statement of witness 'A', there are allegations that the crimes such as robbery and criminal mischief are being committed by the Petitioner and his gang. Therefore, we find that there is nothing extraneous which is quoted in Clause (i) of paragraph 5(c). Therefore, even the said ground cannot be accepted.

13 The last contention is that though in-camera statements of witnesses 'A' and 'B' have been shown

to have been verified by the Assistant Commissioner of Police (Andheri Division), there are no dates of verification mentioned thereon. The learned APP has produced the original file for perusal. In the verification recorded by the Assistant Commissioner of Police, in the first sentence itself the Assistant Commissioner of Police has specifically mentioned the date on which the witnesses were present before him for the purpose of recording their verification.

14 Another contention is that for the incident of April, 2014, in-camera statement of witness 'B' has been recorded belatedly on 4th August, 2014. In this Petition, Writ Court cannot go into the veracity of the version of witness 'B'. The question is whether proper subjective satisfaction has been recorded by the Detaining Authority. By placing reliance on in-camera statement, which is allegedly recorded belatedly, subjective satisfaction is not vitiated.

15 Therefore, we see no merit in any of the grounds urged by the learned counsel appearing for the Petitioner.

16 Accordingly, there is no merit in the Petition and the same is rejected. Rule is discharged with no order as to costs.

(A.K.MENON,J.)

(A.S.OKA,J.)