

Maria S.

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.125 OF 2022

Mr Valy D'Costa
32 years of age,
R/o H. No.170,
Ghotnamoddi, Tilamol
Quepem, Goa &
Presently Lodged at
Central Jail Colvale Goa

...Petitioner

Versus

1. Government of Goa,
Chief Secretary, Secretariat,
Porvorim, Goa
and four others.
2. Under Secretary Home (General)
Department of Home,
Government of Goa
Secretariat, Porvorim, Goa
3. Director General of Police,
Police Headquarters,
Panaji-Goa
4. Supdt. Of Police
Anti Narcotics Cell,
Panaji Goa

...Respondents

5. STATE
Through PP,
High Court of Bombay at Porvorim,
Goa

Mr Arun Bras De Sa with Mr Kyle N. D'Souza, Advocates
for the Petitioner.

Mr S. G. Bhobe, Public Prosecutor, *for the Respondents.*

**CORAM: M. S. SONAK &
BHARAT P. DESHPANDE, JJ.**

DATE: 20 December 2022

ORAL JUDGMENT: (Per. M. S. Sonak, J.)

Heard Mr Arun Bras De Sa who appears alongwith Mr Kyle D'Souza, Advocates for the petitioner and Mr S. G. Bhobe, learned Public Prosecutor for the State.

2. This is a petition seeking a writ of habeas corpus in the context of petitioner's detention vide detention order dated 03.09.2022 purported to have been issued under the provisions of Illitict Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (the 'said Act').

3. Rule was issued in this petition on 14.11.2022 and was made returnable preemptorily on 20.12.2022. The concerned respondents were directed to positively file reply latest by 05.12.2022 by serving advance copy on the learned counsel for the petitioner. Rejoinder, if any, was to be filed by 14.12.2022.

4. Till date, no return has been filed in this matter. Mr Desa, learned counsel points out that though the impugned detention order was served upon the petitioner on 06.09.2022, till date, the grounds of detention have not been furnished to the petitioner. As a result, the petitioner is prevented without any grounds on which he has been under preventive detention and represented against the same.

5. The factual position about non-communication of the grounds till date is not disputed.

6. Section 3 of the said Act under cover of which the impugned detention order is purportedly made reads as follows:

3. Power to make orders detaining certain persons.—(1)

The Central Government or a State Government, or any officer of the Central Government, not below the rank of a Joint Secretary to that Government, specially empowered for the purposes of this section by that Government or any officer of a State Government, not below the rank of a Secretary to that Government, specially empowered for the purposes of this section by that Government, may, if satisfied, with respect to any person (including a foreigner) that, with a view to preventing him from engaging in illicit traffic in narcotic drugs and psychotropic substances, it is necessary so to do, make an order directing that such person be detained.

(2) When any order of detention is made by a State Government or by an officer empowered by a State Government, the State Government shall, within ten days, forward to the Central Government a report in respect of the order.

(3) For the purposes of clause (5) of Article 22 of the Constitution, the communication to a person detained in pursuance of a detention order of the grounds on which the order has been made shall be made as soon as may be after the detention, but ordinarily not later than five days, and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention.

7. Article 22(5) of the Constitution provides that when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order

shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order. Thus, in terms of the constitutional mandate under Article 22(5) and the statutory but equally mandatory provision under Section 3(3) of the said Act, the detaining authority was duty bound to communicate to the petitioner the grounds of detention as soon as may be, after the impugned detention order was made and served upon the petitioner. Section 3(3) provides that such communication must not ordinarily be later than 5 days and in exceptional circumstances for reasons to be recorded, not later than 15 days from the date of detention.

8. The timelines indicated in Section 3(3) have been breached in the present case. There is no explanation about non-communication of grounds within the ordinary period of 5 days from the date of detention. No order is produced to make out any case of exceptional circumstances. In any case, even the timeline of 15 days is observed only in breach.

9. Therefore, based upon the constitutional mandate under Article 22(5) read with Section 3(3) of the said Act, further detention of the petitioner cannot be sustained. Case is made out for issue of a writ of habeas corpus.

10. There appear to be several grounds rendering the impugned detention order vulnerable. However, there is no necessity to visit all such grounds. Suffice to note that the impugned detention order does not even apprise the petitioner of his right to make a representation against the same. This is evident from the perusal of the detention order at Exhibit 'D' (page 49) of the paperbook.

11. In ***Kamleshkumar Ishwardas Patel v/s. Union of India and Others***¹, constitution Bench, at paragraph 38 observed as follows:

'38. Having regard to the provisions of Article 22(5) of the Constitution and the provisions of the COFEPOSA Act and the PIT NDPS Act the question posed is thus answered: Where the detention order has been made under Section 3 of the COFEPOSA Act and the PIT NDPS Act by an officer specially empowered for that purpose either by the Central Government or the State Government the person detained has a right to make a representation to the said officer and the said officer is

¹ (1195) 4 SCC 51

obliged to consider the said representation and the failure on his part to do so results in denial of the right conferred on the person detained to make a representation against the order of detention. This right of the detenu is in addition to his right to make the representation to the State Government and the Central Government where the detention order has been made by an officer specially authorised by a State Government and to the Central Government where the detention order has been made by an officer specially empowered by the Central Government, and to have the same duly considered. This right to make a representation necessarily implies that the person detained must be informed of his right to make a representation to the authority that has made the order of detention at the time when he is served with the grounds of detention so as to enable him to make such a representation and the failure to do so results in denial of the right of the person detained to make a representation.

12. The constitution Bench has clearly held that a detenu has a right to represent against the preventive detention order. This right to represent necessarily implies that the person detained must be informed of his right to make such representation to the authority that has made the detention order at the time when he is served with the grounds of detention so as to enable him to make such representation and the failure to do so results in denial of the right of the person detained to make a representation.

13. In paragraph 47 of ***Kamleshkumar*** (supra), the constitution Bench upheld the decision of the Madras High Court that had set aside the detention orders due to the failure on the part of the detaining authority to inform the detenu that he has a right to make a representation to the detaining authority and that such failure resulted in denial of the constitutional right guaranteed under Article 22(5) of the Constitution.

14. The decision of the constitution Bench in ***Kamleshkumar*** (supra) was followed in ***Ankit Ashok Jalan v/s. Union of India & Ors²***, reiterating that detenu must be informed of his right to make an effective representation.

15. Therefore, apart from several other grounds which would render the impugned detention order vulnerable, we are satisfied that a writ of habeas corpus must be issued on the above two grounds discussed by us.

16. Accordingly, the Rule is made absolute in this petition without any order for costs.

² (2020) 16 SCC 127

17. The impugned detention order dated 03.09.2022 is set aside. The petitioner-detenu must be released forthwith unless his detention is ordered in any other case.

18. Registry to process the issuance of the writ with utmost despatch.

BHARAT P. DESHPANDE, J.

M. S. SONAK, J.