Star LAW report

"The Governments are found to be over jealous about preventive detention..."

High Court Division (Special Original Jurisdiction)
The Supreme Court of Bangladesh
Writ Petition No 6728 of 2001
Kalandiar Kabir
V
Bangladesh and others
Before Mr. Justice Hamidul Haque and Ms. Justice Nazmun Ara Sultana
Judgement: January 12, 2002
Result: Rule absolute

Background

Md Hamidul Hoque, J: This rule was issued calling upon the respondents to show cause as to why the detenu Shahariar Kabir now detained in Dhaka Central Jail, should not be brought before this Court so that it may satisfy itself that he is not being held in custody illegally and without any lawful authority.

Mr M Amir-ul Islam appeared on behalf of the petitioner. He has challenged the validity of the order of detention on several grounds, which we like to discuss one by one. First argument of Mr M Amir-ul Islam is that the detenu was arrested under section 54 of the Code of Criminal Procedure but there was no reason to arrest the detenue under that section 54 of the Code of Criminal Produce. In this connection, he has taken us through the provisions of section 54 of the Code of Criminal Procedure and has argued that under nine circumstances as mentioned in the above section, a police officer may arrest a person without a warrant and without any order from a Magistrate. We cannot accept the argument of Mr Islam. It is true that under nine circumstances a person may be arrested under section 54 of Code of Criminal Procedure by police without any warrant. Seven circumstances are not applicable but we have found that the provisions of this section shall also apply when a police officer receives any credible information that a person may be concerned in any cognisable offence or receives any credible information or a reasonable suspicion that a man might have committed an act in any place out of Bangladesh which if committed in Bangladesh would have been punishable as an offence. So, we are of the view that arrest of the detenu under section 54 of Code of Criminal Procedure was not illegal in view of the above power given to the police officer under section 54 of Code of Criminal Procedure.

Deliberations

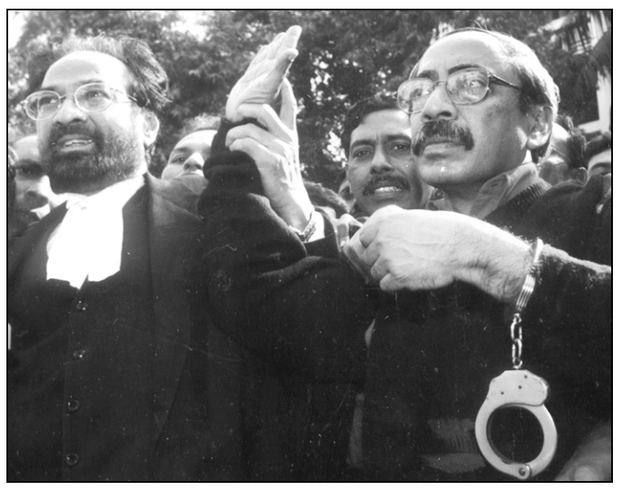
It is true that clause (g) of section 2 of the Special Powers Act was omitted by Act 18 of 1991. The purpose was probably to ensure freedom of expression as embodied in our Constitution. However, on perusal of section 2 (f) which explains the meaning of 'prejudicial act' we find that such act is an act which is intended or likely to prejudice the sovereignty or defence of Bangladesh; prejudice the maintenance of friendly relationship with foreign states; prejudice the security of Bangladesh or endangers public safety or the maintenance of public order; create or excite feelings of enmity or hatred between different communities or classes of people; interfere with or encourage or incite interference with the administration of law or maintenance of law and order etc. In this case, we find from the ground for detention that on the recovery of some cassettes the authority decided to detain him under section 3(2) of the Special Powers Act with a view to prevent him from doing any prejudicial act within meaning of section 2 (f). The possession of the materials created a suspicion in the mind of the authority that detenu might engage in any activities as referred to above. So, according to us, in spite of omission of clause (g), the authority had the scope to detain the detenu, on the ground as mentioned in annexure J. At that stage, obviously, no proof of future participation was necessary. Mr. Islam has also argued that the detention was malafide and as such the grounds of detention were not supplied to the detenu and the learned Advocate had to make a prayer before the court for allowing them to procure copy of the grounds and to give them an opportunity to meet the detenu for consultation. There is some substance in this argument of Mr Islam.

This matter came up for hearing on 12.12.01. The order of detention was passed on 25.11.01. The provision for furnishing the ground is contained in section 8 of the Special Powers Act 1974. The purpose of furnishing the grounds to the detenu is to afford him an opportunity to submit a representation against order of his detention. At the time of hearing on 12.12.01, the learned DAG submitted that the grounds were supplied to the detenue but the learned Advocate for the petitioner submitted that he had no information that the grounds were actually supplied. After hearing the parties, the court then passed an order directing the authority to allow two lawyers of the detenu to meet the detenu and to allow the detenu to consult his lawyers. Mr. Islam has referred to paragraph 7 (1) of the supplementary affidavit and has submitted that the grounds were only shown to the detenu and was allowed to read the same but it was taken back and kept in the office. We find that it was supplied to the detenu on 8.12.2001. We cannot approve of the action of the authority. This court had to interfere by passing an order to give an opportunity to the lawyers to meet the detenu to get instruction from him and to procure the copy of the grounds supplied to the detenu. However, as the learned Advocates were ultimately allowed to meet the detenu in compliance with the order of the court, we think that the detenu ultimately got the opportunity to file a representation against the order of his detention but this subsequent conduct of the authority cannot be considered to hold that the initial order of detention was malafide.

Lastly, the most important argument of Mr. Islam is that after detaining the detenu under section 3 (2) of the Special Powers Act, a specific criminal case has been started over the self same facts and as such he has argued that there cannot be two parallel proceedings against the same person. In support of his views Mr Islam referred to some decisions of this court and also a decision of Supreme Court of India. The first case, which was cited by Islam, is the case of the Shahidul Haque vs. Government of East Pakistan reported in 20 DLR 1005. Next, he cited the case of Mrs. Tahera Islam Vs. Secretary, Ministry of Home, Bangladesh reported in 8 BLD 262. The Indian case cited by him is the case of Biram Chand Vs. State of Uttar Pradesh reported in 1974 AIR (SC) 1161. Mr. Islam has also argued that after starting a regular case against the detenu on the self same facts, there was no scope of extending the detention and this extension shows that it was done without application of mind.

Mr. Mizanur Rahman, the learned DAG with Mr Zaman Akter the learned AAG has submitted that the activities of the detenu comes within definition of "prejudicial act" because the detenu was acting against the sovereignty and security of Bangladesh. They have also submitted that there was nothing malafide in the order passed by the Government. It is also argued that there may be a valid detention order in spite of pendency of a case and in this connection they pendency of a case and in this connection they referred to the cases of Habiba Mahmud V. Bangladesh reported in 45 DLR (AD) 89, the case of Nasima Begum vs. Bangladesh reported in 49 DLR (AD) 102, the case of Nasim Begum Vs Home Ministry reported in 3 BLD 140.

The question whether parallel proceedings may be continued or not



came up for decision in so many cases before the Indian Supreme Court. In the case of Biram Chand vs. State of Uttar Pradesh, a Division Bench of Supreme Court of India held that the if the authority concerned makes an order of detention under the Act and also prosecutes him in a criminal case on the self same facts that would be totally barred. The following is the observation of the Court: "The detaining authority cannot take recourse to two parallel and simultaneous proceedings nor can take recourse to a ground which is the subject matter of criminal trial". In the instant case before us, in the grounds of detention there is noreference of any pending case. The case against the present detenu was started on 8.12.2001 with the filing of a first information report by a police inspector and officer in charge of Airport police station. Mr Islam has argued that after passing the order of detention under section 3(2) of the Special Powers Act over the same facts, a regular criminal case has been started with specific allegations under some section of the Penal Code, the detention cannot be continued and this according to him, will amount to two parallel prosecutions.

Though passing of an order of detention after a criminal case is instituted on the self same facts and allegation is not barred by specific provision of Special Powers Act or by any other law but in view of earlier judicial pronouncements we accept the view that when a specific case has been started in relation to the self same facts, the same activity should not, "in fairness" be considered as a ground for detention. Of course, there is slight difference between the facts of those cases with the facts of the present case before us. In the reported cases criminal case was either started immediately before passing of the order of detention or on the date of detention on the self same facts. In the instant case, the criminal case was started after 13 days from the date of passing of the order of detention and as such there is no reference of any case in the grounds of detention itself.

On perusal of the grounds and the certified copy of the First Information Report, which was produced before us at the time of hearing, we find that the case was started on the same allegations or facts as mentioned in the grounds for detention. The learned DAG and AAG have pointed out that the occurrence took place outside the territory of Bangladesh and it may be difficult to prove the allegations in the criminal case against the present detenu and for that reason continuation of detention is necessary. We cannot accept this view. Time has not yet came to decide whether evidence will come or not but we have found that the criminal case has been started on the self same facts and allegations as mentioned in the grounds for detention. The law will take its own course in respect of the criminal case but we are of the view that the starting of the specific case negatived the necessity of continuation of detention. So, according to us, though initially the authority had the scope of and reason for passing the order of detention when the detenu was found in possession of the materials as mentioned in the grounds of detention, but after starting of the specific case, continuation of detention will be bad in law and illegal.

Observations

Before we part with, we like to make some observations on the allegation made by Mr Islam about the ill treatment meted out to the detenu. A detenu has neither been found guilty by any Court of law for commission of any offence nor he is standing trial for any alleged offence but he is detained only to prevent him from doing any prejudicial act in future. In the Jail Code, detail procedure has been laid down as to what treatment should be meted out to convicts and under trial prisoners. Under that Code on commission of any offence in Jail itself or on violation of any rule, there are provisions of punishment of a convict or under trial a prisoner. There is no scope of torturing even a convict or under trial prisoner. In the Jail there is no separate provision for a detenu or and no rule as to how he is to be treated. The Jail Code was prepared during British time. At that time there were state prisoners. Unfortunately, though several decades passed, no initiative was taken by any Government during this long period to make the Jail Code up to date. Though the Governments are found to be over jealous about preventive detention, but no steps were taken to determine how a detenu should be treated. Even if the old rules of the Jail Code are applied which is contained in chapter 32 of the Jail Code, a detenu should receive much better treatment.

We could not find any decision of our courts on the point of treatment of the prisoners with reference of these two Articles. So, we like to remind the authority that the treatment towards the prisoners should be human and in accordance with the rules because a prisoner remains a human being and is entitled to be treated as such. This is more important while treating a detenu. The Government should frame rules regarding the detenu keeping in mind that he still retains some right under Articles 27 and 30 of the Constitution in spite of his detention.

We cannot approve the action of the authority about the manner in which copy of the ground was supplied to the detenu and the difficulty he had to face in having consultation with his lawyer and meeting members of his family. The right to consult a lawyer is given under clause (1) of article 33 but clause (3) (b) provides that provision of clause (1) shall not apply if a person is detained for preventive detention. However, clause (5) of this Article provides that grounds should be communicated as soon as may be and the detenu shall be afforded an opportunity of making a representation against the order. This provision of affording an opportunity to submit representation would be meaningless unless a detenu gets an opportunity to consult a lawyer. As regard, the opportunity of meeting the members of the family, we like to emphasize that such opportunity should be given, denial of which will amount denial of his rights, which he should enjoy in spite of preventive detention. In this connection, we may refer to the decision of the Indian Supreme Court as made in the case of Francis Coralie in which the Supreme Court had to issue instruction upon the authority to allow the members of the family of the detenu to meet him twice in a week.

Decision

In view of our discussion, the present rule is liable to be made absolute. We have found that there was valid ground for passing the initial order of detention but at the same time we have found that there is no valid ground for continuation of the detention after starting of the case on the self same facts and allegation with reference to which the order of detention was passed. In the result, the rule is made absolute. It is declared that the detenu Shariar Kabir, son of late Mr. Siddiquallah of Ga-16 Mahakhali, PS Gulshan, District-Dhaka now detained in Central Jail, Dhaka is being held in custody without any lawful authority and be set at liberty forthwith of not wanted in any other case.

Mr M Amirul Islam with Dr Shirin Sharmin Choudhury, Ms Tania Amir, Ms Manzila Murshid, Advocates for petitioner. Mr Mizanur Rahman, AAG with Mr Zaman Akter, AAG-for the State.

FOR YOUR information

10 things you should know if you are arrested

LAW DESK REPORT

HOW TO DEFINE ARREST? ONLY WHEN...

The police say, "You are under arrest." The police handcuff you .You are prevented from leaving a room, a site etc. by the police.

WHAT IF YOU ARE STOPPED BY THE POLICE

(while walking away, driving home etc.)
You may be questioned. ONLY give your particulars i.e. name, address and occupation. You may also be asked to show your Identity Card if you are a student. You don't have to answer any other questions. Always ask for the police's identification. Always take down their names and ID numbers. Take down the number of the patrol car.

IF YOU ARE ASKED ANY OTHER QUESTION

Ask the police "Am I under arrest?"

If they say "yes", do not answer any more questions. It is your right to only answer questions in court.

If they say "no", you may leave anytime.

IF YOU ARE BEING ARRESTED

Alert the people near you. If you have a hand phone, call your friend, family or lawyer. After arrest you will most likely be taken to the respective police station. If you are arrested by the Detective Branch of Dhaka , you may be taken to the DB Office at Minto Road. Ask your friend, family or lawyer to go first to the Thana or DB office to verify your arrest and whereabouts.

Note down the time when and the place from where you were arrested.

AFTER ARREST, THE POLICE MUST TELL YOU

Why you are arrested. It is your constitutional right to know the grounds on which you are arrested. Article 33(1) of our Constitution provides, " No person who is arrested shall be detained in custody without being informed… of the grounds for such arrest…".

AFTER ARREST

The police can only keep you in the lockup for 24 hours. This is your CONSTITUTIONAL right. Article 33(2) enumerates, " Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate…". After the 24-hour period expires, the police must bring you before a magistrate for remand (a stay in the police lockup to "assist" their investigation). Otherwise you will be released either on police bail (jamin) or charged in court. Once charged, you need a bailer and money unless it's a nonbailable charge.

You can't bring anything into the lockup except for the clothes you have on. When the police take your things away, you must sign for it. If you have money or bank/credit cards, make sure you count your money and make the police write down how much you had on, and which bank/credit cards you have.

POLICE QUESTIONING

Be careful when answering verbal questions put by the police. It may be in a form of friendly questions about the weather, your family etc. to relax you. Think twice before answering them as it can be used against you in court. Remember, the police's work is to make sure they have enough evidence to charge you, not to have friendly conversation.

If the police ask you to give statement, you must give your particulars e.g. your name, address, occupation etc.. And find out the name of the officer. Any other questions, we STRONGLY advise you not to answer until your day in court, and together with your lawyer. It is your right! Article 33(1) entitles you to " the right to consult and be defended by a legal practitioner" of your choice. Whatever you may say, can be used against you or your friends. You can answer all other questions like this way:

Q: Were you at Dhanmondi in the afternoon?
A: I will only answer all questions in court.
Q: How did you get to Dhanmondi this afternoon?
A: I will only answer all questions in court.
Q: Did your mother prepare lunch for you before you left?
A: I will only answer all questions in court.

If the police officer taking your statement threatens you verbally or behave in a threatening manner, you must stop giving your statement immediately. Stay calm and tell him/her, "I cannot continue with my statement because you are threatening my safety. I want this to be noted in my statement." If he/she doesn't do type your objection, wait until the end of your statement. But if he/she continues to threaten you, leave the room and alert the other officers and ask for their 'protection'.

When you finish answering all questions, the police officer will allow you to read your statement. He/she will ask you if you have anything to add, change, delete. This is when you correct any mistakes on the statement or add any other comments. If you have been threatened during questioning or assaulted during your arrest etc., this is another opportunity for you to say it. The police officer must write all that out.

IF YOU ARE BROUGHT IN FRONT OF A MAGISTRATE

(For Remand)
If you don't have a lawyer, you must insist legal representation. The Parliament passed Legal Aid Ain, 1999 and the Government has adopted a scheme of legal aid accordingly to help the poor and unable people to consult and be defended by legal practitioners. Tell the magistrate if you have any grievances e.g. if you were beaten up, threatened; if you are feeling ill, need medication etc.

IF YOU ARE BROUGHT IN FRONT OF A MAGISTRATE

(For Charges)
Again, you must insist on legal representation.

Make sure you have someone to bail you out. If you have not been able to contact your family or friends, ask permission from the magistrate to assist you in contacting your family. Otherwise you can ask your lawyer. Your family will have to bring money to bail you out.

IF YOU ARE BEATEN IN CUSTODY

No law of our land allows the Police to beat or torture you. As per Article 35(5) of the Constitution torture is strictly prohibited. After you are freed on bail, make sure you go to a government clinic or hospital to have a medical check up. Make sure you know the name of the doctor and the reference number to your medical report as you can use this later in court.

If you are still in remand, make sure you tell the magistrate that you need to go to the hospital or clinic.

LAW week

Scuffle between two groups of lawyers!

Two groups of lawyers loyal to AL and BNP led alliance scuffled with each other on 1 July for an hour in the Supreme Court Bar Auditorium over appointment of new judges and non-confirmation of three judges.

ETV regime likely comes to an end?

A full bench of the Appellate Division unanimously upheld the High Court Division's verdict that declares the licensing agreement between the Government and the ETV illegal, rejecting the leave to appeal petition, but stayed the execution of the verdict for five weeks. The decision of the High Court Division was given in a writ petition filed by Prof. Chowdhury Mohammed Hossain of the Pharmacy department and Prof. Abdur Rob of the Geography department, of Dhaka University along with the president of a faction of Bangladesh Federal Union of Journalists (BFUJ Gias Kamal Chowdhury on September 19, 2000. The petitioners claimed that international bids were invited for setting up a private television channel in 1998 where the ETV was one of the participants. But after scrutiny, the tender evaluation committee sent a list to the Ministry of Information disqualifying the ETV. But, mysteriously, another list was sent to the ministry later that day putting the ETV on the top of the list of bidders. A High Court Division Bench comprising of Justice M. A. Aziz and Justice Sikder Makbul Haque on 25 September issued a show cause notice asking the government as to why the licensing agreement between the government and the ETV should not be declared illegal as well as void and ordered to stop the telecast of the ETV until the rule is dissolved finally. The High Court Division extended the time of stay order from time to time upon the application of the ETV. The hearing of the case started on a Division Bench comprising of Justice Md. Hamidul Haque and Justice Nazmun Ara Sultana which declare the licensing agreement as illegal finding corruption and malpractice in the process. Finally, a leave to appeal petition was filed by the ETV authority, which was rejected by the Appellate Division of the Supreme Court . Dr Kamal Hossain, informed, on behalf of the investing companies Citicorp and Waterford, that there are many foreign stakeholders in ETV. He emphasised on the prospect of American investment in Bangladesh, which, according to Dr. Hossain, might be jeoparadised if the ETV is not allowed to function. Barrister Syed Ishtiaque Ahmed, on behalf of the Chairman of ETV appealed to review the Court's decision. The Court stayed its order for 5 weeks and allowed them to file a review petition within the period. "We also watch ETV and would be deprived if it closes down. But we have to deliver justice in the light of the law, taken into consideration all legal aspects of the case", the Bench replied.

Specialized lawyers for saving public properties

The Ministry of Housing and Public Works decides to create a separate fund to engage 'specialized lawyers' to defend cases involving public properties which may run into hundreds of crores of taka. The move to have a separate fund for engaging high-priced lawyers was reached as the ministry kept losing legal battles while defending public interests in the court of justice.

Shazneen's father cross-examined

Latifur Rahman, second prosecution witness in the Shazneen rape case and father of the victim, was cross-examined for about two hours in the Second Special Court for Prevention of Women and Children Repression, Dhaka on Wednesday, July 3, 2002. The lawyer for principal accused Shahidul Islam alias Shahid cross-examined him. Shazneen Tasnim Rahman, 15, youngest daughter of Latifur Rahman, Chairman of Transcom, was raped and murdered at their Gulshan residence on April 23, 1998. Latifur Rahman was again cross-examined in the same court by the same lawyer on Wednesday, July 10. Judge Kazi Rahmat Ullah adjourned the hearing till August 1.

Murder becomes normal trait

Murder has become normal trait in the district of Barisal, Bhola Pirojpur, Potuakhali and Barguna. About 9 people were killed in these districts in July. The development made the local people afraid of the deteriorating law and order situation. In Barisal, the situation gets worse. 10 persons were murdered in June. At the same time terrorist activities have greatly increased in this district. Arms decoits committed decoity in Sonali Bank on June 23. Theft and robberies are being committed almost every night in different parts of the district causes the people feel insecured. The role of police is being questioned as they fail to nab any criminal.

Suicide of a lawyer

Mohammed Mosharraf Hossain, 42, a lawyer of the Dhaka Judge Court allegedly committed suicide by drinking poison. The reason behind the suicide believed by his colleagues, to be the frustration over financial condition. His wife told that he was suffering from metal depression.

Repression on women and children

At least 32 women and 9 children were subjected to repression in Rajshahi district during last month, according to the survey carried by Association for Community Development (ACD). Of the women victims, 27 committed suicide, 4 were killed, 1 was attempted to murder, 7 were raped and others were kidnapped. In the case of the children, 3 were killed, 3 were attempted to murder while one was subjected to rape.

Amendment finalised

The Law Commission has finalised the recommendations for amendment to section 54 of the Criminal Procedure Code (Cr.P.C) in order to curtail the power of indiscriminately arresting common people by police on mere suspicion. Against the backdrop of the gross misuse of the section by the police, increasing demands to amend Section 54 are made from every section of the society. The amendment would ensure that police arrest people only after receiving credible information or reasonable complaint. The proposed amendment might have suggested empowering Magistrates to release an arrested person incase of failure of the police to start a case against her/him within three days of his arrest.

High Court rule on the promotion of 170 Deputy Secretaries

A High Court Division bench comprising of Justice Shah Abu Nayeem Mominur Rahman and Justice Mohammad Arayesh Uddin, have issued a rule nisi asking government to show cause as to why the promotion of 170 Deputy Secretaries to the post of Joint Secretary should not be declared as mala fide, unlawful, void and is of no legal effect. The court further directed the Secretary of the Ministry of the Establishment to transmit the impugned SRO/ notification, No, Sha-Mo (Uni-1)-2/2002-35 dated June 13, 2002, to the court under which the promotion was given.This direction of the HC Division has come through a writ petition filed by the affected Deputy Secretaries. Dr Kamal Hossain, appearing on behalf of the petitioners, argued that, the said notification on the basis of which, the promotions were given has not been brought before the public, as well as the policy was been kept secret which is not in accordance with law.