(1993) 02 CAL CK 0022

Calcutta High Court

Case No: None

Harbir Chawla		APPELLANT
	Vs	
Mahendra Prasad and Another		RESPONDENT

Date of Decision: Feb. 1, 1993

Acts Referred:

- Arms Act, 1959 - Section 25, 27
- Constitution of India, 1950 - Article 22, 22(5)
- Customs Act, 1962 - Section 108, 3
- Penal Code, 1860 (IPC) - Section 120, 121A, 122, 384, 506

Citation: 98 CWN 440

Hon'ble Judges: Shymal Kumar Sen, J; Ajit K. Sengupta, J

Bench: Division Bench

Judgement

Shymal Kumar Sen, J.
By consent of parties all the aforesaid Habeas Corpus writ petitions are heard together since they involve common question and are disposed of by one common judgment. The facts leading to the aforesaid Habeas Corpus writ petition relating to Harbir Chawla inter alia are that the petitioner is a resident of Chan-drapura in the State of Maharashtra,

The petitioner carries on trading and for that purpose has to travel to different parts of India.

The petitioner can read and write Gurmukhi language and can sign in English. He cannot read or understand Hindi language. He is also not sufficiently educated to understand complicated English sentence.

The petitioner came to Calcutta by air from Delhi on 17th August, 1992.

On arrival as the Calcutta Airport, he was intercepted by some persons and was taken to Lake Town Police Station.

The petitioner was charged for commission of offence u/s 121A/122/384/506/120 I.P.C. and Section 25 and 27 of the Arms Act and was implicated in Lake Town Police Station Case No. 149 dated 2nd August, 1992.

The petitioner was charged as a person maintaining link with Babbar Khalsa Group.

2. It has been submitted on behalf of the petitioner that he is completely innocent and had nothing to do with the commission of any of the offences in respect of which he was arrested. He was compelled by the police to make a statement by the Police which was obtained from him under duress and coercion.

3. On 18th August. 1992. in the forwarding report the Officer-in-Charge, Lake Town Police Station, had alleged that on the basis of the statement of the petitioner the police could unearth other members of the said group who had allegedly taken shelter in Calcutta and its adjoining areas. A copy of the said application for remand made by the Officer-in-Charge Lake Town Police Station dated 18th August. 1992. has been annexed to the writ petition. The petitioner was produced before the Learned Sub-Divisional Judicial Magistrate, Barrackpore (North) 24 Paragons in connection with the said case from time to time. One of the orders dated 25th August. 1992 has been annexed to the writ petition.

4. It has been submitted that since the case against the petitioner was absolutely false and there was and could be no evidence to connect the petitioner with the said case he was bound to be released by Court

5. It has been alleged that the petitioner being semi illiterate could not follow the legal procedure and formalities but realised that some officers of the Customs Department came to the Police Station and made the petitioner to sign a statement which was already written by them The petitioner had no alternative but to sign the said statement and was not aware of its contents.

Two other persons who were also arrested at about the same time from the Airport were also similarly compelled to sign such statements.

6. On 31st August, 1992, the petitioner thereafter filed a bail application before the learned Chief Judicial Magistrate. Barasat, 24-Paraganas (North) in which the petitioner categorically stated that statements had been forcibly taken under duress and coercion. The petitioner further stated in that application the fact that he was forced to sign a few blank papers also. A copy of the said bail application has been annexed to the writ petition.

The petitioner was kept in custody when the petitioner was suddenly served with an order of detention passed under COFEPOSA Act signed by the respondent No. 1. The said order stated that with a view to prevent the petitioner engaging in concealing and transporting smuggled goods in future the petitioner has been detained. A copy of the order of detention has been annexed to the writ petition.

7. It has been submitted that the provisions of COFEPOSA Act has been used against the petitioner as a convenient substitute for the ordinary law of the land. The Authorities after arresting the petitioner on a charge of alleged commission of offences punishable under Indian Penal Code and Arms Act and realising that the petitioner is bound to be released as there was no material against him, procured the COFEPOSA order from the Detaining Authority to illegally detain the petitioner under preventive detention on the basis of manufactured evidence or materials.

It is the contention of the petitioner that the COFEPOSA Act has beer-used in the case of the petitioner mala fide.

It has further been contended that the Detaining Authority did not at all apply his mind in passing the order of detention.

It is also the case of the petitioner that he was detained under COFEPOSA and the copy of the grounds of detention was served on him in English. The said grounds ran into several pages and the petitioner does not have sufficient knowledge of English to understand the same A copy of the grounds of detention in English served on the petitioner has been annexed to the writ petition.

8. It is also the contention of the petitioner that the petitioner was also served with a Hindi version the grounds of detention, a language which he does not at all understand. At the time of service of the grounds of detention, neither the English version nor the Hindi version of the grounds was read over or explained to the petitioner.

The petitioner requested the Serving Officer to provide him with a copy of the grounds of detention in Gurmukhi language but the Officer declined to do so.

9. It has also been alleged that the petitioner ultimately managed to get the English and Hindi versions of the grounds of detention read over and explained to him and it transpired that the said two versions are different. The documents supplied with the English grounds are numbering 41 where as the documents supplied with the Hindi version were only 26.

10. It has been submitted that the grounds of detention are vague, imprecise and lacking in material particulars rendering it impossible for the petitioner to make an" effective representation.

It has further been submitted that there has been gross violation of Article 22(5) of the Constitution of India.

The other allegations are also the same as in the case of Harbir Chawla which have already been set out.

11. In the case of Writ petitioner Sat Pal the facts are almost identical.

The said writ petitioner stated in his petition that the had never been to school. He cannot read and write in any language. He can speak and understand Hindi a little bit. He knows Gurumukhi. He can only put his signature in English and Gurumukhi. The aforesaid contentions and submissions were dealt with by the respondent No. 1 of the affidavit-in-opposition. The address of the writ petitioner in Jalandhar furnished by the writ petitioner in his statement was found to be non-existent and that the writ petitioner in his voluntary statement stated ''I can speak and under stand Hindi and little bit 1 know Gurumukhi.'' The writ petitioner has fully used the word ''little bit'' along with first sentence. Actually the writ petitioner stated In his voluntary statement that he knows Gurumukhi little bit.

12. In the case of writ petitioner Indrajit Kumar the facts are more or less the same.

The said writ petitioner stated in his petition that he cannot write in any language apart from Gurumukhi. He can speak and understand Hindi little bit. He can also some-how put his signature in English and Hindi. The said allegations have been dealt with in the affidavit-in-opposition filed by the respondent No. 1 inter alia contending that the address of the writ petitioner in the State of Jammu and Kashmir furnished by the writ petitioner was found to be incorrect. In his voluntary statement made by the writ petitioner before the Customs Officer at Calcutta Airport on 17th August. 1992 it was stated that he knows only Hindi and he could read Hindi well. Furthermore, at the end of the statement he himself had written down in Hindi language recording the authenticity of the statement given by him.

Under such circumstances all the aforesaid writ petitions were filed challenging the said detention order.

13. Learned Advocate for the respondent No. 1, on the other hand, submitted that the writ petitioner Harbir Chawla is a resident of Chandrapura in the State of Maharashtra. The respondent No. 1 in his affidavit-in-opposition has dealt with the petitioner''s averments. Learned Advocate referred to the affidavit in opposition wherefrom it would be evident that the writ petitioner is well conversant in English and Hindi both the languages and he can read and write in both the languages, i.e. English and Hindi both. Endorsement given by him in Hindi in each page of his statement u/s 108 of the Customs Act, 1962 and signature in English clearly indicate that he knows both Hindi and English. Moreover he pointed out that it is for the first time before this Court that he has taken such plea.

14. The common point urged on behalf of the appellants is that the petitioner was served with detention order couched in the language which the petitioner is not acquainted with and the contents of the said order and the statements were not explained to the petitioner, it has also been submitted on behalf of the respondent No. 1 that the question of not taking into consideration the retracted statements of the petitioners dated 31st August. 1992, does not arise since the detention order was passed on 2nd September, 1990. The bail application on behalf of the

petitioners were moved on 31st August, 1992 afternoon. It has also been submitted that the bail petition was not signed by any of the writ petitioners but by the Learned Counsel for the petitioners. It has been contended that the said bail application dated 31st August. 1992, cannot be by any stretch of imagination an application for the retraction of statements as recorded by the Customs Officials after recovery of the subject goods from them.

Under such circumstances it has been contended that there was nothing wrong in considering the bail application by the concerned authority.

15. We have considered the submissions of the learned Advocate for the parties and the decision cited from the bar.

In the case of Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, it was held that the grounds for detention is required to be communicated under the conservation of Foreign Exchange and Prevention of Smuggling Activities Act. In paragraph 62 of the said judgment at page 699 the Supreme Court observed, inter alia, as follows :-

It will be appropriate to deal with the first ground whether the grounds should have been communicated in the language understood by the detenus? The Constitution requires that the grounds must be communicated. Therefore, it must follow as an imperative that the grounds must be communicated in a language understood by the person concerned so that he can make effective representation.

16. In the case of Mr. Kubic Dariuz v Union of India and others reported in AIR 1990 SC 605 the Supreme Court observed that it is settled law that the communication of the grounds which is required by the earlier part of Clause (5) of Article 22 is for the purpose of enabling the detenu to make a representation, the right to which is guaranteed by the latter part of the clause. A communication in this context, must, therefore, mean imparting to the detenu sufficient and effective knowledge of the facts and circumstances on which the order of detention is passed, that is, of the pre judicial acts which the authorities attribute to him. Such a communication would be there when it is made in a language understood by the detenu.

17. "Communicate" is a strong word. It requires that sufficient knowledge of the basic facts constituting the grounds should be imparted effectively and fully to the detenu in writing in a language which he understands, so as to enable him to make a purposeful and effective representation. If the grounds are only verbally explained to the detenu and nothing in writing is left with him in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed. This follows from the decision in Harikisan Vs. The State of Maharashtra and Others, and Hadibandhu Das Vs. District Magistrate and Another,

18. The same principle has already been enunciated by the Supreme Court. The detenu was a Polish national. It was alleged that he smuggled gold to India. The

order of detention and grounds of detention were served in English. The detenu received them and acknowledged the receipt thereof as it appears from the records, putting his signature in English. He did not complain that the grounds of detention were not understood by him. On the other hand in the very grounds of detention it was stated that in course of interrogation he answered the questions in English including the questions as to how he happened to learn English. The gist of his answers in this regard was also given in the grounds of detention. It revealed that those contained much of information peculiar to the detenu himself which could not have been communicated by him to the interrogators unless he knew the English language. In several places he corrected the statement putting appropriate English words and signing the corrections. No objection regarding non-communication of the grounds in a language understood by the detenu was made within the statutory period for furnishing the grounds.

19. It was held that the fact that the representation was beyond the statutory period, almost a month after the grounds were served, along with the detenu''s statements as to how he learnt English, showed that the detenu understood the English language, had working knowledge of it and was feigning ignorance of it, and there was no violation of Art. 22(5) on the ground of non-communication of the grounds of detention in a language understood by him.

20. In Smt. Raziya Umar Bakshi Vs. Union of India and Others, Fazal Ali J held (at page 1752) that the service of the grounds of detention on the detenu was a very precious constitutional right and where the grounds were couched in a language which was not known to the detenu, unless the contents of the grounds were fully explained and translated to the detenu, it would tantamount to not serving the grounds of detention to the detenu and would thus vitiate the detention ex facie In Nainmal Partap Mal Shah Vs. Union of India (UOI) and Others, the detenu stated that he did not know the English language and therefore could not understand the grounds of detention, nor he was given a copy of the grounds duly translated in vernacular language. In the counter-affidavit the detaining authority suggested that as the detenu had signed a number of documents in English, it must be presumed that he was fully conversant with English. Rejecting the contention it was held by this Court that merely because he may have signed some documents, it could not be presumed, in absence of cogent material, that he had working knowledge of English and under those circumstances there had been clear violation of the constitutional provisions of Articles 22(5) so as to vitiate the order of detention. Thus what was considered necessary was a working knowledge of English or full explanation or translation. In Surjeet Singh Vs. Union of India (UOI) and Others, the, petitioner being served with the detention order and the grounds in English contended that English was not a language which he understood and that this factor rendered it necessary for the grounds of detention to be served on him in Hindi which was his mother tongue and that the same having not been done, there was in law no communication of such grounds to him, and it was held that under those facts and

circumstances it had not been shown that the petitioner had the opportunity which the law contemplated in his favour of making an effective representation against his detention, which was therefore, illegal and liable to be set aside.

21. In Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, the detenu did not know English but the grounds of detention were drawn up in English and the detaining authority in affidavit stated that the Police Inspector while serving the grounds of detention fully explained the grounds in Gujarati to the detenu. Admittedly, no translation of the grounds of detention into Gujarati was given to the detenu. It was held that there was no sufficient compliance with the mandate of Article 22(5) of the Constitution which required that the grounds of detention must be communicated to the detenu.

22. The Supreme Court in the case of K. Satyanarayan Subudhi Vs. Union of India, and others, held that if there are more than one ground and if the detention can be justified on one of the grounds, the order of detention can still be sustained. The Supreme Court in the aforesaid decision has distinguished its earlier judgment.

23. In the aforesaid decision it was held that "the non-placement of the retraction of the confessional statement by the detenu before the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and in our considered opinion, makes the order of detention invalid."

24. Mr. Somnath Chatterjee learned advocate appearing on behalf of the petitioner submitted that the detaining authority must take into consideration all the relevant circumstances of the case. He should not omit to take into consideration any material fact, nor should he consider any irrelevant fact.

25. It is well settled that the detaining authority must take into consideration all objective materials, otherwise there is a failure on the part of the detaining authority in arriving at his conclusion fairly or lawfully which according to Mr. Chatterjee has not been done in the instant case.

26. Mr. Chatterjee has also submitted that the detaining authority should have taken into consideration any voluntary statement made by the detenu, and should have considered whether there is any retraction of the same or of any alleged confession made by the detenu. Non-consideration of such retraction according to Mr. Chatterjee, is a gross failure on the part of the detaining authority and the same totally vitiates the order of detention.

27. In support of his contention the Learned Advocate relied upon the following decisions.

In the case of Ashadevi v K. Shivraj and another reported in AIR 1979 SC 447 it was held as follows :.

It is well settled that the subjective satisfaction requisite on the part of the detaining authority, the formation of which is a condition precedent to the passing of the detention order will gel vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other ate ignored or not considered by the detaining authority before issuing the detention order.

28. In the aforesaid case by a detention order the detenu was detained with a view to preventing him from engaging in transporting smuggled goods. In passing the detention order the detaining authority based its decision on the detenu''s confessional statement made earlier before the Customs Officers. The said confessional statements were subsequently retracted by the detenu at the first available opportunity while he was in judicial custody.

29. It was held that the questions whether the confessional statements recorded earlier were voluntary statements or were statements which were obtained from the detenu under duress or whether the subsequent retraction of those statements by the detenu was in the nature of an after thought, were primarily for the detaining authority to consider before deciding to issue the detention order but since admittedly the aforesaid vital facts which would have influenced the mind of the detaining authority one way or the other were neither placed before nor considered by the detaining authority it was held that there was non-application of mind to the most material and vital facts vitiating the requisite satisfaction of the detaining authority thereby rendering the detention order invalid and illegal."

30. In Ganga Ramchand Bharvani Vs. Under-Secretary to The Government of Maharashtra and Others, it was inter alia held by the Supreme Court as follows :

The constitutional imperatives enacted in Art 22(5) of the Constitution are two fold : (i) the detaining authority must, as soon as may be, that is, as soon as practicable after the detention, communicate to the detenu the grounds on which the order has been made, and (ii) the detaining authority must afford the detenu the earliest opportunity of making a representation against the detention order. In the context "grounds" does not merely mean a recital or reproduction of a ground of satisfaction of the authority to the language of Section 3; nor it its conclusion of fact." "Nothing less than all the basic facts and materials which influenced the detaining authority in making the order of detention must by communicated to the detenu. The mere fact that the grounds of detention served on the detenu are elaborate, does not absolve the detaining authority from its constitutional responsibility to " supply all the basic facts and materials relied upon in the grounds to the detenu.

31. In the aforesaid case the detenu had asked for statements of witnesses and other documents but the detaining authority without applying its mind to the nature of the documents, the copies of which were asked for by the detenu, mechanically

refused as desired by the Collector to supply the copies of all the documents. Indeed, it was on receiving a direction from the Central Government that the copies were supplied. On account of this chill indifference and arbitrary refusal, the detenu who had applied for copies could get the same only after more than one month. Thus there was unreasonable delay of more than a month in supplying the copies to the detenu, of the material that had been relied upon or referred to in the "grounds"'' which must be supplied to the detenu with reasonable expedition to enable him to make a full and effective representation at the earliest. Of course, what is "reasonable expedition" is a question of facts depending upon the circumstances of the particular case. In the peculiar facts of the instant case, it must be held that the delay of more than a month, in supplying the copies of the basic materials and documents to the detenu had vitiated the detention."

32. Mr. Somnath Chatterjee, Learned Counsel for the petitioner has also relied on a judgement in the case of Sita Ram Somani Vs. State of Rajasthan and Others, and in the aforesaid decision the Supreme Court in paragraphs 3 and 4 of the said Judgment at page 1073 and 1074 observed as follows :

One of the principal points taken in the High Court and repeated before us was that there was no application of mind by the detaining authority as certain vital facts were not brought to the attention of the detaining authority and were, therefore, not taken into consideration by that authority. The ground raised by the appellant in the High Court in his own words is as follows.

That there has been non-application of mind in passing the detention order. The petitioner says that the following relevant facts which would have weighed the satisfaction of the detaining authority one way or the other and influenced the mind of the detaining authority have been purposely withheld and suppressed from the detaining authority thus vitiating the satisfaction :

(a)...

(b) That the petitioner in his bail applications (Annexures A and B) had retracted from the confessional statement and had denied any recovery of gold, foreign currency from his premises.

(c) Shri Om Prakash had also moved bail application in the Court of Addl. Chief Judicial Magistrate, Sessions Court and High Court. He had retracted from his confessional statement and also his association with the petitioner.

(d) The petitioner had retracted from the statement by making an application to the Collector of Customs on 19-1-1985.

(e) Shri Om Prakash had also retracted from his confessional statement by making an application of 18-1-1985.

(f) to (g)...

33. The petitioner says that the above material being relevant and material which would have influenced the mind of the detaining authority one way or the other has been suppressed from the detaining authority.

34. On behalf of the Union of India who was the second respondent before the High Court, a counter-affidavit was filed in which it was stated :

It is not denied that the bail application moved by the petitioner was not submitted before the detaining authority but it is denied that they were not placed before the detaining authority purposely with a view to suppress. The bail applications were not material to be placed before the detaining authority -;.....The representation dated 18-1-1985 of Shri Om Prakash Soni addressed to the Collector, Customs, Jaipur were not considered relevant to be placed before the detaining authority.

35. Later it was said in the same affidavit:

Moreover the documents enumerated in these paras were not considered and were not material. The petitioner has not suggested any material in the said documents which was over and above and very material relevant for the purpose of consideration for the detaining authority. Without which the petitioner cannot take any advantage on the same...

The bail application can never be said to be material document for the purpose of consideration of the detaining authority when the representations were already considered.

36. On behalf of the State of Rajasthan, two counter-affidavits were filed in the first one it was stated : " The documents referred to by the petitioner in this para are not relevant. However, all these documents were also considered at the time of confirming the detention order on 14th August 1985." In the second counter, it was claimed that the Screening Committee consisting of the Law Secretary, the Director General and the Inspector General of Police and the Collector of Customs met on April 4, 1985 and considered the question of detaining the appellant under the COFEPOSA Act, At that time it was said "All matters pertaining to confessional statements, retraction of confessional statements, bail applications, courts orders and all other records were placed before the Screening Committee by the Customs Department." It appears from the counter that thereafter the papers were processed by the Deputy Secretary to the Government of Rajasthan. Shri Pagoria who stated in the affidavit:

Before passing the detention order the whole record of the Customs Department was called, considered by me at the time of processing on 21-5-1985.

37. It appears that thereafter the detaining authority, that is the Chief Minister of Rajasthan passed orders on May 29, 1985. From what has been stated in the counter filed by the Union of India and two counters filed by the State of Rajasthan, it appears to be clear to us that the documents mentioned by the appellant in his

petition were not placed before the detaining authority and, therefore, were not considered by the detaining authority. It is possible that they were placed before the Screening Committee in the first instance, but that is immaterial. It was the detaining authority that had to consider the relevant material before taking a decision whether it was necessary to detain the appellant under the COFEPOSA Act. That was not done and there was therefore a clear non-application of mind by the detaining authority to relevant material. Unfortunately, the High Court viewed it as a question of jurisdiction, that is to say, the High Court thought that the detaining authority had jurisdiction to make the order of detention despite the retraction by the accused of his earlier confessional statement and the tendency of the criminal case against the appellant in which bail had been granted subject to conditions. No one can dispute the right of detaining authority to make an order of detention if on a consideration of the relevant material, the detaining authority came to the conclusion that it was necessary to detain the appellant. But the question was whether the detaining authority applied its mind to relevant considerations. If it did not, the appellant would be entitled to be released. The counters to which we have referred seem to us to make it clear that relevant material was not placed before the detaining authority and there was no occasion for the detaining authority to apply its mind to the relevant material. In the circumstances, the appellant is entitled to be released.

38. In the case of K Satyanarayan Subudhi vs. Union of India and Ors (Supra) it has been held by the Supreme Court that non-placement of retraction of confessional statement by detenu before detaining authority and non-consideration of such retraction by detaining authority while making order of detension is invalid. More so when detenu was under detention for over eight months and order of detention was for period of one year.

39. The Supreme Court in this context, inter alia, observed as follows :-

We have considered the same very minutely and carefully and it appears to us that in fact there were not two grounds but only one ground and the non-placement of the retraction of the confessional statement by the detenu before the detaining authority and non-consideration of the same while arriving at his subjective satisfaction in making the order of detention goes to the root of the order of detention and in our considered opinion makes was the order of detention invalid.

40. In these circumstances we do not think that the decisions of this Court in Prakash Chandra Mehta Vs. Commissioner and Secretary, Government of Kerala and Others, as well as Madan Lall. Anand v. Union of India (1990) SCC 81 are applicable to the instant case. We have also considered another aspect of the matter i.e. the detenu is under detention for over eight months and the order of detention is for a period of one year. Considering this aspect also along with the other aspect mentioned hereinbefore we think it Just and proper to quash the order of detention and direct for the release of the detenu appellant forthwith provided he is wanted

by another. The appeal is thus allowed and the order of detention is quashed."

41. It is. therefore settled as appears from the aforementioned cases that the detaining authority must take into consideration all objective materials otherwise there is a failure on the part of the detaining authority in arriving at his conclusion fairly or lawfully and such non-consideration vitiates the. decision of the detaining authority. It is also well-settled that where the detaining authority takes into consideration any voluntary statement made by the detenu, it is essential for the detaining authority to consider whether there is any retraction of the same or of any alleged confession made by the detenu. Non-consideration of such retraction is a gross failure on the part of the detaining authority and the order of detention accordingly stands vitiated.

42. In the writ petition before us it appears from record that authority concerned has failed to consider the bail application wherein the petitioner has retracted from the confessional statement. The petitioner has also retracted from the confessional statement made in the said bail application. The said fact, however, should have been scrutinized and considered and the petitioner should have been given opportunity to make his submissions thereon.

43. It also settled as appears from the decisions already noted that the petitioner should have been supplied with copies of the grounds in the language he understands clearly and the contents of the document should have been explained to him in the instant case. In the cases before us the said obligations were not complied with.

44. Considering the facts and circumstances of the case the detention orders are accordingly quashed and set aside.

All the aforesaid writ petitions are accordingly disposed of.

There will be no order as to costs.

A.K. Sengupta, J.

I agree.