

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
JAMMU**

LPA NO. 19/2024

Showkat Ali,
S/o. Mishar Din@Mishru's,
R/o. Saldhar, Tahsil Mahore,
District Reasi

... Appellant

Through: - Mr. Mohammad Amir Awan, Advocate

Versus

Union Territory of Jammu and Kashmir
& Ors.

... Respondents

Through: - Mr. Sumeet Bhatia, G.A

CORAM:

**HON'BLE MR. JUSTICE ATUL SREEDHARAN
HON'BLE MR. JUSTICE PUNEET GUPTA**

ORDER

Per Atul Sreedharan J.

The present appeal has been filed by the appellant who is aggrieved by the judgement dated 13/10/2023 passed in WP (CRL) No. 42/2023 whereby, the habeas corpus petition filed on the behalf of the appellant was dismissed by the learned single judge.

- 2.** The brief facts of the case are as follows. The appellant has been detained under the J & K Public Safety act, 1978 vide order of detention No. 03-PSA of 2023 dated 20/02/2023. The said order was issued by the respondent No. 2. The appellant is presently lodged at District Jail Amphalla, Jammu.
- 3.** The case of the union territory against the appellant is that he was indulging in activities that were prejudicial to the security

of the state. Undisputedly, there are no FIR's registered against the appellant and he has been taken into preventive detention on the grounds that he was indulging in anti-national activities by being in constant touch with his cousin brothers who were involved in militancy and have presently crossed over to Pakistan. It is also the case of the union territory that the petitioner has been indulging in radicalising the youth of Reasi to join and strengthen a network against the nation which is threatening the sovereignty and security of the nation. It is also the case of the union territory that the appellant has been taken into preventive detention after adhering to all the constitutional and procedural safeguards and the material that has formed the basis for the grounds of his detention have also been furnished to him. It is also the case of the union territory that the grounds of detention and other material were read over and explained to the petitioner in the languages that he understands.

- 4.** In the grounds of detention, the charge against the appellant is that his brother, one Mohammad Sharif, who is a resident of Sildhar in District Reasi, had joined militancy in the year 2002 and an FIR was registered against him in P/S Mahore. It is further alleged that the appellant's brother crossed over to Pakistan in the year 2010 and joined the ranks of militants there. It is also alleged that a cousin brother of the appellant by the name of Mohammed Shafi, a resident of district Ramban had also joined terrorist activities and that he was also

presently in Pakistan. The next allegation against the appellant was that the appellant's brother-in-law by the name of Nisar Ahmed, a resident of District Reasi had also joined the ranks of militancy in 2002 but was later killed by the security forces in the year 2007. It was also alleged that the appellant was maintaining contacts with both his brothers who were settled in Pakistan and also with another Pakistan based handler named Mohammed Qasim, a resident of Angralla, through social media apps and was involved in reviving militancy by himself motivating the family members of the killed militants to join the ranks of terrorists and wage a secret war against the nation and disturb peace and tranquillity in the district.

- 5.** The dossier disclosed three cases against the appellant. They are DDR No. 22 dated 01/02/2023 of PS Mahore, DDR No. 09 dated 06/02/2023 of PP Shajroo PS Mahore and DDR No. 12 dated 11/02/2023 of PS Mahore. As regards DDR No. 22 dated 01/02/2023, it relates to an information from a reliable source that the appellant has been indulging in anti-national activities. It further alleges that one of his elder brothers namely Mohammad Sharif had joined militancy in the year 2002 and an FIR No. 10/2010 for offences under sections 120-B/121/122/IPC along with offences under 7/25 of the Arms Act was registered against him at PS Mahore. It was also alleged that Mohammad Sharif had crossed over to Pakistan in the year 2010 and joined militant ranks there. In the same daily diary

report, the next allegation is that the brother-in-law of the appellant whose name is Nisar Ahmad, a resident of tehsil Mahore, District Reasi, joined militancy in 2002 but was killed by the security forces in the year 2007. It further disclosed that the appellant is in constant contact with his brother and cousin through WhatsApp numbers and other restricted applications and that the appellant, with other anti-national elements across the borders, were surreptitiously radicalising others for strengthening his network against the nation. It is further alleged that the appellant has been creating an atmosphere to disturb communal harmony and that there was a need of keeping his activities under surveillance as a preventive measure as the appellant was indulging in reviving militancy in the area.

- 6.** The entry in DDR No. 09 dated 06/02/2023 of police post Shajroo accused the appellant of indulging in anti-national activities affecting the security of the union territory of J and K. After that the remaining part of this daily diary entry is identical to the entries in DDR No. 22 dated 01/02/2023 relating to the brothers of the appellant having joined the ranks of militants along with his brother-in-law who was subsequently killed by the security forces.
- 7.** As regards DDR No. 12 dated 11/02/2023 of PS Mahore, the allegation is that on 11/02/2023, and information was received through reliable source at police station Mahore, that the

appellant has been indulging in anti-national/anti-social activities having an effect upon the security of J and K and had developed a mechanism of contacting the families of the killed militants with a view of widening his activities. After that, the remaining allegations in the daily diary report is identical to the allegations pertaining to his brothers being involved in the militant activity along with his brother-in-law, who was subsequently killed by security forces which facts are already mentioned in DDR No. 09 dated 06/02/2023.

- 8.** Thus, it is seen that all the three daily diary entries are identical, and the only difference is the dates on which those entries have been made. Thereafter, the grounds of detention disclose that from the facts and circumstances mentioned in the grounds of detention, that the appellant at the behest of PAK handlers have been looking out for opportunities to instigate the local youth/families of the killed terrorists to join militancy with an oblique motive of reviving and strengthening the militancy - related network in the name of Jihad against the country. It further observed that the activities of the appellant are prejudicial to the security of the country and in particular to the union territory of J and K.
- 9.** The Ld. single judge was of the view that the settled position of law regarding the scope of judicial review of detention orders is limited to the extent of examining whether the detaining authority has applied its mind to all the relevant circumstances

and whether there is proximate link between the past conduct of a person and the necessity to detain him. Applying the same to the facts of the case, the learned single judge referred to the brothers of the appellant being involved in militancy and how the appellant's brother-in-law had also joined militancy in the year 2002 only to be killed by the security forces in 2007 and how, the appellant was maintaining contacts with his two brothers who were now settled in Pakistan. The Ld. Single judge also considered the allegation in the grounds of detention that the appellant is in contact with one Mohammed Qasim, a Pakistan-based handler to revive militancy in District Reasi. These allegations according to the learned single judge are specific and clear leaving no scope for ambiguity. It also records the fact that the appellant may have been only five years old when his cousin brothers were indulging in militant activities and had crossed over to Pakistan but that he continued his association with them after he grew up. On that basis, the learned single judge arrived at the finding that the detaining authority had derived subjective satisfaction on relevant material which form the basis of the impugned order of detention which has live proximate link necessitating the preventive detention of the appellant.

CAN SUBJECTIVE SATISFACTION BE BASED UPON BALD ALLEGATIONS OR, MUST THE DETAINING AUTHORITY INSIST ON MATERIAL/FACTS IN SUPPORT OF SUCH ALLEGATIONS?

- 10.** There is a plethora of judgements of the Supreme Court and the various high Courts of the country on the aspect of “subjective satisfaction” to be arrived at by the detaining authority which would reflect the application of mind on its part. The main grounds for setting aside an order of preventive detention are the non-application of mind of the detaining authority or the denial of opportunity or material to the detainee to enable him to make an effective representation against his detention. That brings this court to the question as to whether subjective satisfaction can be arrived at by the detaining authority only based on bald allegations in the police dossier, without there being any facts/material in support of those allegations?
- 11.** Before proceeding further, certain questions come to the mind of this Court. **(a) Firstly**, is there any difference between an “**Allegation**” and “**Charge**”? and **(b) secondly**, if there is a difference between the two, is there a variation in their application *qua* a criminal trial and in proceedings under the preventive detention laws? And **(c) thirdly**, what is required in the grounds of detention, an allegation or a charge?
- 12.** An allegation is an imputation. It need not be verifiable. Charge on the other hand is also an imputation, *albeit* verifiable. An imputation without material in support is an allegation and an imputation with supporting material is a charge which *prima facie* reflects that what is imputed, maybe true. Thus, allegation is the genus and charge its species. By analogy, the concept can

be understood at the stage of framing charge in a criminal trial. The chargesheet filed by the police may level several allegations against the accused in the chargesheet but, the Trial Court frames charge for only those allegations for which *prima facie* evidence exists in the chargesheet. While an allegation may be generalised, non-specific and broad based, a charge must be specific, precise and accord a reasonable opportunity to the person so charged to conduct his defence or proffer an explanation. Thus, a verifiable allegation/imputation is a charge.

- 13.** To answer the second question that this Court has posed to itself, this Court is of the opinion that there is a marked difference in the operation of “charge” in a criminal trial and in proceedings under the preventive detention laws. In a criminal trial, the one who imputes i.e., the prosecution, bears the *onus probandi* of proving every single charge against the accused which if not proved beyond reasonable doubt, may result in the acquittal of the accused. While, in proceedings under the preventive detention laws, the *onus probandi* of giving a convincing explanation to the imputations levelled by the detaining authority, is on the detainee and if the same satisfies the detaining authority or the advisory board, his detention may be revoked.
- 14.** As regards the third question as to what is required to be stated in the grounds of detention viz., allegations or charge, this Court

is of the view that the grounds of detention must lay down the charge against the detainee. It must be precise, unequivocal and unambiguous. The detainee must be in a position to give a specific reply/rebuttal to the charge and that is only possible where charge is specific and precise. Else, the detainee is only able to give a bare denial by stating that the allegation is false. However, if the charge is specific regarding the date, time and the specific act of the detainee which requires him to be taken into preventive detention then, the detainee is able to give a specific response of denial rather than a bare denial. Thus, this Court is of the view that the grounds of detention must lay down the specific charge against the detainee rather than unsubstantiated and unverifiable allegations. If the grounds of detention are based on unsubstantiated allegations, the same, along with the order of detention can be quashed as the detainee has not been given an opportunity to make a viable representation either to the detaining authority or to the advisory board. The opportunity to represent to the abovementioned authorities is not a hollow formality. To detain a person only based on allegations without there being any material to substantiate those allegations would imperil the fundamental right of the individual enshrined in article 21 of the Constitution.

- 15.** Whenever, the District Magistrate receives a request from the police along with the dossier to detain an individual, he must

examine the charge by referring to the material accompanying the police dossier which would at least *prima facie* substantiate the charge against the detainee. Besides, the charge against the individual must be substantial and not fanciful or imaginary. The District Magistrate must appreciate that the authority to detain an individual as a preventive measure would also result in the violation of article 21 of the Constitution, if the same is exercised without caution or accountability. The exigencies of the time though relevant, cannot be stretched to the extent of depriving an individual's liberty in the absence of reasonable cause. The material in support of the charge warranting the detention of an individual must be such that it *prima facie* probalilise the allegations levelled against him.

16. Thus, subjective satisfaction arrived at by the District Magistrate in the absence of any material to *prima facie* support the allegations against the detainee, in the police dossier, would smack of non-application of mind on the part of the detaining authority. A constitution court must scrutinise the grounds of detention to satisfy itself that the allegations contained in the police dossier and considered by the District Magistrate in the grounds of detention, were supported by adequate material justifying the subjective satisfaction arrived at by the District Magistrate, that the detention of the detainee was essential, either in the interest of security of the state or public order. While doing so, the High Court is not expected to supplant the

subjective satisfaction of the District Magistrate with that of its own, but it is only to examine the grounds of detention to satisfy itself that there was reasonable cause to detain the detainee. No man may be summarily detained under the preventive detention laws only on the basis of unsubstantiated and bald allegations. It is only when the detention is justifiable on the basis of material in support of the allegations in the police dossier against the detainee, that the court would examine whether other procedural formalities, which are mandatory have been complied with. Where the subjective satisfaction of the detaining authority has been arrived at without any *prima facie* material in support of the allegations warranting the detention of the detainee, the order of detention cannot be upheld only on the ground that other constitutional and procedural safeguards of giving the material to the detainee on the basis of which has been detained, have scrupulously been observed. If the High Court adopts a hands-off approach while dealing with an order of detention under the Public Safety Act only on the ground that the mandatory procedural safeguards have been complied with even after being convinced on merits that there existed no material against the detainee in support of the allegations against him in the police dossier forwarded to the District Magistrate, the same would reduce the protection under article 21 of the Constitution purely cosmetic.

17. The grounds of detention in this case are vague without any specific reference to date, time and place. It is not disputed that when the brothers of the appellant allegedly went away to Pakistan in order to participate in terrorist activity against the Indian state, the detainee was only a child and, if the brothers of the appellant have joined the ultras and moved to Pakistan, how is the appellant responsible for the same? Likewise, if the brother-in-law of the appellant joined the terrorists and was later killed by the security forces, how is the appellant connected to the actions of the brother-in-law, one way or the other? The three daily diary reports are identical but for the fact that they have been recorded on three different dates. The imputation that the appellant was in contact with secessionists is a bald allegation and not a charge. There is no averment in the grounds of detention as to how the detaining authority arrived at this conclusion. There is no reference to any witness statement, or any documentary material based on which the said allegation has been made. As regards the allegation that the detainee has been trying to influence the families of the killed terrorists to join the movement against the state is concerned, the grounds of detention is totally silent about who these persons were or when and where did the appellant attempt to incite such persons to join his alleged endeavour. This Court has consciously used the term “allegations” to refer to the material in the detention order on account of the absence of

reference to any material that would support the allegations giving it the colour of a charge.

- 18.** This Court is aware that many a times, it is intelligence reports and source information from which this information is received and disclosing the details of the source may imperil the source itself. In such cases, charges with specific details can be given to the detainee redacting the identity of the source therefrom. But to take a stand that no details of the allegations shall be given, and if the same is upheld by this Court, the environment created would be such that anyone and everyone with whom the establishment of the day has an issue, which is not related to public safety/order or security of the state, can still be taken onto preventive detention raising the bogey of either public order or security of the state without giving any specific material in the grounds of detention to the detainee to rebut.
- 19.** It is essential for the grounds of detention to clearly mention the charge and the material on the basis of which the grounds of detention find support for each of the charge. The State cannot level bald allegations on the detainee and hand over a bunch of documents and take the stand that all material considered by the detaining authority has been handed over the detainee. It would also be necessary for the detaining authority to mention in the grounds of detention the material/evidence/documents on the basis of which it is levelling a specific charge against the appellant in the grounds of detention in order to accord a viable

opportunity to the appellant to give a representation to the detaining authority or to the advisory board, as the case may be.

20. Therefore, in view of what has been argued and considered by this court as hereinabove, **the appeal is allowed**, the impugned order is set aside, the order of detention is quashed, and the appellant is directed to be set at liberty forthwith.

(PUNEET GUPTA)
JUDGE

(ATUL SREEDHARAN)
JUDGE

JAMMU
26/07/2024

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No