

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

W.P No. 1215-M/2022 with Interim Relief

(Umar Khan v. The State & others)

Present: Mr. Fazle Haq, Advocate for the
petitioner.

Mr. Razauddin Khan, A.A.G for the
respondents.

Date of hearing: 03.11.2022

JUDGMENT

Dr. Khurshid Iqbal, J.-

 1. The petitioner has suffered preventive detention on the order of the Deputy Commissioner ("Respondent") of District Malakand, passed under section 3 of the West Pakistan Maintenance of Public Order Ordinance, 1960 (MPO), against him. He has filed the instant petition under Article 199 of the Constitution of the Islamic Republic of Pakistan (the "Constitution"), seeking a judicial review of that order in constitutional jurisdiction of this Court. In the order challenged in the instant petition (impugned order), the petitioner is blamed that he is acting in a manner, which is pre-judicial to public peace and maintenance of public order in District Malakand.

2. In response to notice, the learned Additional Advocate General (A.A.G), appeared. We have heard arguments of learned counsel for the

petitioner and the learned A.AG., and perused the available record.

3. The significance of the legality of preventive detention lies in the fact that it relates to the right of an individual's liberty, at one extreme, and the executive's accountability to laws, on the other. It cuts across criminal law, human rights, and good governance in the realm of the rule of law. Indeed, the right to personal liberty is a basic human right and the obligation of the government not to abridge this right is an essential element of the rule of law. We have noted that there is a trend of passing preventive detention orders on various pretexts, which are called into question by appealing to us in our constitutional jurisdiction. Our higher Courts have set out clear and comprehensive guidelines in several cases, including certain leading ones, with precedents from other jurisdictions. We deem it appropriate to discuss the law on the subject in some details, which are not only necessary for our reasons in reviewing the impugned orders, but which may also be helpful to all concerned.

4. Preventive detention, basically a domain of the executive limb of the State, aims at curtailing the liberty of an individual without any specific and actionable criminal charge for protecting society from

the individual's anticipated illegal and criminal activity. In other words, if the liberty of such an individual is not curtailed through an executive order, he/she may commit a crime. Preventive detention is different from punitive detention inasmuch as the latter is pursuant to punishment awarded on the conclusion of a trial by a Court of competent jurisdiction under the law. The former is ordered to prevent, or so to say, preempt an individual from involvement in such acts which are detrimental to society. Thus, preventive detention is ordered on mere suspicion, more so, as a subjective opinion of a public functionary and for this reason comes, at times, under severe attack from the perspective of the constitutionally guaranteed human rights within the contours of the rule of law and accountability of the executive authorities. In this context, it is provided and governed by statutory law and always subject to judicial review by higher Courts under their constitutional jurisdiction. The law itself does not require the public functionary to act upon reasonable ground but leaves it to act upon its own subjective satisfaction Abdul Baqi Baluch v. The Government of Pakistan (PLD 1968 SC 313). Thus, while preventive detention could be ordered under a law, what is necessary is that the public functionary must have material before it while forming its



subjective opinion to pass an order. The Court, then, while reviewing such order has to see whether it is reasonable and compliant with the aim and objective of the law authorizing it.

5. Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. Article 10 guarantees the rights of an individual to be informed of the reason for arrest and detention; to consult and be defended by a legal practitioner of his/her choice; and to be produced before a magistrate *within* (instantaneously) a period of twenty four hours in the event of arrest and detention. While the above safeguards are not available in case of preventive detention, sub-articles (4)-(8) of Article 10 enunciate the subject matters a preventive detention law shall relate to, duration of detention, review of detention and the right of hearing at such review and the subjects (the persons whose preventive detention may be ordered). The MPO, as the law relating to preventive detention, must be compliant with sub-articles (4)-(8) of Article 10.

According to its preamble, the MPO aims at amending and consolidating the law relating to preventive detention and control of persons and publication connected with maintenance of public

order in former West Pakistan. According to Section 3(1), Government may, on being satisfied, order preventive detention of a person: firstly, who acts prejudicially to public safety or maintenance of public order; and secondly, who deals with black market under the 1948 hoarding and black market law; third, involved in smuggling punishable under the 1878 sea custom law or the 1924 land custom law; and, fourth, one who is or was a member of an association or its Executive Committee, having been declared to be unlawful under the law for the time being in force and he remains or becomes a member of such an association thereafter. Section 3 (2) empowers the Government or the District Magistrate, empowered by the Government, to order the arrest and detention of such person about whom he has reason to believe that the act of such a person is prejudicial to public safety or public order.



6. The sensitiveness of the right to liberty vis-à-vis could be understood from the observation of the Supreme Court—"the presumption is that every imprisonment without trial is prima facie unlawful"—in the famous case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14). Such imprisonment, most notably, in the form of preventive detention without any lawful

justification is subject to judicial review by a High Court [Maulvi Farid Ahmad v. Government of West Pakistan (PLD 1965 Lah. 135)]. The nature of judicial review power of a High Court, however, is not that of appeal or revision. The Court has to apply the test of reasonableness and objectivity [Shamas Din v. Deputy Martial Law Administrator, Lahore (PLD 1979 Lah. 74)]. The “satisfaction” of the Government, as per Section 3 of the MPO, while forming an opinion about exercising its power of preventive detention, must be real, meaningful, reasonable and convincing. Thus, mere production of a detention order is not sufficient. The Court will be justified to compel an authority to produce before it the material upon which it has based issuance of an order. This, needless to say, is to ensure that the authority did not pass an impugned order in unlawful manner [Abdul Baqi Baluch v. The Government of Pakistan PLD 1968 SC 313]. In *Shorish Kashmiri* referred to above, the Supreme Court further clarified the function of a High Court, observing that a High Court has to see that the ground in an impugned order is relevant to the purpose of the law authorizing it and that it has been passed on the strength of some material before it and with a degree of reasonableness. The incompatibility of an impugned order with aim of the law may lead one to



infer extraneous consideration and mala fide (Liaqat Ali v Government of Sindh through Secretary, Home PLD 1973 Karachi 73). The Court has to scrutinize the impugned order through the lens of “without lawful authority” and “in lawful manner”, used in Article 199 (b) (1) of the Constitution. The former phrase is suggestive of the fact that an authority has the power under the law to pass such an order. The latter means that it is to be in accordance with law. In other words, these phrases respectively indicate that an impugned order shall not suffer with jurisdictional and procedural defects.

7. The phrase “public order” has not been defined in the law. P. Ramanatha Aiyar’s Advanced Law Lexicon (Shakil Ahmad Khan, LexisNexis, Vol. 3 J-P, 5th Edition, p. 4204) has reproduced its various connotations offered in several Indian cases. A few of them may be cited here for quick reference:

“This is an expression of wide connotation and signifies the state of tranquility prevailing among the members of political society as a result of the internal regulation of the Government.

The concept of “public order” must be distinguished from the concept of “law and order” and “security of the State.” In some cases, the difference was illustrated by means of three imaginary concentric circles, the narrowest (*sic*) relating to security, the next to public order and the third and the largest to law and order. In other cases, the differentiation was based on the degree of the disorder although this test is unsatisfactory.

Public Order means even tempo of the life of the community taking within its fold even a specified locality and a substantial section of the society.”

8. In the case of Federation of Pakistan through Secretary, Ministry of Interior, Islamabad v. Mrs. Amatul Jalil Khwaja and other (PLD 2003 Supreme Court 442), Hon'ble the Supreme Court has laid down certain tests with detailed explanation, which have been summarized in Ameer Hussain v. Government of Punjab and other (PLD 2022 Lah. 61), as follows:

“(i) the Court must be satisfied that the material before the detaining authority was such that a reasonable person would be satisfied as to the necessity for making the order of preventive detention;

“(ii) the satisfaction should be established with regard to each of the grounds of detention and if one of the grounds is shown to be bad, nonexistent or irrelevant, the whole order of detention would be rendered invalid;

“(iii) the initial burden lies on the detaining authority to show the legality of the preventive detention;

“(iv) the detaining authority must place the whole material upon which the order of detention is based before the Court notwithstanding its claim of privilege with respect to any document, the validity of which claim shall be within the competence of the Court to decide.

“(v) the Court has further to be satisfied, in cases of preventive detention, that the order of detention was made by the authority prescribed in the law relating to preventive detention and that every requirements of the law relating to preventive detention had been strictly complied with;

[Handwritten signature]

(vi) the 'satisfaction' in fact existed with regard to the necessity of preventive detention of the detainee;

(vii) the edifice of satisfaction is to be built on the foundation of evidence because conjectural presumption cannot be equated with satisfaction; it is subjective assessment and there can be no objective satisfaction;

(viii) the grounds of detention should not be vague and indefinite and should be comprehensive enough to enable the detainee to make representation against his detention to the authority, prescribed by law;

(ix) the grounds of detention had been furnished within the period prescribed by law, and if no such period is prescribed, then 'as soon as may be'."

 9. This Court has also been able to develop a good deal of jurisprudence on preventive detention. Relevant cases are: Anwar Ali v. District Magistrate, Dir Upper and 8 others (PLD 2020 Peshawar 44), Hamayun v. D.C.O, Kohat and 6 others (2014 P Cr. L J 173), Khanan v. D.C.O, Kohat and 5 others (2014 MLD 105), Khurram Shahzad v. Government Of Khyber Pakhtunkhwa (KPK) through Secretary Home and T.A. and 6 others (2013 YLR 2268), Asif Gohar v. Sardar Aman Khan and 2 others (2010 YLR 2219) and Rizwan Ullah and 2 others v. Secretary Home and Tribal Affairs Govt. of N.-W.F.P. peshawar and 3 others (2009 MLD 1482).

10. The right to liberty is a universally recognized human right. The Universal Declaration of

Human Rights, states that no one shall be subjected to arbitrary arrest, detention or exile (Article 9). This protection is elaborated in Article 9 of the International Covenant on Civil and Political Rights, 1976 (ICCPR). In its General Comment 29, the Human Rights Committee, established under the ICCPR, has even stated that the right to liberty is a rule of peremptory norm [HRC, General Comment 29, HRI/GEN/1/Rev.9 (vol I)234, para 11]. Pakistan, as a party to the ICCPR, has binding (also called perfect) obligation to respect (the duty of the State to refrain from violation), to protect (duty of the State to prevent violation by third parties); and fulfill (duty of the State to formulate policy) human right for its citizens.



11. We would now revert to the case in hand. The ground mentioned in the impugned order is that the petitioner is stated to have “involved in bullying and menace”. The impugned order does not refer to any material at all. It follows that the respondents had no material before it to form a subjective opinion in support of the impugned order. The impugned order fails to qualify the tests mentioned in para 9, above. There was no material before the respondents; no question arises as to satisfaction of each ground; the respondents failed to discharge their initial burden to show the legality of the impugned order; the

respondents failed to show any material let alone whole material upon which they passed the impugned order; the respondents failed to satisfy this Court that they passed the impugned order as prescribed in the law; they failed to show that the 'satisfaction' in fact existed; the impugned order are not based on evidence appear to be conjectural; the ground of detention are vague and indefinite. The ground of detention, however, was furnished promptly.

12. As a corollary of our above discussion, the petition in hand, is allowed. The impugned order of respondent No. 2 dated 11.10.2022 is set aside as the same is found by us to be against the preamble, spirit, scope and object of Section 3 of The West Pakistan Maintenance of Public Order Ordinance, 1960. The petitioner is directed to be released forthwith, if not required in any other case.

13. These are the reasons of our short order of the even date.

Announced
Dt: 03.11.2022
Abdul Saboor


JUDGE


JUDGE

(D.B) **HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR**
HON'BLE MR. JUSTICE Dr. KHURSHID IOBAL

office
2/12