Privy Council Appeal No. 83 *of* 1945

The King-Emperor - - - - - - - - *Appellant*

v.

Vimlabai Deshpande and another - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1946

Present at the Hearing:

THE LORD CHANCELLOR
LORD WRIGHT
LORD DU PARCQ
LORD JUSTICE MORTON
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal by special leave from an order of the High Court of Judicature at Nagpur made on the 29th September, 1944. The order was made by the High Court in purported exercise of the powers conferred on it by Section 491 of the Code of Criminal Procedure, which enables High Courts to take action in the nature of *habeas corpus*. The order directed that the second respondent, Puroshottam Yeshwant Desphande, (hereinafter called " the detenu "), should be set at liberty forthwith on the ground that his detention was illegal. In granting special leave to appeal, the Board imposed the two following conditions: (1) That the detenu should not in any event be re-arrested in respect of the matters to which the appeal relates, and (2) That the petitioner should pay the costs as between solicitor and client incurred by the respondents both in opposing the petition and in the appeal.

At the outset counsel for the respondents contended that no appeal was competent. That such a contention is open at the hearing of an appeal, notwithstanding that special leave has been given without reserving express power to challenge the competency of the appeal, was established by two decisions of this Board, *Zahid Husain* v. *Mohammad Ismael*, (1930), L.R. 57 I.A. 186, and *Mukhlal Singh* v. *Kishuni Singh*, *ibi.* p. 279. In support of his argument that the appeal is incompetent counsel relied mainly on the well-known case of *Cox* v. *Hakes*, 15 App. Cas. 506, and a recent decision of this Board, *The King-Emperor* v. *Sibnath Banerji*, (1945), L.R. 72 I.A. 241. In *Cox* v. *Hakes*, the House of Lords decided that in England no appeal lay from an order of discharge made on the return to a writ of *habeas corpus*. The question turned primarily on the construction of Section 19 of the Judicature Act, 1873. In their speeches, both Lord Halsbury and Lord Herschell noticed two decisions of the Privy Council, *Attorney-General for Hong-Kong* v. *Kwok-A-Sing*, (1873), L.R. 5 P.C. 179, and *Reg* v. *Mount*, (1875) L.R. 6 P.C. 283, and pointed out that special considerations applied to appeals from Colonial

Courts in which the Privy Council was tendering advice to His Majesty as to the exercise of the prerogative. The case of *The King-Emperor* v. *Sibnath Banerji* was one in which an appeal lay from an order of discharge made by a High Court in India under section 491 of the Code of Criminal Procedure to the Federal Court under section 205 of the Government of India Act, 1935, and from the Federal Court to the Privy Council under section 208, and it was held that the rule in *Cox* v. *Hakes* had no application to such a case. In the present case, however, no appeal lay to the Federal Court under the Government of India Act, 1935, since no question was involved as to the interpretation of the Act or any Order-in-Council made thereunder, and the question for decision is whether an appeal lies direct to the Privy Council from an order of a High Court discharging a person from custody under Section 491 of the Code of Criminal Procedure. The broad principle which must determine this question is that appeals from decisions of Courts in the British Dominions and Dependencies to the King in Council are heard under the Royal Prerogative, and that the prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliament. There is no Act of Parliament which prohibits, or authorises the prohibition of, an appeal to His Majesty in Council by a party aggrieved against an order discharging from custody under Section 491 of the Code of Criminal Procedure. In their Lordships' opinion, therefore, the preliminary objection fails.

Dealing with the merits of the matter, their Lordships think that the questions for decision lie within a narrow compass and depend on the construction of Rule 129 of the Defence of India Rules, 1939, with which must be read Rule 26. It will be convenient at the outset to set out the relevant provisions of those Rules.

" Rule 129.—(1) Any police officer . . . may arrest without warrant any person whom he reasonably suspects of having acted . . .

(*a*) . . . in a manner prejudicial to the public safety or to the efficient prosecution of the war.

(2) Any officer who makes an arrest in pursuance of sub-rule (1) shall forthwith report the fact of such arrest to the Provincial Government and pending the receipt of the orders of the Provincial Government may, subject to the provisions of sub-rule (3), by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify: Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding 15 days without the order of the Provincial Government; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding 2 months.

(4) On receipt of any report under the provisions of sub-rule (2) the Provincial Government may, in addition to making such order subject to the second proviso to sub-rule (2) as may appear necessary for the temporary custody of any person arrested under this rule, make in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the said Government in the circumstances of the case to be reasonable or necessary."

" Rule 26.—(1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war, it is necessary so to do, may make an order:

(*b*) directing that he be detained; "

The relevant facts giving rise to this appeal can be briefly stated:

(*a*) On the 21st August, 1944, the detenu was arrested pursuant to an order given by the Deputy Inspector-General of Police, under Rule 129. The arrest was made by a Police Officer, K.C. Diwakar.

(*b*) On the 22nd August, under an order signed by the said K.C. Diwakar, the detenu was committed to the custody of the Superintendent, Central Gaol, Nagpur. The order was expressed to be made under the powers conferred by sub-rule (2) of Rule 129.

(*c*) On the 23rd August, a report of the arrest was made to the Provincial Government as required by sub-rule (2).

(*d*) On the 26th August, the Provincial Government, purporting to act under sub-rule (4) of Rule 129, directed that the detenu be detained in police custody for a period expiring on the 4th September, 1944.

(*e*) On the 2nd September, 1944, the Provincial Government, purporting to act under sub-rules (2) and (4) of Rule 129, directed that the detenu should be detained in police custody for a further period of 15 days from the 5th September, 1944. A further order was made by Government on the 19th September, 1944, for a further extension of the period of detention, but as this order was made after the hearing in the High Court, such order cannot affect the position.

(*f*) In the meantime, namely, on the 25th August, the detenu's wife, who is the first respondent, made application to the High Court under Section 491 of the Code of Criminal Procedure, complaining that the detention of the detenu was illegal and improper. This application was supported by certain affidavits made by Waman Deshpande, a nephew of the detenu, alleging, amongst other things, that the detenu had been interrogated by the police whilst in prison, that he had been questioned only about one Inamdar, a former employee of the detenu, who was alleged to have been concerned in a dacoity committed in the Province of Bombay, and that no questions were ever put to the detenu about any activities which could have brought him within the operation of Rule 129 of the Defence of India Rules.

(*g*) No evidence was filed by the Police Officer who arrested the detenu, or by the Deputy Inspector-General of Police on whose orders the arrest was made, and the only evidence filed on behalf of the Provincial Government dealing with the grounds of suspicion against the detenu was an affidavit sworn by the Chief Secretary of the Provincial Government on the 10th September, 1944, which said that the report of the arrest of the detenu had been received by the Provincial Government on the 23rd August, and that it revealed reasonable grounds for suspecting that the detenu was actively associated with certain persons engaged in underground activities calculated to prejudice the public safety and efficient prosecution of the war, and in the opinion of the Provincial Government there were reasons to suspect that they had already acted in a manner which had prejudiced the public safety. It will be noticed that this affidavit contains no allegation that the detenu himself had been engaged in any subversive activities, or even that he was aware of such activities on the part of his associates.

(*h*) The application was heard by the High Court of Nagpur on the 11th September, and judgment was given on the 29th September, holding that the detention of the detenu was illegal, and directing that he be set at liberty forthwith.

The two questions which in their Lordships' view arise on this appeal are:

(i) Where a Police Officer makes an arrest under Rule 129 (1) of the Defence of India Rules, is he bound to prove to the satisfaction of a Court before whom the arrest is challenged that he had reasonable grounds of suspicion?

(ii) If he is so bound and fails to discharge the burden laid upon him, is an order made by the Provincial Government under Rule 129 (4) for the temporary custody of a person arrested valid notwithstanding that the arrest was invalid?

Upon the first question it is important to notice the differences between Rule 26 and Rule 129. Under the former rule an order of detention can be made only by the Central or Provincial Government, though this power may be delegated under the Defence of India Act; and the Government

may make an order of detention if it is satisfied with respect to any particular person that, with a view to preventing him from indulging in the subversive activites specified, it is necessary so to do. It is to be noticed that the Government must be satisfied, mere suspicion is not enough, but there is no qualifying adverb such as " reasonably " or " honestly " attached to the word " satisfied ". On the other hand, under Rule 129, any Police Officer can arrest on mere suspicion, but the suspicion must be reasonable, the exact words being " any person whom he reasonably suspects ". As the High Court noticed in their Judgment, the House of Lords, in the case of *Shearer* v. *Shields*, [1914], A.C. 808, had to construe a provision in the Glasgow Police Act authorising constables to arrest if they had reasonable grounds of suspicion, and the House held that the burden rested upon the constable concerned to show that his suspicion was reasonable and his act therefore justified. Their Lordships think that the same result must follow under Rule 129. Reliance was placed by the appellant on *Liversidge's* case, [1942], A.C. 206, but as the High Court again noticed, there are two very material distinctions between that case and the present one. In the first place, the authority empowered to arrest under the Defence of the Realm Act is a high officer of state, namely, the Home Secretary, and not a mere Police Officer; and in the second place the House of Lords was impressed with the obvious inconvenience and danger to the public which might ensue if the Home Secretary was bound to disclose confidential information on which he had acted. In India this danger is very largely mitigated by the existence of Rule 26, under which the Government can act whenever it is satisfied as to the matters mentioned in the rule. Cases in India under the Defence of India Rules which may involve disclosure of secret and confidential information will arise only in cases lying in the border-land between the Police being suspicious, and Government being satisfied, as to a person's subversive activities, and such cases are hardly likely in practice to be either numerous or serious.

In their Lordships' opinion, therefore, the High Court was right in holding that the burden lay upon the Police Officer to satisfy the Court that his suspicions were reasonable, and it is plain that on the evidence he had not discharged that burden.

The second question turns on the construction of Sub-Rule (4) of Rule 129, and was strongly pressed by Sir Thomas Strangman on behalf of the appellant. His contention was that the Provincial Government, acting under the power conferred by Sub-Rule (4), had made orders for the temporary custody of the detenu which were on their face unobjectionable, and that such orders were valid whether or not the detenu had been validly arrested. Counsel felt the difficulty of maintaining that an order for detention would be valid if the arrest had been made in bad faith, which he submitted was not the case which he had to meet, and he suggested that an order for custody would be valid if in the light of circumstances known to the Government the arrest appeared to be proper. But the language of Sub-rule (4) affords no warrant for any such distinction. If a valid order for custody can be made, although the arrest was invalid, it can make no difference whether the illegality of the arrest was due to an honest error or to an act of bad faith.

Sub-rule (4) is curiously expressed. It provides that on the receipt of a report under Sub-rule (2) which, be it noted, need only be as to the fact of arrest, the Provincial Government may, in addition to making such order as may appear necessary for the temporary custody of any person arrested under the rule, make, in exercise of any power conferred on it by any law for the time being in force, such final order as to his detention as may appear to Government to be reasonable or necessary. Reference to any law for the time being in force introduces the powers conferred by Rule 26 and possibly other provisions of law, though no such provisions were brought to their Lordships' attention. The sub-rule is so framed as to suggest that what is really being conferred on Government is power to make a final order, power to make an order for temporary custody being expressed parenthetically. But when the language is looked at

carefully it is plain that the sub-rule does not purport to enlarge the powers which Government may possess under any law for the time being in force, and this part of the rule seems designed only to indicate that Government can take advantage of a person being in temporary custody when making a final order under any other law. But a final order for detention can be made under Rule 26 on Government being satisfied as in the rule mentioned, and its validity depends in no way upon the person against whom the order is made being already under arrest. The only substantive power which is conferred upon the Provincial Government by sub-rule (4) is a power to make such order as may appear necessary for the temporary custody of any person, not, be it noted, " arrested ", but " arrested under this rule ", that is on reasonable suspicion as to the person's activities. If no arrest was made under the rule, the power to make an order for temporary custody of the detenu never arose. Their Lordships therefore agree with the High Court in thinking that the Provincial Government had no power to make an order for the temporary custody of the detenu, whose arrest under sub-rule (1) was invalid.

Mr. MacKenna, for the appellant, further relied on Section 16, sub-section (1) of the Defence of India Act, 1939, which provides " no order made in exercise of any power conferred by or under this Act shall be called in question in any Court ". But this argument only raises the same question in a different form. If the orders made by the Police or the Provincial Government were invalid they were not made in exercise of a power conferred by the Act.

The learned judges of the High Court in their judgment—which is not open to criticism on the ground of undue brevity—discussed various other aspects of the case, and their Lordships must not be taken as being in agreement with all the opinions expressed by the learned judges. Upon the view which their Lordships have expressed that the Provincial Government have failed to prove that the arrest of the detenu was justified, and that the orders for custody made against him were illegal, the High Court was plainly justified in making the order which it did make under Section 491 of the Code of Criminal Procedure.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant must pay the respondent's costs of this appeal as between solicitor and client.

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DELIVERED BY SIR JOHN BEAUMONT

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