IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16046 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NIZAMBHAI CHANDBHAI SHEIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 16046 of 2004

MS SAHIN QUARESHI FOR MR MM TIRMIZI for Petitioner

MR HM PRACHCHHAK AGP for Respondents

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 28/02/2005

ORAL JUDGEMENT

1. By filing this Special Civil Application under Article 226 of the Constitution of India, the petitioner has challenged the order of his detention passed by the Police Commissioner, Ahmedabad City on 30th September,

2004 in exercise of powers conferred upon him under Section 3(1) of the Gujarat Prevention of Anti Social Activities Act, 1985 ["PASA Act" for short]. The petitioner is under detention as cruel person from 30th September, 2004 in pursuance of the abovesaid order of detaining authority.

2. The grounds of detention as placed on record reveal that the detaining authority replied upon two types of materials to arrive at subjective satisfaction that the petitioner was a cruel person within the meaning of Section 2(bbb) of the PASA Act. Firstly, the detaining authority relied upon a crime registered against the petitioner before Danilimda Police Station being C.R.No.3172 of 2004 on 12th September, 2004 for the breach of under Sections 3, 5, 7 and 8 of the Bombay Animal Preservation Act, 1954 and for the breach of Section 11-L of The Prevention of Cruelty to Animals Act, 1960 and for the breach of Sections 335 and 336 of the Bombay Provincial Municipal Corporation Act. It was alleged that in this case, that on 12th September, 2004, the Police Inspector one Shri J.H.Chavda of Danilimda Police Station on secrete information, raided a place known as Ram Rahim Tekara, Near New Nagina Maszid in the compound of one Ramesh Sabuwala and found that the petitioner and one other person without obtaining license slaughtering male buffaloes and during raid, the petitioner as well as other persons i.e. Shabbir escape and absconded.

3. The detaining authority relied upon two incamera statements as recorded by the sponsoring authority on 24th September, 2004 and 25th September, 2004 and both verified by the detaining authority on 28th September, 2004. The identities of the witnesses have not been disclosed by the detaining authority claiming privilege under Section 9(2) of the PASA Act. The first witness referred to an incident occurred on 27th August, 2004. At about 5.00 P.M. the witness was passing through Ram Rahim Tekra and found the petitioner and his accomplices sitting there. The petitioner approached the witness and stated that the witness was keeping watch on the slaughter house of the petitioner and on his information, the police used to raid their unlawful slaughter house. The witness was beaten by the petitioner and was threatened by a knife. A crowd was gathered, but none intervene. The second witness referred to an incident occurred on 4th September, 2004. At about 11.00 A.M., the witness was present at his house, where the petitioner and his accomplices approached the witness with gunny bag filled with deadly weapons to slaughter

the animals. The petitioner stated that at that time the police surveillance was strict and, therefore, he intended to keep the the said weapons to slaughter the animals at the house of the said witness. The witness refused to keep such weapons, so the petitioner got excited and he dragged the witness in public place and started beating him. The petitioner aimed a knife to inflict a blow on the witness, but on shouts raised by the witness, though a crowd was gathered, but non-dared to rescue the witness. The petitioner and his accomplices rushed towards the crowd and people started running helter-skelter. The traffic on the road was disrupted and atmosphere of terror and fear was created.

4. From the above material, the detaining authority came to the conclusion that the petitioner was a habitual offender and of a cruel mind. The petitioner was of ferocious and dangerous tendency and after forming a gang through bullying tactics involved himself in slaughtering the animals. Whoever objected to the activities of the petitioner, was beaten in the public by the petitioner. On account of fear and terror of the petitioner no citizens dared to file any complaint against him. Further in view of the detaining authority, the petitioner was a cruel person within the meaning of PASA Act and his activities were prejudicial to the maintenance of the public order. After considering other remedial measures available against the petitioner in general law, the detaining authority came to the conclusion that the activities of the petitioner were required to be prevented forthwith and there was no other alternative, except to detain the petitioner under the PASA Act as cruel person. The detaining authority, therefore, passed an order of detention of the petitioner, which is under challenged in this petition.

5. Learned advocate Ms.Sahin Quareshi for learned advocate Mr.M.M.Tirmizi for the petitioner and learned AGP Mr.H.M.Prachchhak for the respondents were heard at length. Affidavit-in-reply filed by the detaining authority and placed on record by the learned AGP is taken into consideration.

6. Out of various grounds urged on behalf of the petitioner to challenge the order of detention under question as opposed and controverted by the learned AGP, it appears that this petition can be examined on the sole issue whether there was sufficient materials before the detaining authority to arrive at the subjective satisfaction that the petitioner was committing habitually offences under Section 8 of the Bombay Animal

Preservation Act, 1954.

7. Having considered rival contentions fully and going through the record and the grounds of detention, it is necessary to observe that in the matter of detention the prime consideration must not loss sight of that the object of detention law is prevention and not the punishment. Keeping this very object in mind whenever preventive action is proposed to be taken, the authority concerned must arrive at subjective satisfaction from the material on record objectively. The prime necessity to detain a person under preventive detention is to weigh liberty of a citizen vis-a-vis activities alleged against him. Therefore, the behaviour or the activities alleged must be carefully scrutinized by the detaining authority, because such behaviour is a core and backbone of the preventive action. The apprehension of the detaining authority concerning the future behaviour of the detenu which might be alleged to be prejudicial to the society must pass through the strict scrutiny of the detaining authority. There must be cogent material before the detaining authority indicating tendency of repeating prejudicial behaviour of the detenu to the society.

8. It must not also be lost sight of that in the present case, the petitioner is branded as cruel person within the meaning of Section 2(bbb), of the PASA Act. The intention of legislature is very clear from the phraseology used and employed in the statue. It is necessary to reproduce the definition of cruel person as inserted under the PASA Act vide Section 2 of the Amending Act No.16 of 1985, the statue lays down as under:-

> "(bbb) "cruel person" means a person, who either by himself or as member or leader of a gang habitually commits or attempts to commit abets the commission of an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954 (Bom.LXXII of 1954)"

9. Now going through the provisions of the definition of "cruel person", from bare reading of the same, it becomes clear that the legislature intended such behaviours to be branded as behaviour of a cruel person when such person either by himself or as member or leader of a gang habitually commits or attempts to commit or attempts an offence punishable under Section 8 of the Bombay Animal Preservation Act, 1954. The said Section 8 prescribes penalty for the contravention of the provisions of the said Act and the important provisions

in the said Act, are grafted in Section 5 so far as the offence part is concerned whereby slaughtering of animals is made prohibited and restricted and is allowed only on certain conditions. There must be overt behaviour of habitually committing the offences as prescribed under the provisions of Bombay Animal Prevention Act, 1954, on the part of detenu, before he is branded as "cruel person".

10. Habitually committing the offence refers to repetitive tendency of human conduct to commit the same act. It is necessary to refer here to the observations made by the Apex Court in the matter of GOPALANACHARI Vs. STATE OF KERALA, as reported in AIR 1981 S.C. 674, while dealing with terminology like "by habit", "habitual", "desperate", "dangerous, "hazardous" etc. with reference to Section 110 of the Code of Criminal Procedure. The Apex Court observed as under in paragraph No.6.

> "6. Article 21 insists that no man shall be deprived of his life or personal liberty except according to the procedure established by law. In Maneka Gandhi case(l) this Court in clearest terms strengthened the rule of law vis a vis personal liberty by insisting on the procedure contemplated by Art. 21 having to be fair and reasonable, not vagarious, vague and arbitrary:
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> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.
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> The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles, J., called "the justice of the common law".
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> Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of

procedural safeguards and right to a hearing has a human-right ring. In India, because of poverty and illiteracy, the people are unable to protect and defend their rights; observance of fundamental rights is not regarded as good politics and their transgression as bad politics. I sometimes pensively reflect that people's militant awareness of rights and duties is a surer constitutional assurance of governmental respect and response than the sound and fury of the 'question hour' and the slow and unsure delivery of court writ.....

To sum up, 'procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22. It has been rightly pointed out that for other rights forming part of personal liberty, the procedural safeguards enshrined in Article 21 are available.[(1978) 1 SCC 248 at p. 338 (per Krishna Iyer,J.) : (AIR 1978 SC 597)]

The constitutional survival of s. 110 certainly depends on its obedience to Art. 21, as this Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the Police cannot be constitutionalised in the context of Art. 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at s. 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber....", "by habit a receiver of stolen property....", "habitually protects or harbours thieve....", "habitually commits or attempts to commit or abets the commission of .... ", "is so desperate and dangerous as to render his being at large without security hazardous to the community". These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom upto a period of three years, must be scrutinised by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically commit them to prison and Art. 21 is for them a freedom under total eclipse in practice. Courts are guardians

of human rights. The common man looks upon the trial court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial judges must remember, This Court in Hoskot's case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under s. 110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the trial magistrates to discharge their duties, when trying cases under s. 11(), with great responsibility and whenever the counter-petitioner is a prisoner give him the facility of being defended by counsel now that Art. 21 has been reinforced by Art. 39A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like "by habit", "habitual", "desperate", "dangerous", "hazardous" cannot be flung in the face of a man with laxity of semantics. The Court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference - that by confirmed habit, which is second nature, the counter-petitioner . is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous; to call a man desperate is to affix a desperate adjective to stigmatise a person as hazardous to the community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout the person without economic stamina, who in practice gets caught in . the coils of s. 110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the causality. After all, the judicial process must

not fail functionally as the protector of personal liberty."

[Emphases supplied]

11. Now referring to the facts of the present case and the material relied upon by the detaining authority, it is clearly borne out that the detaining authority relied upon two aspects in scrutinizing the behaviour of the petitioner as aforesaid. Out of these two aspects, filing of criminal case against the petitioner for the breach of the provisions of Bombay Animal Preservation Act, 1954 could hardly be said to be a material exhibiting habitual tendency of the petitioner to commit such offences, in view of what is observed by the Apex Court in the above said decision of GOPALANACHARI [supra]. Confusion which is likely to arise at this juncture is whether a solitary crime registered against the detenu is sufficient to warrant action under preventive detention law. It is required to be explained that the question in this case, does not arise whether a solitary crime registered against the detenu is sufficient to detain the petitioner, but question precisely arises having regard the statutory provisions in the shape of Section 2(bbb) whether merely filing of a solitary case, which is still to be tried, the person can be branded as habitual offender, which is a prime requirement for detention under the PASA Act as a cruel person. On going through the investigation papers thoroughly it is nowhere emanated that the behaviour of the petitioner disclosed through the investigation in the said crime leads to infer that the petitioner was habitual offender within the meaning of Section 2(bbb) of the PASA Act. The filing of a stray case would not warrant inference of committing "habitually" such offences.

12. The act of slaughtering and caused to be slaughtering certain animals as envisaged by the Section 5 of The Bombay Animal Preservation Act is made offence under that Act. The habit of doing such acts repeatedly by way of second nature, as a confirmed conduct may attract rigorous inference of habitually committing the said offences. So far as preventive detention laws are concerned phrases employed like "habitual offender" must not be given any laxity in its application to given facts. In the present case, the solitary crime registered against the petitioner is still to be tried and the petitioner might be punished if found guilty, but registration of such crime would not reveal habitual conduct. Satisfaction of the competent authority must be

based on specificity and the rigorous inference must be drawn from such grave material which indicates that by confirmed habit, which is a second nature, the detenu was sure to repeat such offences.

13. In the matter of MUSTAKMIYA JABBARMIYA SHAIKH Vs. M.M. MEHTA, COMMISSIONER OF POLICE AND OTHERS, as reported in 1995 (3) SCC 237, the Apex Court after referring to the decision of Apex Court in the matter of Gopalanachari (Supra), while discussing Section 2(c) of the PASA Act and more particularly dealing with the phraseology of "habitually committing offence" employed therein observed as under in para-8.

"8. The Act has defined "Dangerous person" in clause (c) of Section 2 to mean a person who either by himself or as a member or leader of a gang habitually commits or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Penal Code or any of the offences punishable under Chapter V of the Arms Act. The expression "habit" or "habitual" has however, not been defined under the Act. According to The Law Lexicon by P. Ramanatha Aiyar, Reprint Edn. (1987), p.499, 'habitually' means constant, customary and addicted to specified habit and the term habitual criminal may be applied to anyone who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word 'habitually' mean 'usually' and 'generally'. Almost similar meaning is assigned to the words 'habit' in Aiyar's Judicial Dictionary, 10th Edn. p. 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a 'dangerous person' unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal. In Gopalanachari v. State of Kerala this Court had an occasion to deal with expressions like "bad habit", "habitual", "desperate", "dangerous", and "hazardous". This Court observed that the word habit implies frequent and usual practice. Again in Vijay Narain Singh v. State of Bihar this Court construed the expression "habitually" to

> mean repeatedly or persistently and observed that it implies a thread of continuity stringing together similar repetitive acts but not isolated, individual and dissimilar acts and that repeated persistent and similar acts are necessary to justify an inference of habit. It, therefore, necessarily follows that in order to bring a person within the expression "dangerous person" as defined in clause (c) of Section 2 of the Act, there should be positive material to indicate that such person is habitually committing or attempting to commit or abetting the commission of offences which are punishable under Chapter XVI or Chapter XVII of IPC or under Chapter V of the Arms Act and that a single or isolated act falling under Chapter XVI or Chapter XVII of IPC or Chapter V of Arms Act cannot be characterized as a habitual act referred to in Section 2(c) of the Act."

[Emphasis supplied]

14. The other aspects of the material which relied upon by the detaining authority i.e. statements of the witnesses cannot be said to be cogent material to arrive at subjective satisfaction that the petitioner was a habitual offender within the meaning of PASA Act as envisaged by the provisions of Section 2(bbb). This is so because, if these two incamera statements are taken at their face value, they are unable to lead to draw that rigorous inference that the petitioner, by confirmed habit was committing the offences of slaughtering the animals as envisaged by Section 5 of the Bombay Animal Preservation Act, 1954. In one statement it is alleged that the petitioner on suspicion that witness was providing information to police, the said witness was beaten. While in second case the petitioner attempted to lodge some weapons at the house of the witness and on refusal the witness was beaten. If these incidents are scrutinized carefully without any concession of laxati, it is clear that the conduct would not fall within the scope of "slaughtering animals or causing such slaughtering or abetting such slaughtering." The thread of continuity in the commission of offence repeatedly and persistently is nowhere found. Thus the material which is in two parts firstly, investigation papers in the said crime and two incamera statements fails to satisfy the test of judicial scrutiny in respect of the detenu being habitual offender within the meaning of Section 2(bbb) of the PASA Act, especially in view of what is stated by the Apex Court in the decision of GOPALANACHARI [supra].

15. The subjective satisfaction, therefore, arrived at by the detaining authority is vitiated. In view of the above discussion and the order passed by the detaining authority which is under challenged in this Special Civil Application is required to be quashed on the grounds discussed above.

16. In the result, the petition is allowed. The order passed by the Police Commissioner, Ahmedabad City on 30th September, 2004, against the petitioner in exercise of powers under Section 3(1) of the PASA Act is hereby quashed and set aside. The detenu NIZAMBHAI CHANDBHAI SHEIKH is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule is made absolute. Direct service is permitted.

[J. R. VORA,J.]

(vijay)