

PHILLIPPA ANNE DUKE

v.

THE STATE OF TAMIL NADU & ORS.

May 21, 1982

[O. CHINNAPPA REDDY, J.]

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, Ss. 8 and 11 and Constitution of India, 1950, Article 22 (5).

Advisory Board—Legal representation or 'friendly' representation to detenu—Grant of facility—When arises.

Detention order—Representation of the detenu to the Central Government—What is—Bout De Papiere to Prime Minister—Petitions memorial to Minister—Whether statutory representation.

The two petitioners who were British nationals and friends and collaborators in smuggling enterprises were detained under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 for smuggling electronic equipment and goods worth several lakhs of rupees in secret compartments and hidden cavities of a Mercedes Benz van.

The High Court dismissed their petitions for release from detention.

In their writ petitions under Article 32 it was contended that : (1) the representation made by them to the Central Government to revoke the orders of detention as long back as March 1982 remained undisposed of and on this ground alone they were entitled to be released; (2) the Bout De Papier presented to the Prime Minister of India during her visit to England pointing out that the order of detention passed against the petitioners might be lifted and the detenues be either released or charged and brought to trial without delay, had not been disposed of; and (3) that they had been denied the right to be represented before the Advisory Board by an Advocate or at least by a 'friend' and thus they were denied an opportunity to make an appropriate and effective representation to the Advisory Board.

Dismissing the petitions,

HOLD : (1) Representations from whatever source addressed to whosoever officer of one or other department of the Government cannot be treated as representations to the Government under the COFEPOSA. [772 D]

(2) The Bout De Papier presented to the Prime Minister during her visit to Britain and the subsequent reminder addressed to the External Affairs Ministry by

A the British High Commission are not representations to the Central Government. They were merely diplomatic communications between the Governments of the two countries which will be answered through appropriate diplomatic channels in proper time. Such diplomatic communications between one country and another cannot be treated as representations to the statutory authorities functioning under the COFEPOSA. [771 G-H; 772 A-E]

B 34(i) The Advisory Board consisting of three Judges of the High Court considered it unnecessary and inadvisable to allow legal representation to the detenus. That was a matter for decision of the Advisory Board and this Court would not be justified to substitute its judgment in place of the Board's judgment. [774 C]

C (ii) A 'friendly' representation would have been provided by the Board had it been demanded. But it was not for the Advisory Board to offer 'friendly' representation to the detenus without being asked for. [774 D-E]

In the instant case the order of detention made on January 7, 1982 was considered by the Advisory Board on February 8, 1982 and its report showed that the detention was justified. [775 C-D]

D ORIGINAL JURISDICTION: Writ Petition (Criminal) Nos. 271-272 of 1982.

(Under Article 32 of the Constitution of India)

Ram Jethmalani and Miss Rani Jethmalani for the Petitioner.

E *R.K. Garg and A.V. Rangam*, for the Respondents.

The Judgment of the Court was delivered by

F CHINNAPPA REDDY, J. Richard Beale and Paul Duncan Zawadzki, two British nationals, said to be friends and collaborators in smuggling enterprises are now under detention under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act. Richard Beale arrived at Madras from Singapore on December 11, 1981. He brought with him a Mercedes Benz van. On examination by the customs authorities, the van was found to have secret compartments and hidden cavities. It was laced and lined, as it were, with all manner of electronic equipment and goods worth several lakhs of rupees. Richard Beale was interrogated and made a statement. He was arrested and produced before the learned Metropolitan Magistrate of Madras. His friend and collaborator Paul Duncan Zawadzki, who had separately arrived in India and who attempted to contact Richard Beale, was also interrogated, later arrested and produced before the Metropolitan Magistrate. Orders of detention under the COFEPOSA

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were made against both of them on January 7, 1982 and grounds of detention were duly served on them. The detenus moved the High Court of Tamil Nadu for their release from detention, but their applications were dismissed. They have now come to this Court seeking Writs of Habeas Corpus under Art. 32 of the Constitution. The two petitions were argued together by Shri Jethmalani and they may be conveniently disposed of by a single order.

The first submission of the learned Counsel was that the representation made by the detenus to the Central Government to revoke the orders of detention so long back as March, 1982 remained undisposed of till this day and on that ground alone, the detenus were entitled to be released. Shri Jethmalani drew my attention to S. 11 of the COFEPOSA which enables the Central Government to revoke or modify an order of detention made by the State Government or its officers and to the decisions of this Court laying down that delay by the Central Government in dealing with representations of the detenu would also entail the detention invalidating itself. Apart from the fact that there is no proper foundation for the submission, I am not satisfied that there is any merit in the submission. The Writ Petitions were filed on March 12, 1982 and there was then no hint of this submission. The counter-affidavit on behalf of the State of Tamil Nadu was filed on April 5, 1982. Thereafter, the clerk of the learned Counsel for the Petitioners has sworn to an affidavit mentioning the facts giving rise to the present submission. It appears from the affidavit that when the Prime Minister of India was recently in England, a Bout De Papier was presented to the delegation accompanying her, expressing concern about the detention without trial of Richard Beale and Paul Duncan Zawadzki and suggesting that the detention order might be 'lifted' and the detenus either released or charged and brought to trial without delay. It further appears that the British High Commission in India also addressed the Ministry of External Affairs, Government of India, and reminded them about the Bout De Papiere presented to the Prime Minister's delegation in Britain during her visit to that country. According to Shri Jethmalani, the Bout De Papiere presented to the Prime Minister's delegation in Britain and the subsequent reminder by the British High Commission constitute a representation to the Central Government demanding their immediate consideration in terms of the provisions of the COFEPOSA. I have no doubt that the Bout De Papier and the reminder, diplomatic

A communications that they are between the Governments of the two countries, will be attended to and answered through appropriate diplomatic channels in proper time and with necessary expedition. But I find it difficult to treat such diplomatic communications between one country and another as representations to the statutory authorities functioning under the COFEPOSA, as
B representations which require immediate consideration by the statutory authorities and which if not considered immediately, would entitle the detenus to be set at liberty. Nor is it possible to treat the countless petitions, memorials and representations which are everywhere presented to the Prime Minister and other Ministers as statutory appeals or petitions, statutorily obliging them to
C consider and dispose of such appeals and petitions in the manner provided by statute. No doubt the Prime Minister and other Ministers, as leaders in whom the people have reposed faith and confidence, will deal with such appeals and petitions with due and deserved despatch. But quite obviously that will not be because
D they are discharging statutory obligations. It is not also possible to treat representations from whatever source addressed to whomsoever officer of one or other department of the Government as a representation to the Government requiring the appropriate authority under the COFEPOSA to consider the matter. I do not consider that the Bout de Papiere presented to the Prime Minister during her visit to Britain and the subsequent reminder
E addressed to the External Affairs Ministry by the British High Commission are representations to the Central Government which are required to be dealt with in the manner provided by the COFEPOSA.

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G It was next submitted by the learned Counsel that the Chief Minister, who according to the Rules of Business of the Government of Tamil Nadu, was required to deal with matters relating to preventive detention neither applied his mind to the making of the orders of detention, nor considered the representation of the detenus himself. The relevant files have been produced by the learned Counsel for the State of Tamil Nadu and on perusing them, I find no substance in the submission of the learned Counsel.

H The submission which was most strenuously urged by the learned counsel was that the detenus had been denied the right to

be represented before the Advisory Board by an Advocate or at least by a friend and that they were thus denied the right to make a proper and effective representation to the Advisory Board. This was sufficient, said the learned Counsel, to vitiate the detention. The learned Counsel urged that the detenus were foreign nationals and they were under a handicap being ignorant of the laws and procedures of this country. To deny legal representation to them was an unreasonable exercise of the discretion vested in the Advisory Board to permit or not to permit legal representation. According to the learned Counsel, this was a clear case where legal representation should have been permitted. In any case, it was urged, the detenus ought to have been offered at least 'friendly' representation, if not legal representation. Reliance was placed upon the following observations of the Constitution Bench in *A.K. Roy v. Union of India* :⁽¹⁾

"Another aspect of this matter which needs to be mentioned is that the embargo on the appearance of legal practitioners should not be extended so as to prevent the detenu from being aided or assisted by a friend who, in truth and substance, is not a legal practitioner. Every person whose interests are adversely affected as a result of the proceedings which have a serious import, is entitled to be heard in those proceedings and be assisted by a friend. A detenu, taken straight from his cell to the Board's room, may lack the ease and composure to present his point of view. He may be "tongue-tied, nervous, confused or wanting in intelligence" (see *Pett v. Greyhound Racing Association Ltd.*, 1969, 1 QB 125), and if justice is to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. Just as a person who is dumb is entitled, as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice

(1) A.I.R. 1982 S.C. 710.

A per se, and, therefore, if a statute excludes that facility expressly, it would not be open to the Tribunal to allow it. Fairness, as said by Lord Denning M.R., in *Maynard v. Osmond* [1977] 1 QB 240, 253, can be obtained without legal representation. But, *it is not fair*, and the statute does not exclude that right, *that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility.*"

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C In the present case, the Advisory Board consisting of three Judges of the High Court of Tamil Nadu considered it unnecessary and inadvisable to allow legal representation to the detenus. It was a matter for the decision of the Advisory Board and I do not think I will be justified in substituting my judgment in the place of their judgment. The detenus were heard personally by the Advisory Board. After seeing and hearing them personally also, the Board did not feel it necessary to provide legal representation to them which they would certainly have done if they had thought that the detenus appeared to require such representation. Regarding representation by a friend, there was never any such demand by the detenus. A 'friendly' representation would certainly have been provided if it had been so demanded. It was not for the Advisory Board to offer 'friendly' representation to the detenus even if the latter did not ask for it. Relying upon a sentence in the counter-Affidavit of Shri Thiru Bhaskaran that representation not only by a lawyer, but by a friend was also considered not necessary by the Advisory Board, it was argued that the Advisory Board had, without warrant, refused even friendly representation. Shri Thiru Bhaskaran was speaking for the State of Tamil Nadu and not for the Advisory Board. I have perused the file of the Advisory Board which was produced before me and I have also perused the communications addressed by the Advisory Board to the Government of Tamil Nadu and to the detenus. I do not find the slightest hint of a demand for 'friendly' representation or its denial anywhere. The Advisory Board was neither asked nor did the Board deny any 'friendly' representation.

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H A charge was made against the Advisory Board that there was inequality of treatment. It was said that while the detaining authority was allowed to be represented by its officers and advisers, the detenus were allowed no representation. There is no substance

in this charge. From the affidavit of the Chairman of the Advisory Board, I find that all that happened was that some customs officers were allowed to be present in the corridor so as to enable them to produce the relevant files whenever required for perusal by the Board. The charge of inequality of treatment is, therefore, baseless.

Yet another submission of the learned Counsel was that the Advisory Board failed to consider the question whether the detention continued to be justified on the date of the report of the Advisory Board, even if it was justified on the date of the making of the order of detention. The order of detention was made on 7.1.82 and the consideration by the Advisory Board was on 8.2.82. The passage of time was not so long nor had any circumstances intervened to justify any compartment-wise consideration of the justification for the detention on the date of the making of the order of detention and on the date of the report of the Advisory Board. In the circumstances of the case, I think that the report of the Advisory Board that there was sufficient cause for the detention of Richard Beale and Paul Duncan Zawadzki necessarily implied that the detention was found by the Board to be justified on the date of its report as also on the date of the making of the order of detention.

A complaint was also made that the Advisory Board carried on its correspondence with the detenus through the Government. This, it was stated, gave rise to a suspicion that everything was done by the Board at the behest or in consultation with the Government. This complaint is wholly unjustified. As already mentioned by me, the Advisory Board consisted of three Judges of the High Court of Tamil Nadu and as explained by the Chairman in his Affidavit, the correspondence etc. is carried on through the Government because the Board has no separate administrative office of its own. All the points urged on behalf of the detenus fail and the petitions are, therefore, dismissed.

N.V.K.

Petitions dismissed.