

## SUPREME COURT.

BO SAN LIN (APPLICANT)

v.

THE COMMISSIONER OF POLICE AND ONE  
(RESPONDENTS).\*† S.C.  
1948

July 12.

[On appeal from the High Court.]

*Public Order (Preservation) Act, 1947—S. 5 (a) and (b)—S. 9 (1)—Power of Court—Whether invalid, Telephone message by Commissioner of Police to Police Station Officer to arrest if an order—Subsequent order in writing whether can validate previous illegal arrest—Order enumerating 71 persons—Necessity for individual consideration.*

*Held:* (1) That if the orders made by the Commissioner of Police under s. 5 (a) and (b) of Public Order (Preservation) Act, 1947, were invalid and not in accordance with the requirements of the Act they were not made in exercise of a power conferred by the Act.

*King-Emperor v. Vimlabai Deshpande*, 73 I.A. 144 at p. 155, referred to.

By Article 25 of the Constitution the right conferred on a citizen is indefeasible and none of the contingencies contemplated by sub-s. (3) of Article 25 arose and the provisions of s. 9 of Public Order (Preservation) Act, 1947, if it purports to exclude the jurisdiction of the Supreme Court, is void as being repugnant to the Article 25 of the Constitution. In a proceeding under Article 25 of the Constitution in spite of s. 9 (1) of Public Order (Preservation) Act, 1947, it is competent for the Supreme Court to consider whether the action taken by the Commissioner of Police is legal or not;

(2) That though the Commissioner of Police might have had good and sufficient grounds for what he did, law requires that he should proceed in a certain manner. Unless the procedure adopted was in accordance with law the detention would be illegal. The order contemplated by s. 5 (a) and (b) must be one in writing and in this case at the outset there was no such order and consequently the arrest and detention were illegal.

*Held further:* The jurisdiction of the Commissioner of Police under s. 5 (a) of the Act arose only on his being satisfied of certain circumstances and the order in the case dated 30th June 1948 mentions "I hereby direct . . . . detention with effect from" previous dates. *Ex-post-facto* detention under s. 5 (a) of the Act is clearly illegal.

A single order in respect of 71 persons arrested at different places on different dates deprecated.

*Thein Moun*g for the applicant.

*Chan Tun Aung* (Assistant Attorney-General of the Union of Burma) for the respondents.

\* Criminal Misc. Application No. 11 of 1948.

† Present: SIR BA U, Chief Justice of the Union of Burma, E MAUNG, J., and KYAW MYINT, J., of the Supreme Court.

The judgment of the Bench was delivered by

E MAUNG, J.—Maung Mya Maung, who was produced before the Court on the 8th day of July 1948 in pursuance of a writ of *habeas corpus*, was on that date directed to be released and we now proceed to give our reasons for the order then made.

On the 26th June 1948 at about 12-45 a.m., as appears from the affidavits in the case, Maung Mya Maung, a member of the People's Volunteer *Aphwe*, Tamwe Circle, was taken into custody by U Ba Than, Police Station Officer of Tamwe. He had since that date been in custody. The present application for directions in the nature of *habeas corpus* was made on his behalf by Bo San Lin, President of the People's Volunteer *Aphwe*, Tamwe Circle. It was claimed on behalf of Maung Mya Maung that his arrest and subsequent detention were illegal and not in accordance with law and that therefore this Court should, in exercise of the powers vested in it by Article 25 of the Constitution, direct his release.

On opportunity being given to the Commissioner of Police and the Superintendent of Jail (Annexe), Insein, to show cause why directions should not be made as sought on behalf of Maung Mya Maung, four affidavits were filed. From these four affidavits it is clear that the case for the respondents is that the arrest and detention of Maung Mya Maung were purported to have been made in exercise of the powers under section 5A (1) (b) of the Public Order (Preservation) Act, 1947.

The initial question that arises for consideration is the operation of section 9 (1) of that Act. It reads :

“No order made in exercise of any power conferred by or under this Act shall be called into question in any Court.”

Does this provision bar the jurisdiction of this Court ?

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In the first place it may be fairly argued, and was in fact argued, on the authority of *King-Emperor v. Vimlabai Deshpande* (1) that if the orders made by the Commissioner of Police were invalid and not in accordance with the requirements of the Act, they were not made in exercise of a power conferred by the Act. It is not necessary to consider the validity of this contention as, in any event, the right conferred on the citizen by Article 25 of the Constitution is one which is indefeasible except in the contingencies contemplated in sub-section (3) thereof. There is no question here of the contingencies contemplated by sub-section (3) of Article 25 and accordingly, even if the view taken by the Privy Council in the above case cannot under ordinary rules of interpretation be supported, it is clear that section 9 of the Public Order (Preservation) Act, 1947, if it can be read as purporting to exclude the jurisdiction of this Court, is, to the extent it is repugnant to the provisions of Article 25 of the Constitution, void. We are clearly of the opinion therefore that in a proceeding taken under Article 25 of the Constitution it is competent for this Court to consider whether the action taken by the Commissioner of Police in purported exercise of the powers under the Public Order (Preservation) Act, 1947, is legal or not.

As stated above, the arrest of Maung Mya Maung was effected at 12-45 a.m. on the 26th June 1948. U Aung Chein, the Commissioner of Police, in his affidavit states: "At about 7-40 p.m. after due consideration I directed U Ba Than on the telephone to arrest the said Maung Mya Maung under section 5A of the Public Order (Preservation) Act, 1947." U Ba Than, the Police Station Officer concerned,

(1) 73 I.A. 144 at p. 155.

in his affidavit states: "I say that at about 7-40 p.m. I was directed by the Commissioner of Police to arrest Maung Mya Maung under section 5A of the Public Order (Preservation) Act, 1947." It is clear therefore, and indeed as the learned Assistant Attorney-General has told us, it is no part of the case for the respondents that U Ba Than in arresting Maung Mya Maung exercised any independent judgment of his own to bring the arrest within the purview of section 5 (1) of the Public Order (Preservation) Act.

The detention, if it is to be justified at all, will have to be justified solely as one made under section 5A of the Act. Section 5A reads as follows:

"5A. (1) If the President is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order it is necessary so to do, the President may make an order—

(b) directing that he be detained . . . . ."

By section 7 of the Act the President may delegate the powers under section 5A to such officer or authority as he may specify and the Commissioner of Police, Rangoon, is one of the officers so specified.

It has been said on behalf of the respondents that from the affidavits and the documents filed before us it is clear that the Commissioner of Police had before him materials from which he, as a reasonable person, could have come to the conclusion that public safety and the maintenance of public order required the detention of Maung Mya Maung and that though it may be that we cannot agree with him on that finding, our powers as a Court issuing directions in the nature of *habeas corpus* are not those of an appellate authority so that we can substitute our own findings on facts for those of the Commissioner of Police.

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We are in agreement with the contention raised on behalf of the Commissioner of Police to this extent that unless we can find that the action taken was one demonstrably groundless or in ignorance or at random or influenced by considerations extraneous to the subject-matter before him, we must accept the findings of the Commissioner of Police. We have to remember that he is the officer responsible for the maintenance of public safety and public order and, once we are satisfied on the materials before us that he has acted in good faith and that the materials before him were such as would move any reasonable person to act as he did, we should not go any further into the matter.

But that, however, is not the end of the matter in this case. The Commissioner of Police might have had good and sufficient reasons for what he did, but the law requires that he should proceed in a certain manner and unless the procedure adopted by him in detaining Maung Mya Maung was in accordance with law the detention order would be illegal. We are clearly of the opinion that in the present case, whatever may have been the merits, the methods adopted were not such as could have been defended and that the detention of Maung Mya Maung must therefore be held to be illegal from its very inception.

What the law authorizes the Commissioner of Police in the circumstances relevant to the present case is to make an order directing that a certain person be detained. Instead what he has done is to send a telephone message to U Ba Than, the Police Station Officer, to arrest Maung Mya Maung. On that verbal message Maung Mya Maung was arrested and on the 28th June 1948 he was delivered to the custody of the Superintendent of Jail (Annexe), Insein. It was not till the 30th June 1948 that U Aung Chein proceeded

to make the order necessary under section 5A of the Public Order (Preservation) Act. The opening words of the order must here be reproduced for reasons which will become apparent later :

" I, Aung Chein, Commissioner of Police, Rangoon, being satisfied that it is necessary to do so to prevent them from acting in any manner prejudicial to the public safety and maintenance of public order hereby direct that the following persons be detained in Insein Central Jail until further orders with effect from the dates mentioned against their names . . . . "

Then followed 71 names and it appears that the arrests were on various dates between the 25th and the 29th June 1948.

It was claimed by the learned Assistant Attorney-General on behalf of the respondents that U Aung Chein must be deemed by his telephone message to U Ba Than in the evening of the 25th June 1948 to have made the order of detention of Maung Mya Maung. That argument overlooks two things. In the first place the scheme of sections 5A and 5B of the Public Order (Preservation) Act, 1947, makes it clear that the order contemplated must be one in writing ; for, it is impossible to contemplate a verbal order in relation to any of the matters specified in these sections. In the second place, the order of the 30th June 1948 was the only operative order of detention as is apparent from the words " I hereby direct." The affidavits of U Aung Chein and U Ba Than make it clear that the order communicated by the former to the latter on the telephone was to arrest Maung Mya Maung. It is clear therefore that when in the early morning of the 26th June 1948 Maung Mya Maung was arrested by U Ba Than, that arrest was illegal. Maung Mya Maung's detention from that time till the issue of the order of the 30th June 1948 was beyond question consequently illegal.

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That brings us to the question whether, when the original arrest was manifestly illegal and not in due course of law, the subsequent order of detention of the 30th June 1948 would legalize the detention of Maung Mya Maung to this date. The learned Assistant Attorney-General concedes that the order cannot have that effect. It is clear that it must be so. The jurisdiction of the Commissioner of Police to act under section 5A of the Public Order (Preservation) Act is dependent on and arises only on his being satisfied of the existence of the circumstances set out in that section. Till then any order of detention would be without jurisdiction. The detention of Maung Mya Maung must be taken as a whole, beginning with his arrest in the early hours of the 26th June and continuing to this date. Moreover, the order of the 30th June 1948 in that it purported to authorize *ex-post-facto* the detention under section 5A of the Act from the 25th June 1948 when the Commissioner of Police gave a verbal order on the telephone to the Police Station Officer, Tamwe, to effect the arrest of Maung Mya Maung, is clearly illegal.

Though we are prepared to accept the assurance of the learned Assistant Attorney-General on behalf of the Commissioner of Police that the case of each individual *détenu* received separate consideration, we think it our duty to record here that the order of detention, which has been brought to our notice in this case, is apt to give rise to a suspicion that in such an important matter as the liberty of a citizen, the Commissioner of Police has not given each case the individual attention it deserves. A single order in respect of 71 persons arrested at different places and on different dates is clearly to be deprecated.