SUPREME COURT.

† S.C. 1948

Aug. 11.

DAW KHIN TEE (APPLICANT)

v.

U CHAN THA AND ONE (RESPONDENTS).*

[On appeal from the High Court.]

Public Property Protection Act, ss. 2 (ii) (b) and 7—Prejudicial Act—When complete—Whether issue or procuring the issue of import licence by illegal means whether is—Suspicion—Nature of.

Held: That the words "prejudicial act" in s. 2 (ii) (*b*) of the Act inclu issue and procuring of licence by illegal means because it would be clearly an act directly or indirectly connected with or relating to, any unlawful activity having for its object the smuggling of any property in Burma in contravention of import or export orders and rules duly made under the Imports and Exports (Temporary) Act, 1947.

Under s. 7 (*3*) it is not necessary that the order of commitment should set out the nature of suspicion entertained by the officer making the arrest and therefore redundant reference to the nature of the suspicion in the order of commitment, cannot be fatal to its validity.

The dividing line between a completed prejudicial act and a prejudicial act in the course of commission is thin, and in some cases it is difficult to dissociate them. Even though the officer making the arrest has not been able to make up his mind as to whether the person to be arrested has actually committed a prejudicial act or still in the course of committing that act, he would still have the right to make the arrest.

The right of appeal is not inherent in the nature of things, it is a right which has to be given by express enactment. The Supreme Court in issuing directions in the nature of *habeas corpus* does not exercise an appellate jurisdiction. If in arresting or directing the detention of a citizen the authority concerned was acting within its lawful powers, the Supreme Court cannot interfere and the Supreme Court cannot go into the question of fact when the Legislature has made that authority the judge of facts. The Supreme Court in proceedings for directions in the nature of *habeas corpus* will accept its findings of facts unless they are vitiated in law.

Suspicion is something much weaker than proof and all that is required of the officer in entertaining a suspicion is that it must be in good faith and a thing shall be deemed to have been done in good faith where it is in fact done honestly, whether it is done negligently or not. If he has acted honestly then the Court will not interfere unless the suspicion was entertained irrationally which would in itself not be conclusive of absence of honesty of motive.

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* Criminal Misc. Application No. 14 of 1948.

† *Present:* SIR BA U, Chief Justice, E MAUNG, J., and KYAW MYINT, J.

King Emperor v. *Deshpande and one*, (1946) 73 I.A. 144 ; *King* v. *Bethel*, 84 E.R. 494 at p. 495, referred to.

E. C. V. Foucar for the applicant.

Chan Htoon (Attorney-General of the Union of Burma) for the respondent.

The judgment of the Court was delivered by

E MAUNG, J.—The applicant prays for directions in the nature of *habeas corpus* on behalf of her husband U Aye Kyi who is now being detained in the Insein Jail under the orders of the President, dated the 13th July 1948, exercising the powers under section 7 (*3*) and (*5*) of the Public Property Protection Act, 1947.

U Aye Kyi, who carries on business as a merchant dealing in textiles and general goods, was arrested by U Ba Chit, Inspector of Police, Public Property Police Bureau of Investigation on the 3rd July 1948. The arrest was purported to have been made under section 7 (*2*) of the Act. Having made the arrest the Inspector of Police reported the fact of such arrest to the President and pending receipt of the orders of the President, he passed an order in writing committing U Aye Kyi to custody in Insein Jail for a period of 15 days. It is on this report that the order of detention by the President was made.

Before us it is claimed on behalf of the applicant that the arrest by U Ba Chit was illegal and the consequential order of detention made by the President on the Inspector's report was void. That the consequential order of detention by the President would be vitiated by an initial illegal arrest is beyond dispute. See *King Emperor* v. *Deshpande and one* (1). The original arrest and the commitment to jail of U Aye Kyi by U Ba Chit have been challenged in two ways.

(1) (1946) 73 I.A. 144.

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First of all it is said on behalf of the applicant that the Inspector of Police before effecting an arrest had to make up his mind that there were grounds for suspecting that the person to be arrested either had committed a prejudicial act or was committing such an act or had committed one such act and was further in the course of committing another such act. The learned counsel for the applicant relies strongly on the wording of the order of commitment of the 3rd July 1948 where the Inspector of Police said, *inter alia*:— "I . . . . have reason to suspect and do in fact suspect that U Aye Kyi . . . . has committed/or was committing a prejudicial act . . . ." On the wording of this order it was urged that the Inspector of Police clearly had not been able to make up his mind what it was he suspected U Aye Kyi of—whether it was of a completed prejudicial act or a prejudicial act in the course of commission.

We agree that this criticism is a substantial one but section 7 (3) of the Act does not require that the order of commitment should set out the nature of the suspicion entertained by the officer concerned. The relevant portion of that sub-section reads: "He may, by an order in writing, commit any person so arrested to such custody as the President may, by general or special order, specify." Accordingly, the redundant reference to the nature of the suspicion in the order of commitment, cannot be fatal to its validity; neither can it be conclusive evidence of the nature of the suspicion which led to the arrest. It is obvious that the order of commitment followed a form prescribed for such cases. The stroke between the words "has committed" and "or is committing" makes it clear that the officer filling up the form of commitment was expected to strike off either of the alternatives not relevant to the case in hand. Can it be said that the

omission to strike off one of the alternatives not applicable is conclusive evidence that the police officer had not formed a definite suspicion on cogent grounds before he effected the arrest? We think not.

Moreover, the dividing line between a completed prejudicial act and a prejudicial act in the course of commission is a thin one. In many circumstances it would be a matter open to serious controversy where to draw the line; from one point of view the prejudicial act may have been completed and from another point of view it may still be in the course of commission. The act and the consequences flowing therefrom are sometimes so entangled that it would be well nigh impossible to dissociate one from the other. In such a case it may well be that in spite of the officer not being able to make up his mind whether the person to be arrested had completed a prejudicial act or was still in the course of committing that act, he would, in our opinion, have the right to act under section 7 (2) of the Act.

Secondly, it was said on behalf of the applicant that the affidavit of U Ba Chit justifying the arrest and detention of U Aye Kyi is not a sufficient return for the detention of U Aye Kyi and that accepting the allegations in the affidavit at their face value they do not constitute in law a "prejudicial act" within the meaning of section 2 (ii) of the Public Property Protection Act.

We have discussed at some length the nature of and the practice for the issue of a writ of *habeas corpus* in *Banerjee*'s case (Criminal Miscellaneous Application No. 5 of 1948) and it is not necessary to go into the matter here again. But it may be recalled that Holt C.J. in *King* v. *Bethel* (1) said:

"There ought not only a good cause to appear but also commitment, both as to the manner and substance of it; for

(1) 87 E.R. 494 at p. 495.

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writ requires *causam captionisel detentionis*, and here is only the cause of the detention and not of the caption; and where the liberty of the subject is concerned we must be certified of the causes."

For the reasons which have already been stated, no exception can successfully be taken to the manner of the arrest and detention. The order of commitment may not have been very happily worded but that is all that can be said against the manner of the arrest or detention. The order of detention made in the name of the President is as regards form perfectly regular.

Coming to the substance we agree with the learned counsel for the applicant that the return could have been in more unambiguous and precise language. There are precedents, where the return not completely regular but disclosing sufficiently to make the Court consider that the return, if amplified, may be a return on which a complete argument could be had, of the Courts granting leave to amplify, and it was suggested to the counsel if by consent they would let further arguments stand over for the return to be amplified. But it was contended on the one hand by the learned counsel for the applicant that such course would prejudice his client and on the other hand by the learned Attorney-General that on the return already made he could support the arrest and the detention of U Aye Kyi. Accordingly, on the materials before us we proceed to decide the matter of the sufficiency or otherwise of the substance of the arrest and detention.

It would be well at this stage of the judgment to clarify the position of this Court in issuing directions in the nature of *habeas corpus*. The right of appeal is not inherent in the nature of things; it is a right which has to be given by express enactment, and in these proceedings this Court is not exercising an appellate jurisdiction. What we have to see is that in arresting

or directing the detention of a citizen the authority concerned was acting within its lawful powers. Where the Legislature made that authority the judge of facts, this Court in proceedings for directions in the nature of *habeas corpus* will accept its findings of facts unless they are vitiated in law.

We do not intend, as it is unnecessary for us, to make here an exhaustive survey of the circumstances in which the findings of facts would not be binding on us. But it is clear that such findings may be vitiated either because the authority concerned did not act in good faith in coming to the finding or if relevant materials were not before it and it allowed itself to form its opinion on extraneous and irrelevant matters; and where the enactment investing the authority with the power requires him to act reasonably, an irrational finding would vitiate itself.

Section 7 (2) of the Public Property Protection Act, 1947, empowers the officer authorized under the Act to arrest "without warrant any person whom he suspects of having committed . . . . or of committing any prejudicial act." Suspicion, it must be remembered, is something much weaker than proof and all that is required of the officer in entertaining a suspicion is that it must be in good faith. [*See* section 10 (*1*) of the Act.] Now, what is good faith? Section 2 (*25*) of the General Clauses Act states that "a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not." Accordingly, as far as the state of the mind of the officer effecting the arrest is concerned the only justicable issue is whether he acted honestly or not, irrespective of whether it was done with due care or not. It may be that if the suspicion was entertained irrationally that in itself would be evidence of absence of honesty; but it would be only one item in the bundle

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of evidence on which the Court would have to decide whether the suspicion entertained was entertained honestly or not. Irrationality in itself would not be conclusive of absence of honesty of motive.

Now in this case honesty in the sense contemplated by section 2 (25) of the General Clauses Act in relation to U Ba Chit has not been directly questioned. What was said was that on the materials before him he, as a reasonable and prudent person, should not have entertained the suspicion of the nature contemplated by the Public Property Protection Act. That leads us to the question whether the entertainment of the suspicion was so irrational on the facts available to the police officer that it would be indicative of want of good faith. In considering this question it must be remembered that the learned counsel for the applicant himself stated that it was a common practice in importing circles for goods, required to be covered by import licences, to be first shipped to Burma and the necessary licences obtained subsequently. He said the issue of importing licences was so often delayed that many importers in anticipation—it is suggested in all good faith—of the grant of licences brought the goods into the ports of the Union of Burma. That practice is clearly an illegal practice in view of section 3 (2) of the Control of Imports and Exports (Temporary) Act, 1947. Section 18 of the Sea Customs Act, with which must be read section 19 of the same Act, prohibits goods falling with the classes covered by an Order under the Control of Imports and Exports (Temporary) Act, 1947, being brought into the Union, whether by land or sea.

We are prepared to agree with the learned counsel for the applicant that the affidavit of U Ba Chit, the Inspector of Police who arrested U Aye Kyi, is not as specific as could be desired. But when in paragraph 2 of his affidavit U Ba Chit stated that he suspected

U Aye Kyi of being concerned in the receiving of licences to import and export goods by illegal means contrary to the rules made by the Government in that behalf and also that U Aye Kyi was concerned in the matter of the loss of nearly Rs. 18 lakhs revenue payable by importers as duty under the Sea Customs Act, we are of the opinion that the only reasonable interpretation that can be put on these statements is that sought to be put on them by the learned Attorney-General. The learned Attorney-General says that the obvious reference in these statements is to the practice admitted by the learned counsel for the applicant of importers, before obtaining importing licences, to ship goods into the ports in the Union and obtaining licences only after the goods had arrived at the ports.

Under the Control of Imports and Exports (Temporary) Act, 1947, and an Order made thereunder, read together with the Sea Customs Act the provisions of which have been made applicable, the importers who import without the necessary licences are liable to confiscation of the goods, in lieu thereof to a fine ranging up to 300 per cent of the value of the goods and a penalty amounting to another 300 per cent of the value of the goods. (*See* section 167, item 8 of the Sea Customs Act.)

The issue then of licences *ex-post facto* and procuring the issue of such licences by illegal means would clearly be an act which directly or indirectly abets or incites or facilitates the contravention of any rule and order made under the Control of Imports and Exports (Temporary) Act, 1947. That act clearly would be a "prejudicial act" within the meaning of section 2 (ii) (*b*) of the Public Property Protection Act. Moreover, it appears also that such an act would fall within the definition of the term "prejudicial act" in sub-clause (*a*) of the same section, namely, an act

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directly or indirectly connected with, or relating to, any unlawful activity having for its object the smuggling of any property in Burma in contravention of import or export orders and rules duly made by the Government under the Control of Imports and Exports (Temporary) Act, 1947. Wharton's Lexicon defines "smuggling" as the offence of importing prohibited articles, or of defrauding the revenue by the introduction of articles into consumption without paying the duty chargeable on them. The allegations above set out would clearly fall within the first arm of this definition.

In these circumstances the application fails and stands dismissed.