SUPREME COURT.

† S.C. 1948

Sept. 22.

MAUNG HLA GYAW (APPLICANT)

v.

THE COMMISSIONER OF POLICE, RANGOON AND ONE (RESPONDENTS).*

Public Order (Preservation) Act, 1947, s. 5A—Preventive Justice—Nature of—Rights and duties of the courts and extent of enquiry they would hold in an application for direction in the nature of habeas corpus.

Held: Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed or from doing some act injurious to the members of the community which he may do but has not yet done, is common to all systems of jurisprudence; and as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable that he would do, it must in all cases necessarily proceed to some extent on anticipation as distinct from proof.

Commissioner of Police acting under s. 5A of the Public Order (Preservation) Act, 1947, cannot be required to act on such materials only as *would be sufficient for conviction at a criminal* trial but his power to detain under the Act is not absolute. Supreme Court can enquire into the legality or sufficiency of any decision of a judicial or quasi-judicial body dealing with the liberty of subjects.

In proceedings in the nature of *habeas corpus* the Supreme Court does not exercise appellate jurisdiction. Its function is simply to see whether the authority detaining a person has or has not acted within the limits of its power. For this purpose it must examine the competency of the authority and also consider whether it had before it such materials as would justify in law to arrive at the conclusion it did, and court may for the purpose of satisfying itself require to be informed of the nature of the materials on which the authority purported to act. The Court can enquire even into the *bona fides* of the authority and genuineness of the order itself.

Rex v. *Secretary of State for Home Affairs*, (1942) 2 K.B. 14 at p. 22, followed.

Though the original order of detention is legal in its inception the court can consider whether because of events subsequently supervening the continuance of the detention is legal or justifiable.

Where the authorities are entrusted with the power to direct detention under the Act for an indefinite—it may be for a prolonged—period, of a citizen, the duty of the authorities is to sift such materials as are before them with care and to form a definite opinion before they take action.

---

* Criminal Misc. Application No. 19 of 1948.

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

S.C. 1948

MAUNG HLA GYAW v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

Aung Min for the applicant.

Chan Htoon (Attorney-General) for the respondents.

The judgment of the Court was delivered by

E MAUNG, J.—This application for directions in the nature of *habeas corpus* raises directly some points not covered by previous decisions of this Court.

The prisoner whose release is sought in these proceedings was taken into custody on the 20th July 1947 and has since been detained at the Jail Annex, Insein. This detention is sought to be justified on behalf of the respondents as having been made under section 5A of the Public Order (Preservation) Act, 1947. In the return made to the summons to show cause on behalf of the Commissioner of Police, it is said that the Commissioner of Police, who had been authorized under section 7 of the Public Order (Preservation) Act to exercise powers under section 5A of the Act, had received credible information that the prisoner had been acting in a manner prejudicial to public safety and the maintenance of public order and that the Commissioner of Police was satisfied that it was necessary that the prisoner should be detained under the provisions of section 5A of the Act. The return proceeds to recite four of the unlawful activities which the prisoner was alleged to have been engaged in.

The return was traversed on behalf of the prisoner in several respects. The order of detention in writing, a copy of which was filed with the return made by the respondents, has been challenged as not being in existence on the 20th July 1947 and it was claimed that the warrant of detention purporting to bear that date is a recent fabrication coming into existence only in July 1948. This is a very grave allegation ; if true, it

S.C. 1948

MAUNG HLA GYAW v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

E MAUNG, J.

would justify the immediate release of the prisoner. But we are satisfied that there is no substance in this allegation. Apart from the inherent improvability of senior and responsible officers like the Commissioner of Police and the Superintendent of Jail being parties to such fabrication, the learned Assistant Attorney-General who appears for the respondent has on definite instructions repudiated the correctness of the allegation made on behalf of the prisoner in this respect.

The detention of the prisoner in this case is under the Public Order (Preservation) Act, 1947. Section 5A, which is the relevant provision of the Act, *inter alia* enables the President of the Union and other officers empowered by him to direct the detention of any particular person if the President or such officer is satisfied that "with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of public order it is necessary so to do." The detention is not for any specified period and it may be indefinite and prolonged in duration.

Preventive justice which consists in restraining a man from committing a crime which he may commit but has not yet committed or from doing some act injurious to the members of the community which he may do but has not yet done, is common to all systems of jurisprudence; and as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable that he would do, it must in all cases necessarily proceed to some extent on anticipation as distinct from proof. It follows, therefore, that it cannot be required of the Commissioner of Police when acting under section 5A of the Public Order (Preservation) Act that he must act on such materials only as would be sufficient for conviction at a

S.C. 1948

MAUNG HLA GYAW v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

E MAUNG, J.

criminal trial. On the other hand, his power to detain a person under the Act is not absolute. Whatever the legal position under a similar enactment may be elsewhere, it cannot within the Union be said that administrative plenary discretion is vested in the officer empowered under the Act and that it is for him without question to decide whether he has reasonable grounds and to act accordingly. No legislative provisions in the Union can validly exclude this Court from enquiring into the legality or the sufficiency of any decision of a judicial or quasi-judicial body.

Even in *Rex* v. *Secretary of State for Home Affairs* (1), which reaches the high water mark in upholding the doctrine of State necessity, Lord Greene M.R. has said :

> " It is clear that there may be many matters into which the court can and will inquire under the section if occasion arises, for example, the *bona fides* of the Secretary of State, the genuineness of the detention order itself, and the identity of the applicant with the person referred to in the order. Similary, if, for example, a regulation empowered the Home Secretary to detain any person who was in fact an alien, the court could inquire into the nationality of the applicant, since, if it transpired that he was not in fact an alien, his detention would be *ultra vires*."

The qualifying words " for example " make it clear that the Master of Rolls even in this case did not intend the list of matters open to examination by the Court to be exhaustive.

As we have already said before in *Daw Khin Tee* v. *U Chan Tha and one* (2) this Court is not exercising appellate jurisdiction in proceedings in the nature of *habeas corpus*. Its functions are generally to see whether the authority which has directed the detention of a person has or has not acted within the limits of its powers. For this purpose, it must examine the

(1) (1942) 2 K.B. 14 at p. 22. (2) Criminal Misc. Application No. 14 of 1948.

S.C. 1948

MAUNG HLA GYAW v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

E MAUNG, J.

competency of that authority to make the order complained of. It can also consider whether the authority had before it such materials as would in law justify it to arrive at the conclusion it did ; in doing so the Court will bear in mind that action under the Public Order (Preservation) Act is one in the nature of administration of preventive justice and that, as has already been said before, action under the Act has necessarily to be to some extent on anticipation as distinct from proof. The Court may for the purpose of satisfying itself that the authority, whose action has been challenged, had materials before it to arrive at its conclusion, require to be informed of the nature of such materials.

In answer to some of the allegations in the return made by the Commissioner of Police it is said on behalf of the prisoner that whatever may have been the position on the 20th July 1947 when the prisoner was taken into custody and his detention ordered, circumstances have since changed and that by the 4th August 1948 when the application for direction in the nature of *habeas corpus* was filed in this Court, the continued detention of the prisoner on the grounds alleged could no longer be justified. These allegations and counter allegations give rise to the question if, assuming the detention to be legal in its inception, the Court can consider in these proceedings whether because of events subsequently supervening the continuance of the detention is legal or justifiable. On principle, it is clear that the Court must have that power. In an application for directions in the nature of *habeas corpus* the return must state not merely the cause of the caption or the original arrest but also the cause of detention at the date the return is made. If by the time the return is made, either because of lapse of time or because of events supervening, the continued

S.C. 1948

MAUNG HLA GYAW v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

E MAUNG, J.

detention becomes illegal, there can be no doubt that in spite of the legality of the original arrest and detention in its inception, the Court has the power and is under a duty to direct the release of the prisoner.

From what has been said earlier in this judgment, it is clear that the formal legality of the original arrest and detention in this case cannot be questioned. There was an order in writing made on the day the prisoner was taken into custody and that order in writing was made by a person competent to make it. All the formal requisites of such an order are present.

Coming to the merits of the case, the arrest and detention were sought to be justified on the allegations (*a*) that the prisoner together with other persons, who also had been taken into custody about the same time as the prisoner, had been engaged in a murder plot resulting in what is known as the State Assassination wherein several Ministers of the Government of Burma and others were murdered on the 19th July 1947 ; (*b*) that the prisoner was directly and indirectly concerned in the loss of arms and ammunition from the Base Ordnance Depôt, Botataung, in or about the month of July 1947 ; (*c*) that the prisoner and two others, who also have been detained under the Public Order (Preservation) Act, were found on the 6th July 1947 in a jeep in which were found a revolver with ammunition—the revolver and ammunition not being covered by any license under the Arms Act ; and lastly (*d*) that the prisoner is " closely connected with Bo Yan Naing and other ex-Burma Defence Army members (*ye-baw haung ahpwe*) who are actively collecting arms and ammunition to subvert the Government established by law."

Applying the principles already enunciated relating to the administration of preventive justice and the functions of the Court in cases where the detention

S.C. 1948

MAUNG HLA GYAW v. THE COMMISSIONER OF POLICE, RANGOON AND ONE.

E MAUNG, J.

was lawful in its inception though supervening events made no longer justified the continuance of the detention, it appears to us that the allegations relating to the State Assassination and the finding of a revolver and ammunition in a jeep, assuming they justified the original arrest, would not justify the continued detention of the prisoner. It would be well if attention is drawn to the fact that the Public Order (Preservation) Act is not intended to punish a person by indefinite and prolonged detention for a crime he has committed ; it is intended to prevent the commission of a crime endangering public safety and public order. For the revolver and ammunition found in the jeep the prisoner had been sent up for trial under section 19 (f) of the Arms Act and, whether it was for lack of evidence or for technical reasons, that criminal trial had come to an end on the 10th March 1948 with an order of discharge. The allegation of the prisoner's complicity in the loss of arms and ammunition at the Base Ordnance Depôt in or about July 1947 may, *prima facie*, be a good return justifying detention but the Commissioner of Police either because the materials before him were not sufficient for him to form an opinion one way or the other or because he had not attempted to come to a definite conclusion, has been content in the return to allege that the prisoner was "*directly or indirectly concerned in the loss, etc.*" In the events that follow in this case, this is not a matter of importance but we feel we cannot too strongly impress on those who are entrusted with powers to direct the detention, for an indefinite—it may be for a prolonged—period, of a citizen that it is their duty to sift such materials as are before them with care and to form a definite opinion before they take action.

The last ground stated in justification of the detention of the prisoner, however, appears to be

sufficient for the dismissal of the application. The allegation made by the Commissioner of Police that the prisoner was closely connected with Bo Yan Naing and other ex-Burma Defence Army members has not been and cannot be seriously challenged. The admitted incident of the 6th July 1947 when the prisoner Maung Lun Bye was found in the company of Bo Yan Naing in a jeep wherein were also a revolver and ammunition not covered by any license, is sufficient proof, if need be, of the close association between the two. In *Tinsa Maw* v. *The Commissioner of Police and one* (1) we have upheld the detention of Bo Yan Naing under section 5A of the Public Order (Preservation) Act. Given the close association between Bo Yan Naing and Maung Lun Bye and given also the engagement of Bo Yan Naing in subversive activities, it cannot possibly be said that the order of detention, which is a measure of preventive justice, is made other than in anticipation in good faith by the Commissioner of Police of the likelihood of Maung Lun Bye's participation in these activities of Bo Yan Naing and his colleagues.

The application for directions in the nature of *habeas corpus* must stand dismissed.

(1) Criminal Misc. Application No. 15 of 1948 of this Court.