

SUPREME COURT.

MA KHIN THAN (APPLICANT)

v.

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

Dec. 1.

Public Order (Preservation) Act, 1947, s. 5 (1)—S. 5(2)—S. 7.

Maung Maung Khin was arrested by the Police Station Officer, Latier Street Police Station on the 7th October 1948 under s. 5 (1) and later under orders of the Deputy Commissioner of Police, Rangoon, to whom authority was delegated under s. 7. The order challenged was that of the 8th October 1948 by the Deputy Commissioner of Police, Rangoon.

Held: That the order of detention was on its face irregular as the *détenué* could not be detained beyond 6th December 1948 and the detention till the 7th December 1948 was irregular. What has to be justified is the original arrest under s. 5 (1) and the charges against the *détenué* of being in contact with the Burma Communist Party and of distributing leaflets and pamphlets issued by the said party and of possession of such a leaflet and some documents was held in the circumstances not sufficient justification. The Burma Communist Party has not been declared an unlawful association and to be a member is not in itself justification for action being taken.

To be a Communist and to propagate communism by distributing literature would be acting within the lawful rights assured to a citizen, if he thereby commits no unlawful act or cause a breach of the peace or public disorder. Possession and retention of documents would not be a sufficient ground in law for action. As from the title of the leaflet the attack was against the AFPFL and not against the Government of the Union of Burma—it was within the powers of a citizen to criticize and attack political organization provided it is legitimate and not prohibited by law.

Held: That the detention was therefore not in accordance with law.

Toe Sein for the applicant.

Ba Sein (Government Advocate) for the respondents.

The judgment of the Court was delivered by

MR. JUSTICE E. MAUNG.—The applicant's husband Maung Maung Khin was arrested by U Than Kyaw,

* Criminal Misc. Application No. 70 of 1948.

† Before SIR BA U, Chief Justice of the Union of Burma, MR. JUSTICE E. MAUNG and MR. JUSTICE KYAW MYINT.

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Police Station Officer, Latter Street Police Station, Rangoon, on the 7th October 1948, acting under section 5 (1) of the Public Order (Preservation) Act, 1947. Maung Maung Khin has since that date been detained, first under the orders of U Than Kyaw and later under the orders of the Deputy Commissioner of Police, Rangoon. The Deputy Commissioner of Police, Rangoon, enjoys by delegation under section 7 of the Public Order (Preservation) Act the powers of the President under section 5 (2) of the Act.

The order of detention now in force and which is being challenged is that of the 8th October 1948, made by the Deputy Commissioner of Police, Rangoon, under section 5 (2) (ii), (4) and it purports to direct the detention of Maung Maung Khin in the Rangoon Central Jail till the 7th December 1948. Recently we have held that the total detention in exercise of powers under section 5 of the Act cannot exceed two months. Accordingly, if in this case we see no reason to interfere with the order of detention, the applicant's husband is due to be released on the 6th December 1948. In this respect there is an irregularity apparent on the face of the detention order in that it purported to authorize the detention till the 7th December 1948.

It is thus of little practical effect to the applicant's husband whether we direct his release to-day or not ; but the case involves points of general application and importance.

The detention being under section 5 of the Public Order (Preservation) Act what has to be justified, as we have on several occasions said, is the original arrest under section 5 (1) of the Act, and U Than Kyaw the Police Station Officer who effected the arrest of Maung Maung Khin, has sought to do this. In support of his action he has claimed firstly, " that Maung Maung Khin is in contact with the Burma Communist Party

and that his particular duty is to distribute copies of leaflets and pamphlets issued by the Communist Party in Sooratee Bazaar, Rangoon"; secondly, "that a copy of Communist printed leaflet entitled 'Communist and PYA must combine and attack the AFPFL' was found" in the possession of Maung Maung Khin when a search was made on him on the 6th October 1948; and lastly, that "when a raid was made on Maung Maung Khin's residence on the 8th October 1948 some documents relating to Burma Communist Party, *viz.* (a) a pamphlet on the speech given by Thakin Than Tun at the Pyinmana Congress, (b) a book on Communism and (c) a song urging the people to join in the rebellion to overthrow Government were found and seized."

It is not claimed on behalf of the respondents that the Burma Communist Party is or has been declared an unlawful association. Accordingly, to be a member of that organization is in itself a matter not justifying in action being taken. To disseminate propaganda on behalf of a certain organization again, is in itself not at all a matter for disapprobation. It is not claimed by U Than Kyaw that the literature said to be distributed by Maung Maung Khin was of such a character that it must necessarily be productive of breach of peace or public disorder. As we apprehend the Constitution of the Union, to be a Communist and to propagate Communism by distributing literature on the subject would be acts within the lawful rights assured to a citizen, so long as he thereby does nothing to commit an unlawful act or cause a breach of the peace or public disorder. In this case, as we have already said, there is no allegation that the literature distributed was of that class which would come within the prohibition of law.

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As regards the documents claimed by the police to have been seized either from the person or the residence of Maung Maung Khin, his wife, the applicant, has claimed that these were documents which, about the time they were seized, were being distributed in the area where they were living and that her husband came into possession of them in an innocent way and without any special knowledge of how they originated and of the doctrines inculcated in them. It may well be as the applicant has claimed. Assuming, however, that these documents were not casually received and retained by Maung Maung Khin, we still cannot see that their possession and retention would be a sufficient ground in law for action under the Public Order (Preservation) Act.

We have not before us the leaflet entitled "Communist and PYA must combine and attack the AFPFL"; but from the title of the leaflet it would appear that the attack was directed towards the AFPFL and not against the Government of the Union as such. The AFPFL is a political organization and the Communist Party and the PYA are other such organizations in the Union. It is of the essence of democratic government that one political organization is entitled to criticize and attack another political organization so long as such criticism and attack is legitimate and is not prohibited by law.

The three other documents which were seized at Maung Maung Khin's residence on the 8th October 1948 cannot also be regarded as sufficient foundation for action under the Public Order (Preservation) Act. The speech given by Thakin Than Tun at the Pynmana Congress at a time when Thakin Than Tun was accepted as a law-abiding citizen of the Union and the record of which speech has not been proscribed by the Government, cannot also be the basis of any action

under the Act. The book on Communism is clearly not a matter needing any further discussion; its possession is perfectly innocuous.

The leaflet containing the song "urging the people to join in the rebellion" has been amplified by the applicant as being one containing the Cultivator's Song. It is a matter of notoriety and publicity—which we are therefore entitled to take judicial notice of—that in the language of politicians in these days "rebellion" (*tawhlan-ye*) does not necessarily mean much and no undue importance should, in our opinion, be attached to its use in political-literature apart from ancillary considerations.

The position then in this case comes to this. The acts charged against the applicant's husband are in themselves colourless and neutral. It may be that these acts together with other circumstances connected therewith would be of moment and amount to a danger to public safety and tranquillity; but of these circumstances we are told nothing. Accordingly, we must hold that on the materials before us the detention of Maung Maung Khin is not in accordance with law.

We therefore direct that Maung Maung Khin be released forthwith.

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