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BHUT NATH METE

v.

THE STATE OF WEST BENGAL

February 8, 1974.

B [V. R. KRISHNA IYER AND R. S. SARKARIA, JJ.]

Maintenance of Internal Security Act, 1971—s. 3—Continuance of emergency not a justiciable issue—Order of detention if bad because criminal prosecutions failed—If Government should pass a speaking order—Communication of facts cornerstone of right of representation—Poverty and illiteracy if relevant to s. 3.

C The petitioner was detained under s.3 of the Maintenance of Internal Security Act, 1971 on the ground that he broke open wagons and looted wheat and tea. The report which was sent by the Police to the District Magistrate was forwarded to the Government and the Board. It contained information that the petitioner was poor and illiterate, had associates in notorious wagon-breakers and anti-social elements, had developed the spirit of lawlessness and aptitude for anti-social activities and that many of the reported and unreported cases of recent and criminal activities existed to his credit besides the instances communicated to the detenu.

D It was contended that (1) there was no real emergency and yet the proclamation of emergency remained unretracted with consequential peril to fundamental rights; (2) that sections 3(3) and 10 of the Maintenance of Internal Security Act violated art. 22(5) of the Constitution; (3) that the order was *male fide* because it was made after and on account of the discharge of the petitioner in the relative criminal cases; (4) that a speaking order should be passed by the government or by the Advisory Board while approving or advising continuance of detention and (5) that some irrelevant and uncommunicated charges had influenced the authority, vitiating the order of detention.

E Allowing the petition,

HELD: (1) Academic exercise in constitutional law are not for courts but jurists and it is not possible to hold that the continuance of emergency was void. It is outside the orbit of judicial control and wandering into the para-political sector. The argument is political, not a justiciable issue and the appeal should be to the polls and not to the courts. [321 H]

F *Rex* v. *Governor of Wormwood Scrubbs Prison*, [1920] 2 K.B. 305, *The King* v. *Halliday*, [1917] A.C. 260, 270 and *Ringkan* v. *Government of Malaysia*, [1970] A.C. 379; 390; 391; referred to.

(2) There is no inconsistency with or erosion of the opportunity of making a representation against the order. The soul of art. 22 is the fair chance to be heard on all particulars relied on to condemn the detenu to preventive confinement. But sec. 3(3) does not and cannot transcend this trammel and never states that particulars conveyed to government and eventually to the Board may be behind the back of the detenu. Reading the provisions liberally and as G owing allegiance to Art. 22(5), it is right to say that all particulars transmitted under s.3(3) beyond the grounds of detention must in no way detract from the effectiveness of the detenu's right of representation about them. The guarantee of Art. 22(5) colours the construction of s. 3. [324 A—C]

(3) It is not correct to say that the order of detention was bad because the criminal prosecutions have failed. It is well-settled that even unsuccessful judicial trial or proceeding would not operate as a bar to a detention order H or render it *mala fide*. [324 E—G]

Subrati v. *State of West Bengal*, [1973] 3 S.C.C. 250, *M. S. Khan* v. *C. C. Roze*. A.I.R. 1972 S.C. 1670 and *Rameshwar Lal* v. *State of Bihar*, [1968] 2 S.C.R. 505;511, followed.

(4) There is no substance in the argument that a speaking order should be passed by government or by the Advisory Board while approving or advising continuance of detention although a brief expression of the principal reasons is desirable. The communication of grounds, the right to make representation and the consideration thereof by the Advisory Board made up of men with judicial experience, the subject matter being the deprivation of freedom, clearly implies a quasi-judicial approach. The bare bones of natural justice in this context need not be clothed with the ample flesh of detailed hearing and elaborate reasoning. A speaking order, like a regular judicial performance, is neither necessary nor feasible. A harmonious reconciliation between the claims of security of the nation and the liberty of the citizen through the process of effective representation before deprivation and fair consideration by the executive and the Advisory Board are the necessary components of natural justice, no more. [326 F] A B

(5) The detention was illegal for denial of opportunity to make effective representation. Sec. 3(3) read with Art. 22(5) stands contravened and the right to represent rendered barren. Particulars prejudicial to the detenu played over the judgment of the authorities but the petitioner never knew of such injurious information, and could not answer back. Communication of facts is the cornerstone of the right of representation and orders passed on uncommunicated materials are unfair and illegal. Poverty and illiteracy are irrelevant to s. 3. The spirit of lawlessness and aptitude for antisocial activities are neither here nor there *vis-a-vis* s.3. Other reported and unreported instances, though relevant, are kept back from the petitioner. [328 B] C

ORIGINAL JURISDICTION : Writ Petition No. 1456 of 1973. D

Under Article 32 of the Constitution for issue of a writ in the nature of *habeas corpus.*

S. J. S. Fernandez, for the petitioner.

P. K. Chakravarty, for the respondent.

The Judgment of the Court was delivered by E

KRISHNA IYER, J.—The petitioner, undergoing inhibitive incarceration in West Bengal, seeks this Court's writ to be liberated on grounds of substantive innocence and processual injustice. Judicial vigilance is the price of liberty and freedom of the person is a founding faith of our Republic. So it behoves us to examine the legal circumstances of the detention in the light of the constitutional constraints under art. 22 and the procedural safeguards of the Act (the Maintenance of Internal Security Act, 1971). F

A brief calendar bearing on the landmark events, giving the core facts relevant to the legality of the detention, is necessary right at the beginning. The order of the District Magistrate, Burdwan, which cast the petitioner into jail recited that he was 'satisfied' that with a view to preventing the petitioner 'from acting in any manner prejudicial to the maintenance of supplies and services essential to the community' the direction for detention under s. 3 of the Act was being made, impeccably adhering to the *mantra* of the law. The grounds which induced the authority's satisfaction were concomitantly furnished as required by s. 6(1), read with s. 3(2), of the Act. "You are being detained" runs the communication....on the grounds that you have been acting in a manner prejudicial to the supplies and services essential to the community *as evidenced by the particulars given below* :—" Three specific instances were set out of November 21, 1971, November 24, 1971 and G H

A January 13, 1972—all over seven months prior to the detention order—alleging that the petitioner and his associates (not named) broke open wagons and 'looted' wheat and tea. There is also a statement that 'the said activity of yours thus attracts Sec. 3(1)(a)(iii) of the ...Act."

It is a trifle mystifying that the detention order is passed many B months after the three criminal break-ins, and equally strange it is that the prisoner is arrested only on February 22, 1973, many months after the order of detention was passed, there being no justification of abscondence. Long before the grounds of detention were served on the detenu (February 22, 1973) the State Government had approved the District Magistrate's order which it did on September 2, 1972. Shortly thereafter, the State Government placed the case of the detenu before C the Advisory Board under s. 10 of the Act, although the actual detention was effected only in 1973. The affidavit-in-opposition by the Deputy Secretary to Government does not explain these time lags between the prejudicial acts and the preventive detention order, and between the order and the detention. The petitioner's averment in this context becomes disturbingly meaningful, for, according to him, the instances were false and when he was prosecuted in Court, the cases D ended in his favour. He has stated in his representation to the Advisory Board that "over the grounds No. 1, 2 and 3 Burdwan P. S. Case No. G.R.P.S. No. 10(11)71, 9(11)71, and 6(1)72 was started. The petitioner was arrested in connection with aforesaid case. But as the charges are false, so no *prima facie* case was established against the petitioner was discharged by the learned S.D.J.M., Burdwan. But soon as the petitioner was discharged from the case, the petitioner E again arrested and arbitrarily detained under MIS Act."

We will consider these aspects in a little detail later. Suffice it to say that the Advisory Board considered the representation of the detenu and the material placed before it by the State, and concluded on April 28, 1973 that there was sufficient cause for the detention of the petitioner. Thereafter, by order dated May 7, 1973, the State Govern- F ment continued the detention "until the expiration of twelve months from the date of his detention or until the expiry of D.I. Act, 1971, whichever is later."

Both the State Government and the Advisory Board had before them, while deciding on the propriety of the detention, the criminal biography of the petitioner, and, indeed, counsel for the State fairly G stated that the opinion and the advice were based upon the specific instances furnished to the petitioner in the grounds of detention as well as on the dossier furnished by the Superintendent of Police, a copy of which has been produced in Court. It looks as if this is a routine procedure and there is a proforma for the history sheet. Column 7 thereof, apart from setting out the three instances communicated to the detenu also mentions certain relevant and injurious circumstances H relating to the petitioner, which may be extracted here :

"The subject Bhut Nath Mete s/o L. Sambhu Nath Mete of Belari, P.S. Ausgram, Dist. Burdwan, was born in a poor

family. He got no education in his childhood. He worked as a day labour. He used to mix up with the notorious wagon breakers and anti-social elements. This inspired in him the criminal propensities which shaped his future career. But to his association with the railway criminals and anti-social elements he developed the spirit of lawlessness and acquired special aptitude for anti-social activities and acts prejudicial to the maintenance of supplies and services essential to the community. For fear of assault and manhandling none of the local people dare to say anything against him and his associates to the Police or to any authority as a result of which many cases remain unreported to the Police.

Besides many of the reported and unreported cases some of the instances of his recent anti-social and criminal activities which were prejudicial to the maintenance of the supplies and services essential to the community are mentioned below...."

It is apparent,—and indeed it is not denied,—that the total impact of these materials on the District Magistrate, the State Government and the Advisory Board, resulted in the initial detention and subsequent continuation in incarceration.

We have now to see what the grounds of challenge are and the sustainability thereof in the eye of the law and the Constitution.

Before getting to grips with the contentions we may indicate the constitutional dimensions of the freedom of which the judges are, in part, sentinels on the *qui vive*. Civil liberty, a constitutional guarantee, is a strange bed-fellow with detention without trial, a British bequest. Begun from the days of the East India Company, our freedom fighters, including the Father of the Nation, have endured its repressive impact and so when the sombre, colonial story came to a close, our founding fathers enshrined freedom of the person as a fundamental right. But as realists they know that we became free amidst blood bath and chaos and the environs of belligerency. The delicate balance between security and liberty had to be kept, conscious that, in the contemporary world, war is to peace near allied and 'this pertition do their bounds divide' and the defenses of a nation can be destroyed and the morale of its people broken not only by external aggression but also by internal disruption. The sensitive underside of the nation can be wounded by those who break up public order, breach State security, blow up essential supplies and services; and so, as an unhappy necessity, preventive detention, apart from punitive prison term, was recognised and provided for. Being committed to the rule of law, primary article of faith, the framers of the Constitution mistrusted uncanalised power in the Executive and wrote into the paramount law provisions regulating preventive detention and proclamations of emergencies. After all, Lord Acton's dictum that absolute power corrupts absolutely was for them no new knowledge, and Lord Atkin's great words in *Liversidge* v. *Anderson*(1) that amid the clash of arms the laws are not silent, that

(1) [1942] A. C. 205

A they may be changed, but they speak same language in war and peace, reverberated in their ears. Therefore, where freedom is in peril and justice is threatened the citizen shall receive the fullest protection from the Court within the four corners of art. 22, benignantly stretched, and the safeguards of the Act liberally interpreted—within legitimate limits. The worth of the human person is a cherished value carefully watched over by the Court. Such is the judicial perspective in the application B of art. 22 to the MISA, which it contains, controls and animates.

Indeed, this Court, by a series of creative pronouncements has built into vast powers vested in the Administration by the MISA and its predecessors legal bulwarks, breakraters and blinkers which have largely humanised the harsh authority over individual liberty otherwise exercisable arbitrarily by executive fiat. In this case, we are concerned C with a limited canvass, for, in a sense, the court's control through review is peripheral, processual and yet crucial. The area of judicial 'embudsmania' which obtrudes into our attention in the present case relates to the observance of natural justice to the partial but compulsory extent the law of the Constitution and the law under the Constitution, obligate. There is a limited 'judicialisation' of administrative acts that art. 22 insists on, which is express, explicit and mandatory D and admits of no exceptions.

Article 22(5) is principled and pragmatic, flexible but firm and enforces the right to be heard without over-loading the administrative process with judicial trappings. It reads :

E "(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

F The fundamental constitutional mandates are that the authority (a) shall communicate to the detainee *'the grounds on which* the order has been made'—nothing less than *all* the material grounds which operate to create that subjective satisfaction in the authority which spells suspension of the citizen's liberty—and (b) shall afford him the *earliest* opportunity of making a *representation against the order*—no avoidable delay, no shortfall in the material communicated shall disable the G prisoner making an early, yet comprehensive say on every particular or fact which has influenced the detainer or other body to order, approve or advice the deprivation of an individual's freedom. Such is the fairness and justice 'untouchably' entrenched in art. 22(5) when administrative action preventively drowns a sacred human right in the name of public good and organised society. The power and its limits co-exist in constitutional amity and the MISA has effectuated this great policy H in s. 3(1) and (3) read with ss. 5(1) 10 and 11(i) and (ii). The humanist restraint so woven into the law against executive extravagance or indifference must be strictly applied since casual and careless and

uninformed disposal of other's freedom is to break faith with the constitutional tryst. The admonition of Patanjali Sastri, C.J., is inspirational :

> "Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court. In this case, the petitioner has the right, under article 12(5), as interpreted by this Court by a majority, to be furnished with particulars of the grounds of his detention "sufficient to enable him to make a representation which on being considered may give relief to him. We are of opinion that this constitutional requirement must be satisfied with respect to each of the grounds communicated to the person detained, subject of course to a claim of privilege under clause (6) of article 22."(1).

The strict construction of the statute setting the court's face sternly against encroachment on individual liberty, keeping the delicate balance between social security and citizens' freedom, is perfectly warranted by this Court's observation in *Kishori Mohan Bera* v. *State of West Bengal*(2) :

> "The Act confers extraordinary power on the executive to detain a person without recourse to the ordinary laws of the land and to trial by courts. Obviously, such a power places the personal liberty of such a person in extreme peril against which he is provided with a limited right of challenge only. There can, therefore, be no doubt that such a law has to be strictly construed. Equally, also, the power conferred by such a law has to be exercised with extreme care and scrupulously within the bounds laid down in such a law."

In a sense this approach is only an application of the insistence of fairness when power is exercised to effect other's rights, particularly the most sensitive of all rights—personal freedom. Natural justice is the index of fairness, although as Sachs, L.J., indicated in *In re-Pargemon Press Ltd.*(3) : "In the application of the concept of fair play there must be real flexibility so that very different situations may be met without producing procedures unsuitable to the object in hand". In *A. K. Krapak* v. *Union of India*(4) this Court qualified :

> "The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously."

After all, one could never be too just or too fair when dealing with civil liberty.

(1) *Dr. Ram Krishan Bhardwaj .v State of Delhi* [1953] S. C. R. 708.
(2) A. I. R. 1972 S. C. 1749.
(3) [1971] 1 Ch. D. 368.
(4) A. I. R. 1970 SC 150.

A With these background observations, the statutory 'musts' of the MISA may now be delineated.

We are concerned, as earlier stated, only with some aspects of the preventive detention jurisprudence, in the present case, and we confine ourselves to them. The District Magistrate should be bona fide satisfied about the prejudicial activities of the detainee. Absence of B bonafides in this context does not mean proof of malice, for an order can be malafide although the officer is innocent. The important point is that the satisfaction of the public functionary, though subjective, must be real and rational, not colourable, fanciful, mechanical or unrelated to the objects enumerated in s. 3(1) of the Act. Viscount Haldane, L.C., in *Shearer* v. *Shields*(1) drew the line neatly thus :

C "Between malice in fact and malice in law there is a broad distinction which is not peculiar to any particular system of jurisprudence. A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far as the state of his D mind is concerned, he acts ignorantly, and in that sense innocently."

The attack on the order of detention has been delivered on the following grounds : (1) that the grounds are ambivalent, vague and void; (2) that the particulars suffer from insufficient communication thus crippling the constitutional right of representation; (3) that the E detention is *mala fide* having been made with ulterior and extraneous purpose of making up for the discharge of the petitioner in the criminal cases; (4) that a few acts of theft, not proximate in time to the detention order after judicial proceedings had failed, have no rational relation to potential prejudicial activities to stanch which it professes to have been made; (5) that the materials impelling the detention order and supplied to the Government and the Board add substantially to the F facts disclosed to the detenu thus hitting him below the belt and denying him the plenary opportunity to answer the uncommunicated but damaging charges with a futuristic import; (6) that the MISA violates art. 22(5) and is unconstitutional; and (7) that the detention has been arbitrary and may continue indefinitely if the Proclamation of Emergency becomes a constant fact of constitutional life and must therefore be regarded as unconstitutional. The last two were urged in another G *habeas corpus* application heard shortly before this one and are dealt with in a way here also.

We have to reject summarily the last submission as falling outside the orbit of judicial control and wandering into the para-political sector. It was argued that there was no real emergency and yet the Proclamation remained unretracted with consequential peril to fundamen- H tal rights. In our view, this is a political, not justiciable issue and the appeal should be to the polls and not to the courts. The traditional

(1) [1914] A. C. 808.

view, sanctified largely by some American decisions, that political questions fall outside the area of judicial review, is not a constitutional taboo but a pragmatic response of the court to the reality of its inadequacy to decide such issues and to the scheme of the constitution which has assigned to each branch of government in the larger sense a certain jurisdiction. Of course, when a problem—which is essentially and basically constitutional—although dressed up as a political question, is appropriately raised before court, it is within the power of the judges to adjudicate. The rule is one of self-restraint and of subject-matter, practical sense and respect for other branches of government like the Legislature and the Executive. Even so, we see no force in the plea. True, an emergency puts a broad, blanket blindfolding of the seven liberties of art. 19 and its baseless prolongation may devalue democracy. That is a political matter *do hors* our ken, for the validity of the proclamation turns on the subjective satisfaction of the President that a grave emergency, of the kind mentioned in Part XVIII, or its imminent danger, exists. In *Rex* v. *Governor of Wornwood Scrubbs Prison*(1) the Earl of Reading observed, on a similar contention :

> "...even if it is material to consider whether the military emergency has come to an end, it is not a matter which this Court can consider; whether the emergency continues to exist or not it is for the executive alone to determine....."

The argument of abuse of power was urged in England but repelled. In *The King* v. *Halliday*(2) Lord Dunnedin met it thus :

> "That is true. But the fault, if fault there be, lies in the fact that the British Constitution has entrusted to the two Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by any written instrument obedience to which may be compelled by some judicial body. The danger of abuse in theoretically present : practically, as things exist, it is in my opinion absent."

And Lord Wright in *Liversidge* v. *Anderson*(3) added effect to the point in these words :

> "The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency."

Of course, the British have no written constitution but the argument remains.

In the recent ruling of the Privy Council in *Hinakan* v. *Government of Malaysia*(4), the vires of a proclamation of emergency was put in issue as unconstitutional and a fraud on power. The Judicial Committee made short shrift of the submission in these words :

(1) [1920] 2 K. B. 305.
(2) [1917] A. C. 260, 270.
(3) [1942] A. C. 206.
(4) [1970] A. C. 379; 390; 391.

A "Although an "emergency" to be within the article must be not only grave but such as to threaten the security or economic life of the Federation or any part of it, the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, epidemics and the collapse of civil government."

B . . . . . .

"It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to inquire whether that situation could itself have been avoided by a different approach."

C . . . . . .

"These were essentially matters to be determined according to the judgment of the responsible Ministers in the lights of their knowledge and experience. And although the Indonesian Confrontation had then ceased, it was open to the D Federal Government, and indeed its duty, to consider the possible consequences of a period of unstable government in a State that, not so long before, had been facing the tensions of Confrontation and the subversive activities associated with it. That the appellant regarded the Federal Government's actions as aimed at himself is obvious and perhaps natural; but he has failed to satisfy the Board that the steps E taken by the Government, including the proclamation and the impugned Act, were in fraudum legis or otherwise unauthorised by the relevant legislation."

Justiciability was left open is that case but the limits of judicial propriety were clearly drawn. The U.S. Supreme Court has frowned on forensic examination of subjects of politics and policy which belong to F the other branches of government although in *Baker* v. *Carr*(1)—a landmark ruling —and *Gray* v. *Senders*(2), constitutional questions with considerable political consequences were boldly handled. Even the Viet Nam war came for judicial consideration. But this large and sensitive debate about the court's power hardly arises here because basically it is a matter least fit for adjudication by judicial methods and materials, and clearly the onus of establishing the effective end of G emergency and absence of any grounds whatever for the subjective satisfaction of the President, heavy as it is, has hardly been discharged. Academic exercises in constitutional law are not for courts but jurists and we decline to hold the continuance of emergency void.

Nor are we impressed with the argument that s. 3(3) and s. 10 violate art. 22(5) of the Constitution. The vice, according to counsel, H is that the detaining authority forwards to Government not merely the grounds of detention but "such other particulars as in his opinion have

(1) 369 U. S. 186 (1962) (2) 372 U. S. 363 (1963)

a bearing on the matter"—which matter may be beyond what is communicated to the detenu. If so, the effective opportunity to make representations against such extra material is absent and the right under art. 22(5) is stultified. No doubt, the soul of art. 22 is the fair chance to be heard on all particulars relied on to condemn the detenu to preventive confinement. But s. 3(3) does not—cannot—transcend this trammel and never states that particulars conveyed to Government and eventually to the Board may be behind the back of the detenu. Reading the provisions literally and as owing allegiance to art. 22(5), it is right to say that all particulars transmitted under s. 3(3) beyond the grounds of detention must, if they have a bearing on the determination to detain, in no way detract from the effectiveness of the detenu's right of representation about them. The guarantee of art. 22(5) colours the construction of s. 3. So viewed, there is no inconsistency with or erosion of the 'opportunity of making a representation against the order'. Whether, in this case, any unconstitutional deficiency in communication of such material has occurred will be tested later.

Is there any substance in the grievance that order is *mala fide*, made after and on account of the discharge of the relative criminal cases? The detention is not punitive but preventive and the District Magistrate's order recites to that effect. In this case, the petitioner's representation mentions the cases challaned and the discharge of the accused by the court in regard to the very incidents pressed into service to found the detention order. The long interval between the incidents and the orders lends probability to the petitioner's plea that there were cases which ended in his favour, particularly because no denial nor explanation is forthcoming on these aspects in the return. The question is whether for the reason that criminal prosecutions have failed the detention order is bad. We think not, and there is authority for it. in *Subrati* v. *State of West Bengal*(1) this Court rejected an identical argument, the purposes of preventive detention being different from conviction and punishment and subjective satisfaction being enough in the former while proof beyond reasonable doubt being necessary in the latter. "The Act creates in the authorities concerned a new jurisdiction to make orders for preventive detention on their subjective satisfaction on grounds of suspicion of commission in future of acts prejudicial to the community in general. This jurisdiction is different from that of judicial trial in courts for offences and of judicial orders for prevention of offences. Even unsuccessful judicial trial or proceeding would, therefore, not operate as a bar to a detention order, or render it *male fide*. The matter is also not *res integra*." In *M. S. Khan* v. *C. C. Bose*(2) a similar view was expressed and now a host of decisions had made the legal position unchallengeable. A note of caution, however, needs to be struck since absolute scrupulousness is expected of authorities exercising this exceptional power. This is not a power to put behind bars anyone you regard as dangerous or rowdyish or irrepressible or difficult of being got rid of by proof of guilt in court. This is an instrument for protecting the community against specially

(1) [1973] 3 SCC 250. (2) A. I. R. 1972 S. C. 1670.

A injurious types of anti-social activity statutorily enunciated. If extraneous motives adulterate the use of power, the court must nullify it. Observations in *Rameshwar Lal* v. *State of Bihar*(1) serve as a warning :

> "The appellant was tried for the offence and acquitted as far back as February 1967. This ground discloses careB lessness which is extremely disturbing. That the detaining authority does not know that the appellant was tried and acquitted months before, and considers the pendency of the case against him as one of the grounds of detention shows that due care and attention is not being paid to such serious matters as detention without trial. If the appellant was tried and acquitted, Government was required to study the judgC ment of acquittal to discover whether all these allegations had any basis in fact or not. One can understand the use of the case if the acquittal was technical but not when the case was held to be false."

After all, however well-meaning Government may be, detention power cannot be quietly used to subvert, supplant or to substitute the D punitive law of the Penal Code. The immune expedient of throwing into a prison cell one whom the ordinary law would take of, merely because it is irksome to undertake the inconvenience of proving guilt in court is unfair abuse. To detain a person after a court has held the charge *false* is to expose oneself to the criticism of absence of due care and of rational material for subjective satisfaction. After all, the responsible officer, aware of the value of civil liberty even for undesirable E persons, must make a credible prediction of the species of prejudicial activity in s. 3(1) before shutting up a person. It may perilously hover around illegality, if a single act of theft or threat, for which a prosecution was launched but failed, is seized upon after, say, a year or so, for detaining the accused out of pique. The potential executive tendency to shy at courts for prosecution of ordinary offences and to rely generously on the easier strategy of subjective satisfaction is a F danger to the democratic way of life. The large number of *habeas corpus* petitions and the more or less stereotyped grounds of detention and inaction by way of prosecution, induce us to voice this deeper concern. Moreover, a criminal should not get away with it as an unconvicted detenu if the rule of law is a live force.

The ritualistic recital of one or two thefts followed by incantatory G statutory phrases in the order, unsupported even by the affidavit of the detaining authority may in some circumstances lead to an inference that the order is in *fraudum legis*. In the present case such an argument has been made but we are not satisfied that there was foul exercise of power merely because the courts have discharged the accused or a competent affidavit has not been filed. True, we should have expected an affidavit from the detaining authority but even that is felt H too inconvenient and a Deputy Secretary who merely peruses the records and swears an affidavit in every case is the poor proxy. Why is

(1) [1968] 2 S. C. R. 505; 511.

an affidivit than needed at all? The fact of subjective satisfaction, solemnly reached considering relevant and excluding irrelevant facts, sufficient in degree of danger and certainty to warrant pre-emptive casting into prison, is best made out by the detaining District Magistrate, not one who professionally reads records and makes out a precis in the form of an affidavit. The purpose is missed, going by the seriousness of the matter, the proof is deficient, going by ordinary rules of evidence, and the Court is denied the benefit of the word of one who takes responsibility for the action, if action has to be taken against the detainer later for misuse. We are aware that in the exigencies of administration, an officer may be held up far away, engrossed in other important work, thus being unavailable to swear an affidavit. The next best would then be the oath of one in the Secretariat who officially is cognisant of or has participated in the process of approval by Government—not one who, long later, reads old files and gives its gist to the court. Mechanical means are easy but not legitimate. We emphasize this infirmity because routine summaries of files, marked as affidavits, appear in the returns to rules *nisi,* showing scant courtesy to the constitutional gravity of deprivation of civil liberty. In some cases, where a valid reason for the District Magistrate's inability to swear affidavits directly has been furnished, this Court has accepted the concerned Deputy Secretary's affidavit. This should, however, be the exception, not the rule. We may refer in this context to the rulings in *Ranjit Dam* v. *State of West Bengal,* (1), *J. N. Roy* v. *State of West Bengal,*(2) and *Shaik Hanif and others* v. *State of West Bengal.*(3)

We need not proceed further with this aspect, in the ultimate view we take on this writ petition.

We are not persuaded that a speaking order should be passed by Government or by the Advisory Board while approving or advising continuance of detention although a brief expression of the principal reasons is desirable. The communication of grounds, the right to make representation and the consideration thereof by the Advisory body made up of men with judicial experience the subject-matter being the deprivation of freedom, clearly implies a quasi-judicial approach. Indeed, where citizen's rights are affected by an authority, the question is not so much the mould into which the nature of the act should be fitted but the nature of the consequence which obligates impartiality, judicial evaluation and reasoned conclusion on facts, as distinguished from policy formulation and zealous implementation regardless of two sides and weighing of evidence. The bare bones of natural justice in this context need not be clothed with the ample flesh of detailed hearing and elaborate reasoning. It must be self-evident from the order that the substance of the charge and the essential answer in the representation have been impartially considered. We do not think that a speaking order like a regular judicial performance is either necessary or feasible. Article 22(5)

(1) A. I. R. (1972) SC 1753. (2) A. I. R. (1972) SC 2143.
(3) Writ Petitions Nos. 1679 etc; judgment on Feburary 1, 1974.

A also does not compel us to reach a different conclusion. After all, we must remember that a harmonious reconciliation between the claims of security of the nation and the liberty of the citizen through the process of effective representation before deprivation and fair consideration by the Executive and the Advisory Board are the necessary components of natural justice. Not more. In times of
B emergency, security of the State and essential supplies and services of the community assume great importance and demand quicker action. At the same time, we cannot underrate the right of the citizen and cannot forget the words of Justice Jackson in *Knaff* v. *Shaughnassy* : (1)

> "Security is like liberty in that many are the crimes committed in its name. The menace to the security of
C this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures on this pattern....The plan that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome and the corrupt to play the
D role of informer undetected and uncorrected."

What has to be underscored is the obligation to make a fair communication of the grounds and the particulars sufficient to enable the detainee to explain his innocence. Faceless informers flourish where confrontation by cross-examination is absent, and orders with the inscrutable face of a sphinx are not uncommon
E where subjective satisfaction is sufficient. All the more reason why there should be a meaningfully comprehensive furnishing of essential particulars so that the executive agencies may be rigorously held to the standards implied by the courts in art. 22(5). Otherwise, in the language of Justice Frankfurther, "he that takes the procedural sword shall perish with that sword." Administrative absolution is incongruous with our constitutional scheme. If control of liberty in
F an emergency—Barbed-wire entanglements of freedom by the executive—is necessary, control of control is in some measure healthy because power in the miniens of government can be 'of an encroaching nature'. Reference was made at the bar in this context to Allen's "Law and Orders", and Markose's "Judicial Control of Administrative Action"

G In the petitioner's case the gravamen of his grievance is that some irrelevant and uncommunicated charges have influenced the authority, vitiating the order. We would not view with unconcern violation on this score, if made out. It is common ground that the police have sent to the District Magistrate (who in turn has forwarded to the Government and the Board) a blistering bio-data. It states that (a) he is poor and illiterate, (b) has associates in notorious
H wagon breakers and anti-social element, (c) has developed spirit of lawlessness and aptitude for anti-social activities, (d) many of the

(1) 338 U. S. 537.

reported and unreported cases of recent anti-social and criminal activities exist to his credit besides the instances communicated to the detenu. Fairly considered, this report has been present to the minds of the authorities but withheld from the affected party. Poverty and illiteracy are outrageously irrelevant to s. 3. The spirit of lawlessness and aptitude for anti-social activities are neither here nor there *vis-a-vis* s. 3. 'Other reported and unreported' instances though relevant are kept back from the petitioner. If such be the case, s. 3(3), read with art. 22(5), stands contravened and the right to represent rendered barren. And yet particulars prejudicial to the detenu played over the judgment of the authorities but the petitioner never knew of such injurious information, and could not answer back. This Court in many weighty pronouncements over two decades has stressed that art. 22(5) vests a real, not illusory right, that communication of facts is the cornerstone of the right of representation and orders based on uncommunicated materials are unfair and illegal.

Before parting with this case, we wish to express our disquiet that more theft even of copper wire, unless in association with other facts may not give rise to an inference of proclivities of the type mentioned in s.3(1). Some proximity in time between the acts and the order, some indications of activities disrupting supplies and services to the community and more 'trendy' behaviour warranting preventive measures, must be available before the extreme step of detention without trial is clamped down. A sober prognosis by the District Magistrate of the detainee's dangerous behaviour must be well-grounded, even if impervious to judicial probe. We cannot dismiss as accidental that in this area of the law, in two leading cases, two judges, Bose. J., and Bhagwathy. J., have referred to the Bestille—not that we express our approbation of its use. Executive care and Advisory Board's vigilance are the hopeful sentinals checking on the misapplication of the MISA, unwittingly to rob the people of the Republic of civil liberties.

We may emphasise that to minimise processual justice to mere communication and consequent representation is not to reduce that prescription to a rope of sand, and to make subjective satisfaction a sufficient pre-requisite to detention is not to reduce judicial review to a brutum fulmen.

We hold that the detention in this case is illegal for denial of opportunity to make effective representation and direct that the petitioner be set free.

P. B. R.