

HUSSAINARA KHATOON & ORS.

v.

HOME SECRETARY, STATE OF BIHAR, PATNA

February 26, 1979

[P. N. BHAGWATI AND A. P. SEN, JJ.]

Constitution of India 1950—Art. 21—Women kept in jail by way of 'protective custody'—Violation of personal liberty.

Code of Criminal Procedure 1973—Ss. 167(5) & 468—Release of under-trial prisoner when Magistrate not satisfied with necessity of continuing investigation or charge-sheet not filed within limitation.

At the further hearing of the case on release of under-trials in the State of Bihar,

HELD : (a)(i) The expression 'protective custody' is an euphemism calculated to disguise what is really and in truth nothing but imprisonment. It is an expression intended to appease the conscience. This so-called 'protective custody' is nothing short of a blatant violation of personal liberty guaranteed under Art. 21 of the Constitution, because there is no provision of law under which a woman can be kept in jail by way of 'protective custody' or merely because she is required for the purpose of giving evidence. [395C-D]

(ii) The Government in a social welfare state must set up rescue and welfare homes for the purpose of taking care of women and children who have nowhere else to go and who are otherwise uncared for by society. [395E]

(b) The under-trial prisoners against whom charge-sheets have not been filed by the police within the period of limitation provided for in sub-section (2) of section 468 cannot be proceeded against at all and they would be entitled to be released forthwith, as their further detention would be unlawful and in violation of their fundamental right under Art. 21. [397 G]

(c) The provision of s. 167(5) of the Code of Criminal Procedure 1973 requiring the investigating officer to satisfy the Magistrate on the necessity of continuation of the investigation beyond a period of six months has not been complied with, because there are quite a few cases where the offences charged against the under-trial prisoners are triable as *summons cases* and yet they are languishing in jail for a long number of years far exceeding six months. [398C]

And the Court directed that :—

(a) All women and children in the jails in the State of Bihar under 'protective custody' should be released and taken forthwith to welfare homes or rescue homes and should be kept there and properly looked after. [395F]

(b) The State Government should scrutinise the cases of under-trial prisoners and release such of them who are not liable to be proceeded against by reason of the period of limitation provided in s. 468 Cr.P.C. having expired. [397H]

(c) The State Govt. should inquire into those cases where the investigation has been going on for a period of more than six months without the satisfaction

A of the Magistrate as envisaged in s. 167(5) and to release the under-trials unless the necessary orders of the Magistrate are obtained within one month. [398D-E]

ORIGINAL JURISDICTION : Writ Petition No. 57 of 1979.

Mrs. K. Hingorani for the Petitioners.

B *Lal Narain Sinha, U. P. Singh and S. N. Jha* for the Respondent.

S. V. Gupte, Attorney General, *R. N. Sachthey* for the Attorney General.

The Order of the Court was delivered by

C BHAGWATI, J.—The Government of Bihar has filed before us a note containing the proposed clarification of paragraph 2(e) of the Government Order dated 9th February, 1979, pursuant to the suggestion made by us in our order dated 19th February, 1979. This clarification states in paragraph one that where the police investigation in a case has been delayed by over two years, the Superintendent of Police will see to it that the investigation is completed expeditiously and final report or charge-sheet is submitted by the police as quickly as possible and the responsibility to ensure this has been laid personally on the Superintendent of Police. We are glad to note that the State Government has responded to our suggestion but we are not at all sure whether it is enough merely to provide that the investigation would be completed expeditiously and the final report or charge-sheet submitted as quickly as possible. We are of the view that a reasonable time limit should be set by the State Government within which these steps should be taken, so that no further delay is occasioned in the submission of the final report or charge-sheet. We fail to see how any police investigation can take so long as two years and if police investigation cannot be completed within two years, then there must be something radically wrong with the police force in the State of Bihar. It appears that there are a number of cases where police investigation has not been completed for over two years and persons have been in jail as under-trial prisoners for long periods. This is a shocking state of affairs so far as the administration of law and order is concerned. We would, therefore, suggest that in those cases where police investigation has been delayed by over two years, the final report or charge-sheet must be submitted by the police within a further period of three months and if that is not done, the State Government might well withdraw such cases, because if after a period of over two years plus an additional period of three months, the police is not able to file a charge-sheet, one can reasonably assume that there is no case against the arrested persons.

The Government of Bihar has also filed a counter-affidavit made by Mr. Mrinmaya Choudhry, Assistant Inspector General of Prisons (1), Bihar setting out the particulars in regard to 18 under-trial who have been ordered to be released by us on their personal bond. The particulars given in this counter-affidavit make very distressing reading. It appears from this counter-affidavit that there are quite a few women prisoners who are in jail without even being accused of any offence, merely because they happen to be victims of an offence or they are required for the purpose of giving evidence or they are in "protective custody". The expression 'protective custody' is a euphemism calculated to disguise what is really and in truth nothing but imprisonment. It is an expression intended to appease the conscience. It cannot be gainsaid that women who have been kept in jail under the guise of 'protective custody' have suffered involuntary deprivation of liberty for long periods without any fault on their part. We may point out that this so-called 'protective custody' is nothing short of a blatant violation of personal liberty guaranteed under Article 21 of the Constitution, because we are not aware of any provision of law under which a woman can be kept in jail by way of "protective custody" or merely because she is required for the purpose of giving evidence. The Government in a social welfare state must set up rescue and welfare homes for the purpose of taking care of women and children who have nowhere else to go and who are otherwise uncared for by the society. It is the duty of government to protect women and children who are homeless or destitute and it is surprising that the Government of Bihar should have come forward with the explanation that they were constrained to keep women in 'protective custody' in jail because a welfare home maintained by the State was shut down. We direct that all women and children who are in the jails in the State of Bihar under 'protective custody' or who are in jail because their presence is required for giving evidence or who are victims of offence should be released and taken forthwith to welfare homes or rescue homes and should be kept there and properly looked after.

We also find from the counter-affidavit that Bhola Mahto was in jail from 23rd November, 1968 until 16th February, 1979 when he was released on his personal bond pursuant to the directions given by us by our order dated 5th February, 1979. He is accused in a case under Section 363 & 368 of the Indian Penal Code and he was committed to the court of Sessions on 13th September, 1972 but his sessions trial has not yet commenced. It is amazing that a sessions

- A** trial of a person committed to the court of sessions as far back as 13th September 1972 should not have been commenced for about seven years. We direct that the Sessions Judge, Patna should forward to this Court through the High Court of Patna an explanation as to why the sessions trial of Bhola Mahto has not yet commenced. This is also a matter to which we would invite the attention of the High Court of Patna.
- B** The same may be said also of Ram Sagar Mistry who was admitted in jail on 28th March, 1971 and committed to the Court of Sessions on 28th June, 1972 on a charge under section 395 of the Indian Penal Code but whose trial has not yet commenced before the Court of Sessions though a period of more than six years has elapsed since the date of his commitment and a period of eight years since the date of
- C** his imprisonment.

The counter-affidavit shows that Babloo Rai who is reported to be a Naxalite is in jail since 15th May, 1975. He is alleged to be involved in five cases which are set out in the counter-affidavit. So far as he is concerned, it will be open to him to make an application to the Magistrate before whom he is produced, for being released on bail or on his personal bond and the Magistrate will deal with his application in accordance with broad guidelines laid down by us in our judgment dated 12th February, 1979.

- D**
- E** We are not at all sure on reading the counter-affidavit whether the under-trial prisoners whose particulars are given there, are being produced periodically before the Magistrate as required by the proviso to Section 167(2) of the Code of Criminal Procedure, 1973. We should like to know from the Government in a proper affidavit to be filed before us on or before 3rd March, 1979 whether these under-trial prisoners were periodically produced before the Magistrate in compliance with the requirement of the proviso to Section 167(2). The proviso to Section 167(2) says that the Magistrate may authorise the detention of the accused person beyond the period of 15 days if he is satisfied that adequate grounds exist for doing so. We hope and trust that in these cases the Magistrates concerned did not act mechanically but
- F** applied their mind and satisfied themselves that adequate grounds existed for remanding these persons to judicial custody from time to time over a period varying from two to ten years, though we fail to see how the Magistrates could possibly have been satisfied about the existence of adequate grounds for remanding these persons to judicial custody for such long periods of time ranging from two to ten years for the purpose of police investigation. This is also a matter which we would like the High Court of Patna to consider after making a detailed
- G**
- H** inquiry.

The Government of Bihar has also filed before us a list giving particulars of the under-trial prisoners who are confined in 17 jails in Bihar for more than 18 months as on 1st February, 1979. The chart shows that there are under-trial prisoners confined in these jails for long periods of time and sometimes even exceeding the maximum punishment which could be awarded to them even if they are found guilty of the offences charged against them. To take an example, we find at Item 30 one Lambodar Gorain has been in Ranchi Jail since 18th June, 1970 for an offence under Section 25 of the Arms Act for which the maximum punishment is two years, with the result that he has been in jail as an under-trial prisoner for 8½ years for an offence for which even if convicted, he could not have been awarded more than two years' imprisonment. There are many such cases in the chart, but it is not possible to identify them easily from the chart because the chart contains a large number of names of under-trial prisoners. We would, therefore, direct the Government of Bihar to submit to us on or before 3rd March, 1979 a revised chart showing yearwise break-up of the particulars of the under-trial prisoners in these jails after dividing them broadly into two categories, one of minor offences and the other of major offences.

Our attention has also been drawn to Section 468 of the Code of Criminal Procedure 1973 which in sub-section (1) provides that except as otherwise provided elsewhere in the Code, no court shall take cognizance of an offence of the category specified in sub-section (2) after the expiry of the period of limitation and under sub-section (2) the period of limitation provided is six months, if the offence is punishable with fine only, one year if the offence is punishable with imprisonment for a term not exceeding one year and three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. It would, therefore, be seen that the under-trial prisoners against whom charge-sheets have not been filed by the police within the period of limitation provided in sub-section (2) of Section 468 cannot be proceeded against at all and they would be entitled to be released forthwith, as their further detention would be unlawful and in violation of their fundamental right under Article 21. We, therefore, direct the Government of Bihar to scrutinise the cases of under-trial prisoners charged with offences which are punishable with fine only or punishable with imprisonment for a term not exceeding one year or punishable with imprisonment for a term exceeding one year but not exceeding three years and release such of them who are not liable to be proceeded against by reason of the period of limitation having expired. This direction shall be carried out by the Government of Bihar within a

A period of six weeks from today and compliance reports containing particulars shall be submitted to this Court, first at the end of four weeks and then at the end of the next two weeks.

We also find from section 167(5) of the Code of Criminal Procedure, 1973 that if in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence, unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary. We are not at all sure whether this provision has been complied with, because there are quite a few cases where the offences charged against the under-trial prisoners are *triable as summons cases* and yet they are languishing in jail for a long number of years far exceeding six months. We, therefore, direct the Government of Bihar to inquire into these cases and where it is found that the investigation has been going on for a period of more than six months without satisfying the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary, the Government of Bihar will release the under-trial prisoners, unless the necessary orders of the Magistrate are obtained within a period of one month from today. We would also request the High Court to look into this matter and satisfy itself whether the Magistrates in Bihar have been complying with the provisions of section 167(5).

F We adjourn the hearing of the Writ Petition to 5th March, 1979 and on that date, we shall proceed to hear and dispose of the Writ Petition on merits on the various questions arising for determination.

N.V.K.