D. Bhuvan Mohan Patnaik and Others

Vs

State Of Andhra Pradesh and Others

Writ Petitions Nos. 295-297 of 1974

(H. R. Khanna, Y. V. Chandrachud, P. K. Goswami JJ)

09.09.1974

JUDGMENT

CHANDRACHUD, J. -

1. This is a group of three writ petitions under Article 32 of the Constitution.

2. D. Bhuvan Mohan Patnaik, the petitioner in Writ Petition No. 295 of 1974 is under going the sentences of 4 1/2 years and 5 1/2 years awarded to him in two sessions cases. He is also an under-trial prisoner in what is known as the Parvatipuram Naxalite Conspiracy Case. Nagabhushan Patnaik, who is the petitioner in Writ Petition No. 296 of 1974 was sentenced to death by the learned II Additional Sessions Judge, Visakhapatnam, but that sentence was commuted by the President to life imprisonment. P. Hussainar, the petitioner in Writ Petition No. 297 of 1974, is undergoing the sentence of imprisonment for life imposed by the same learned Judge. He is also an under-trial prisoner in Parvatipuram Case. The three petitioners are undergoing the sentences in the Central Jail at Visakhapatnam.

3. We are not concerned with any evaluation of the political beliefs of the petitioners who claim to be Naxalites nor with the legality of the sentences imposed on them nor indeed with the charges on which two of them are being tried. The only reliefs which they ask for are : (1) that the armed police guards posted around the jail should be removed and (2) that the live-wire electrical mechanism fixed on top of the jail wall should be dismantled.

4. Mr. Garg who appears on behalf of the petitioners contends that even the discipline of the prison must have the authority of law and that there should be a sort of "iron curtain" between the prisoners and the police so that convicts and under-trial prisoners may be truly free from the influence and tyranny of the police.

5. Section 3(1) of the Prisons Act 9 of 1894, defines 'prison' to mean any jail or place used permanently or temporarily for the detention of prisoners, including "all lands and buildings appurtenant thereto". The Superintendent of the Central Jail, Visakhapatnam, who is the 3rd respondent to the petitions, has filed an affidavit stating that the usual watch and ward staff of the jail having been found to be inadequate, the services of the Andhra Pradesh Special Police Force had to be requisitioned to guard the jail from outside. The affidavit shows that these policemen live in huts built on a part of the vacant jail land and that the officers of the Force are accommodated in the "Jail Club" immediately outside the jail. Their office is situated in a block outside the jail, which was meant to be used as a waiting room for visitors wishing to meet the prisoners. The argument of Mr. Garg is that since prison includes lands appurtenant thereto, the members and officers of the

Andhra Pradesh Special Police Force must, on the affidavit of the third respondent, be held to occupy a part of the prison and that must be prevented as it is calculated to cause substantial interference with the exercise by the prisoners of their fundamental rights.

6. Convicts are not, by mere reason of the conviction, denuded of all the fundamental rights which they otherwise possess. A compulsion under the authority of law, following upon a conviction, to live in a prison-house entails by its own force the deprivation of fundamental freedoms like the right to move freely throughout the territory of India or the right to "practise" a profession. A man of profession would thus stand stripped of his right to hold consultations while serving out his sentence. But the Constitution guarantees other freedoms like the right to acquire, hold and dispose of property for the exercise of which incarceration can be no impediment, likewise, even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law.

7. In State of Maharashtra v. Prabhakar Pandurang Sangzgiri ((1966) 1 SCR 702 : AIR 1966 SC 424 : 1966 Cri LJ 811), a person who was detained by the Government of Maharashtra under Rule 30(1)(b) of the Defence of India Rules, 1962 wrote, while in jail a book of scientific interest and sought permission from the State Government to send the manuscript out of the jail for publication. The request having been rejected the detenu filed a writ petition in the Bombay High Court which allowed the petition. In an appeal filed in this Court by the State Government it was held that though the conditions of detention under Rule 30(4) of the Defence of India Rules, 1962 were the same as under the Bombay Conditions of Detention Order 1951 which laid down conditions regulating the restrictions on the liberty of a detenu, it could not be said that the Order of 1951 conferred only certain privileges on the detenu. The Court observed : "If this argument were to be accepted, it would mean that the detenu could be starved to death, if there was no condition providing for giving food to the detenu". The refusal of the State Government to release the manuscript for publication was held to constitute an infringement of the personal liberty of the detenu in derogation of the law under which he was detained.

8. Though, therefore, under our Constitution, the right of personal liberty and some of the other fundamental freedoms are not to be totally denied to a convict during the period of incarceration, we are unable to appreciate that the petitioners have been deprived of any of their fundamental rights by the posting of police-guards immediately outside the jail. The affidavit of the third respondent shows that as many as 146 Naxalites prisoners were lodged in the Visakhapatnam jail as a result of which the usual watch and ward arrangement proved inadequate. Eleven Naxalite prisoners including two out of three petitioners before us, namely, Nagabhushan Patnaik and P. Hussainar, escaped from the prison on the night of October 8, 1969. It was decided thereafter to take adequate measures for preventing the escape of prisoners from the jail. We do not think that a convict has any right any more than anyone else has, to dictate whether guards ought to be posted to prevent the escape of prisoners. Prisoners will always vote against such measures in order to steal their freedom.

9. The vacant land appurtenant to the jail is by the definition of 'prison' in Section 3(1) of The Prisons Act a part of the prison itself. It cannot, therefore, be gainsaid that members of the Andhra Pradesh Special Police Force must be deemed to be in occupation of a part of the prison premises. The infiltration of policemen into prisons must generally be deprecated for, under-trial prisoner, like two of the petitioners before us, who are remanded to judicial custody ought to be immune from the coercive influence of the police. The security of one's person against an arbitrary encroachment by the police is basic to a free society and prisoners cannot be thrown at the mercy of policemen as if it were a part of an unwritten law of crimes. Such intrusions are against "the very essence of a scheme

of ordered liberty". But the argument of Mr. Garg proceeds from purely hypothetical considerations. The policemen who live on the vacant jail land are not shown to have any access to the jail which is enclosed by high walls. Their presence therefore, in the immediate vicinity of the jail can cause no interference with the personal liberty or the lawful preoccupations of the petitioners.

10. Counsel for the petitioners complained bitterly against the segregation of Naxalite prisoners in a "quarantine" and the inhuman treatment meted out to them as if they were inmates of a "Fascist concentration camp". We would like to emphasis once again, and no emphasis in this context can be too great, that though the Government possesses the constitutional right to initiate laws, it cannot, by taking law into its own hands, resort to oppressive measures to curb the political beliefs of its opponents. No person, not even a prisoner, can be deprived of his 'life' or 'personal liberty' except according to procedure established by law. The American Constitution by the 5th and 14th Amendments provides, inter alia, that no person shall be deprived of "life, liberty, or property, without due process of law". Explaining the scope of this provision, Field, J. observed in Munn v. Illinois ((1877) 94 US 113) that the term "life" means something more than mere animal existence and the inhibition against its deprivation extends to all those limits and faculties by which against its deprivation extends to all those limits and faculties by which life is enjoyed. This statement of the law was approved by a Constitution Bench of this Court in Kharak Singh v. State of U.P. ((1964) 1 SCR 332, 347 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329).

11. But, on a perusal of the affidavit of the 3rd Respondent, we are not satisfied that the allegations made by the petitioners are true, though we do not think that the rosy picture drawn by the 3rd Respondent of life in the Visakhapatnam Central Jail can too readily be accepted. "Airy rooms with cross-ventilation"; a "break-fast and two regular meals a day ..... the total caloric value of which is about 4000 calories per day as against 2500 which is the average caloric value 4000 calories per day as against 2500 which is the average caloric value of food consumed by an Indian", "250 grammes of chicken, a litre of milk and 2 eggs per day" for one of the petitioners who has a duodenal ulcer; "a lot of reading material"; "facilities for playing games like Volleyball, Kabaddi, Badminton, Ring Tennis etc."; the supply of "musical instruments" and "a radio net-work" - these and many other amenities are, according to the 3rd Respondent, made available to the prisoners. We hope and trust that see claim is founded on true facts. But attention of the jail authorities needs to be drawn to what the petitioners have described as the "marathon hunger-strike" by a large number of Naxalite prisoners for improvement in the sub-human conditions of their existence. We are also not prepared to dismiss as wholly untrue the reply of the petitioners to the 3rd Respondent's counter-affidavit, that there is difficulty even in getting a packet of powder for a rickety carrom-board, that the radio net-work consists of a silent museum-piece, that the supply of "musical instruments" consists of an abandoned non-speaking harmonium and a set of dilapidated drums and that all the music that is there is provided by an army though they ought to receive priority in our Constitutional scheme, their denial may not necessarily constitute an encroachment on the right guaranteed by Article 21 of the Constitution. We cannot do better than say that the directive principle contained in Article 42 of the Constitution that "The State shall make provision for securing just and human conditions of work" may benevolently be extended to living conditions in jails. There are subtle forms of punishment to which convicts and under-trial prisoners are sometimes subjected but it must be realized that these barbarous relics of a bygone era offend against the letter and spirit of our Constitution. For want of satisfactory proof, we hesitate to accept the contention of the petitioners that the treatment meted out to them is in violation of their right to life and personal liberty.

12. As regards the live-wire mechanism fixed atop the jail walls, Mr. Garg argues that the act is unconstitutional because a prisoner attempting to escape is, by the use of the device, virtually

subjected to a death penalty. The policy of law as reflected in Section 224 of the Penal Code, says the Counsel, is to visit a prisoner attempting to escape or successfully escaping, to a maximum sentence of two years and a fine. The live-wire gadget lacks the authority of law and since it is a flagrant violation of the personal liberty guaranteed by Article 21 of the Constitution, it must be declared unconstitutional. Counsel fears that if the Court puts its seal of approval on the use of the inhuman mechanism, prisons shall have been converted into cremation grounds.

13. This argument has a strong emotional appeal but not to reason And the appeal to reason is what the court is primarily concerned with in deciding upon the constitutionality of any measure.

14. But before examining the petitioners' contention, it is necessary to make a clarification. Learned Counsel for the respondents harped on the reasonableness of the step taken by the jail authorities in installing the high-voltage live-wire on the jail walls. He contended that the mechanism was installed solely for the purpose of preventing the escape of prisoners and was therefore a reasonable restriction on the fundamental rights of the prisoners. This, in our opinion, is a wrong approach to the issue under consideration. If the petitioners succeed in establishing that the particular measure taken by the jail authorities violates any of the fundamental rights available to them under the Constitution, the justification of the measure must be sought in some "law", within the meaning of Article 13(3)(a) of the Constitution. The installation of the high-voltage wires lacks a statutory and seems to have been devised on the strength of departmental instructions. Such instructions are neither "law" within the meaning of Article 13(3)(a) nor are they "procedure established by law" within the meaning of Article 21 of the Constitution. Therefore, if the petitioners are right in their contention that the mechanism constitutes an infringement of any of the fundamental rights available to them, they would be entitled to the relief sought by them that the mechanism be dismantled. The State has not justified the installation of the mechanism on the basis of a 'law' or a 'procedure established by law'.

15. The live-wire is installed on the top of a wall, 14 feet from the ground level, the height of the wall itself being 13 feet. It rests on enamel non-conductors fixed to angle irons which are embedded in the wall. The wire has no direct contact with the wall and there is no possibility of the electrical current leaking through the wall. The prison-walls are themselves situated at a distance of about 20 feet from the cells where the petitioners are lodged. An electrician inspects the system regularly. Finally, the mechanism is not a secret trap as all prisoners are warned of its existence and a non-electrical barbed-wire fences the jail walls.

16. There is thus no possibility that the petitioners will come into contact with the electrical device in the normal pursuit of their daily chores. There is also no possibility that any other person in the discharge of his lawful functions or pursuits will come into contact with the same. Whatever be the nature and extent of the petitioners' fundamental right to life and personal liberty, they have no fundamental freedom to escape from lawful custody. Therefore, they cannot complain of the installation of the live-wire mechanism with which they are likely to come into contact only if they attempt to escape from the prison. Carrying the petitioners' contention to its logical conclusion, they would also be entitled to demand that the height of the compound wall be reduced from 13 feet to say 4 or 5 feet as a fall from a height of 13 feet is likely to endanger their lives. In fact the petitioners could ask that all measures be taken to render safe their attempts to escape from the prison.

17. In holding that the live-wire mechanism does not interfere with any of the fundamental freedoms of the petitioners, we are not influenced by the consideration so prominently mentioned by

the 3rd Respondent in his further affidavit that a similar system is in vogue in Hyderabad Warangal and Nellore. If the system is unconstitutional, its wide-spread use will not make it constitutional.

18. Section 46, Criminal Procedure Code, 1898, furnishes no analogy to the present case because it lays down how arrests are to be made and the extent of force which may be used if the person to be arrested forcibly resists the endeavour to arrest him. Sub-section (2) of Section 46 authorises the person making the arrest to "use all means necessary to effect the arrest" while sub-section (3) provides that "Nothing in this section given a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life". Chapter V of the Code of 1898 in which Section 46 appears is headed : "Of Arrest, Escape and Retaking". Section 46 deals with the mode in which arrests, for the first time, may be effected. Section 66 deals with the power, on escape, to pursue and re-take the prisoner. It provides that "If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India". Apart from this, the installation of the high-voltage wire does not offend against the command of Section 46(3) even on the assumption that the sub-section covers the re-arrest of a prisoner who has escaped from lawful custody. The installation of the system does not by itself cause the death of the prisoner. It is a preventive measure intended to act as a deterrent and can cause death only if a prisoner courts death by scaling the wall while attempting to escape from lawful custody. In that sense, even a high wall without the electrical device would be open to the exception that a prisoner falling from a height, while attempting to escape by scaling the wall, may meet with his death. Section 46(3) is, therefore, not contravened and the grievance that the mechanism involves to total negation of the safeguard afforded by Criminal Law is without any substance.

19. The petitioners are, therefore, not entitled to either of the two reliefs sought by them and the rule must be discharged. But that is on the ground that the acts complained of are not shown to cause any interference with the fundamental rights available to them and not on the ground that prisoners possess no fundamental rights. The rights claimed by the petitioners as fundamental may not readily fit in the classical mould of fundamental freedoms, but "basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. ..... To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society".

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