T. V. Vatheeswaran

Vs

State of Tamil Nadu

Criminal Appeal No. 75 of 1983

(D. Chinnappa Reddy, R.B. Misra JJ)

16.02.1983

ORDER

CHINNAPPA REDDY, J. –

1. A prisoner condemned to death over eight years ago claims that it is not lawful to hang him now. Let us put the worst against him first. He was the principal accused in the case and, so to say, the arch-villain of a villainous piece. He was the brain behind a cruel conspiracy to impersonate Customs Officers, pretend to question unsuspecting visitors to the city of Madras, abduct them on the pretext of interrogating them, administer sleeping pills to the unsuspecting victims, steal their cash and jewels and finally murder them. The plan was ingeniously fiendish and the appellant was the architect. There is no question that the learned Sessions Judge very rightly sentenced him to death. But that was in January 1975. Since then he has been kept in solitary confinement, quite contrary to our ruling in Sunil Batra v. Delhi Administration((1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155 : AIR 1978 SC 1675 : 1978 Cri LJ 1741). Before that he was a 'prisoner under remand' for two years. So, the prisoner claims that to take away his life after keeping him in jail for 10 years, eight of which in illegal solitary confinement, is a gross violation of the Fundamental Right guaranteed by Article 21 of the Constitution. Let us examine his claim. First, let us get rid of cob-webs of prejudice. Sure, the murders were wicked and diabolic. The appellant and his friends showed no mercy to their victims. Why should any mercy be shown to them? But, gently, we must remind ourselves it is not Shylock's pound of flesh that we seek, nor a chilling of the human spirit. It is justice to the killer too and not justice untempered by mercy that we dispense. Of course, we cannot refuse to pass the sentence of death where the circumstances cry for it. But, the question is whether in a case where after sentence of death is given, the accused is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, is it not open to a court of appeal or a court exercising writ jurisdiction, in an appropriate proceeding, to take note of the circumstance when it is brought to its notice and give relief where necessary ?

2. Before adverting to the constitutional implications of prolonged delay in the execution of a sentence of death, let us refer to the judicial attitude towards such delay in India and elsewhere.

3. In Piare Dusadh v. Emperor(AIR 1944 FC 1 : (1944) 6 FCR 61 : 211 IC 556), the Federal Court of India took into consideration the circumstance that the appellant had been awaiting the execution of the death sentence for over a year to alter the sentence to one of transportation for life.

4. In Ediga Anamma v. State of A. P.((1974) 3 SCR 329 : (1974) 4 SCC 443 : 1974 SCC (Cri) 479), Krishna Iyer and Sarkaria, JJ. observed that "the 'brooding horror of hanging' which has been

haunting the prisoner in her condemned cell for over two years" had an "ameliorative impact" and was "a factor of humane significance in the sentencing context".

5. In State of U. P. v. Lalla Singh((AIR 1978 SC 368 : (1978) 1 SCC 142 : 1978 SCC (Cri) 70 : 1978 Cri LJ 359), Gupta and Kailasam, JJ., were dealing with a case of gruesome murder of three persons, the head of one of whom was severed. The learned Judges, while of the view that the Sessions Judge was perfectly in order in imposing the sentence of death, thought that as the offences had been committed more than six years ago, the ends of justice did not require the sentence of death to be confirmed.

6. In Bhagwan Bux Singh v. State of U. P.(AIR 1978 SC 34 : (1978) 1 SCC 214 : 1978 SCC (Cri) 104 : 1978 Cri LJ 153), the sentence of death was commuted to imprisonment for life by Murtaza Fazal Ali and Kailasam, JJ., having particular regard to the fact that the sentence of death had been imposed more than two and a half years ago.

7. In Sadhu Singh v. State of U. P.(AIR 1978 SC 1506 : (1978) 4 SCC 428 : 1979 SCC (Cri) 49), Sarkaria, A. P. Sen, JJ. and one of us (Chinnappa Reddy, J) took into account the circumstance that the appellant was under spectre of the sentence of death for over three years and seven months to alter the sentence of death to one of imprisonment for life.

8. In State of U. P. v. Sahai(AIR 1981 SC 1442 : (1982) 1 SCC 352 : 1982 SCC (Cri) 223 : 1981 Cri LJ 1034), Murtaza Fazal Ali, Baharul Islam and Varadarajan, JJ., while holding that the murders were 'extremely gruesome, brutal and dastardly', nonetheless declined to pass the sentence of death on the ground that more than eight years had elapsed since the occurrence.

9. In Furman v. State of Georgia(408 US 238 : 33 L Ed 2d 346 (1972)), Justice Brennan observed : "The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death".

10. In Noel Riley v. Attorney-General(1982 Criminal Law Review 679), the majority of the Lords of the Judicial Committee of the Privy Council expressed no opinion on the question whether the delayed execution of a sentence of death by hanging could be described as "inhuman or degrading punishment". But Lord Scarman and Lord Brightman who gave the minority opinion, after referring to the British practice and Furman v. State of Georgia(408 US 238 : 33 L Ed 2d 346 (1972)), People v. Chessman, People v. Anderson Ediga Anamma v. State of A. P.((1974) 3 SCR 329 : (1974) 4 SCC 443 : 1974 SCC(Cri) 479) Rajendra Prasad v. State of U. P.((1979) 3 SCC 646 : 1979 SCC (Cri) 749) and Tyrer v. United Kingdom, said,

> It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in Anderson case, it is cruel and has dehumanising effects. Sentence of death is one thing : sentence of death followed by lengthy imprisonment prior to execution is another.
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> It is of course true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal

> and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhumane and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay in the circumstances of these five cases. We do not doubt that the appellants have proved that they have been subjected to a cruel and dehumanising experience....
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> Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading. Such a case has been established, in our view, by these appellants.

11. While we entirely agree with 'Lord Scarman and Lord Brightman about the dehumanising effect of prolonged delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay, the time is immaterial when the sentence is death. Be the cause of the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay.

12. What are the constitutional implications of the dehumanising factor of prolonged delay in the execution of a sentence of death ? Let us turn at once to Article 21 of the Constitution, for, it is to that Article that we must first look for protection whenever life or liberty is threatened. Article 21 says; "No person shall be deprived of his life or personal liberty except according to procedure established by law. " The dimensions of Article 21 which at one time appeared to be constricted by A. K. Gopalan v. State of Madras(1950 SCR 88 : AIR 1950 SC 27 : 1950 SCJ 174 : 51 Cri LJ 1383) have been truly expanded by Maneka Gandhi v. Union Of India ((1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597) and Sunil Batra v. Delhi Administration.

13. In Maneka Gandhi v. Union of India((1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597), it was held that the various articles of the Constitution in Part III (Fundamental Rights) were not several, isolated walled fortresses, each not reacting on the other, but, on the other hand, were parts of a great scheme to secure certain basic rights to the citizens of the country, each article designed to expand but never to curtail the content of the right secured by the other article. No article was a complete code in itself and several of the Fundamental Rights guaranteed by Part III of the constitution overlapped each other. So, a law satisfying the requirements of Article 21 would still have to meet the challenge of Article 14 and Article 19 of the Constitution. In regard to Article 21 itself, it was held that the procedure contemplated by the article had to be fair, just and reasonable, and not some semblance of procedure, fanciful, oppressive or arbitrary. Chandrachud, J. (as he then was) said : (SCC p. 323, para 48)

> But the mere prescription of some kind of procedure cannot ever meet the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.

> Chandrachud, J. expressed his total agreement with Bhagwati, J's following observations : (SCC p. 324, para 48)

The law must, therefore, now be taken to be well settled that Article 21 does not exclude Article 19 and that even if there is a law prescribing a procedure for depriving a person of 'personal liberty' and there is consequently no infringement of the fundamental right conferred by Article 21, such law, in so far as it abridges or takes away any fundamental right under Article 19 would have to meet the challenge of that article.

Bhagwati, J. further observed : (SCC p. 281, para 5)

> But apart altogether from these observations in A. K. Gopalan case 11, which have great weight, we find that even on principle the concept of reasonableness must be rejected in the procedure contemplated by Article 21, having regard to the impact of Article 14 on Article 21.

Again he said : (SCC P. 284, Para 7)

> The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

14. In Sunil Batra v. Delhi Administration((1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155 : AIR 1978 SC 1675 : 1978 Cri LJ 1741), Krishna Iyer, J, while dealing with the question whether solitary confinement could be inflicted on a person awaiting death sentence, observed : [SCC para 52, pp. 518-19 : SCC (Cri) pp. 179-80]

> True, our Constitution has no 'due process' clause or the VIII Amendment; but, in this branch of law, after Cooper(R.C. Copper v. Union of India, (1970) 1 SCC 248 : (1970) 3 SCR 530) and Maneka Gandhi((1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597), the consequence is the same. For what is punitively outrageous, scandalisingly unusual or cruel and rehabilitatively counter- productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21. Part III of the Constitution does not part company with the prisoner at the gates, and judicial oversight protects the prisoner's shrunken fundamental rights, if flouted, frowned upon or frozen by the prison authority. Is a person under death sentence or under trial unilaterally dubbed dangerous liable to suffer extra torment too deep for tears ? Emphatically no, lest social justice, dignity of the individual, equality before the law, procedure established by law and the seven lamps of freedom (Article 19) become chimerical constitutional claptrap.....

In the same case, Desai, J said : [SCC para 228, pp. 574-75 : SCC (Cri) pp. 235-36]

> The word "law" in the expression "procedure established by law" in Article 21 has been interpreted to mean in Maneka Gandhi case 12 that the law must be right, just and fair, and not arbitrary, fanciful or oppressive. Otherwise it would be no

> procedure at all and the requirement of Article 21 would not be satisfied. If it is arbitrary it would be violative of Article 14. ..

15. In Bachan Singh v. State of Punjab(AIR 1980 SC 898 : (1980) 2 SCC 684 : 1980 SCC (Cri) 580 : 1980 Cri LJ 636), Sarkaria, J. summarised the effect of Maneka Gandhi in these words : [SCC PARA 1135, PP. 729- 30 : SCC (Cri) pp. 625-26]

> In Maneka Gandhi case((1978) 2 SCR 621 : (1978) 1 SCC 248 : AIR 1978 SC 597), which was a decision by a Bench of seven learned Judges, it was held by Bhagwati, j. in his concurring judgment, that the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights under Article 19. It was further observed that Article 14,19 and 21 are not to be interpreted in watertight compartments, and consequently, a law depriving a person personal liberty and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation, ex hypothesis it must also be liable to be tested with reference to Article 15. The principle of reasonableness pervades all the three Articles, with the result, that the procedure contemplated by Article 21 must be 'right' and just and fair' and not 'arbitrary, fanciful or oppressive'; otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied.
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> The learned Judge then referred to Article 21 and said, [SCC para 136, p. 730 : SCC (Cri) p. 626]

If this Article is expanded in accordance with the interpretative principle indicated in Maneka Gandhi, it will read as follows :

> No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

In the converse positive form, the expanded Article will read as below :

> A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.
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> Thus expanded and read for interpretative purposes, Article 21 clearly brings out the implication, that the founding fathers recognised the right of the State to deprive a person of his life or person liberty in accordance with fair, just and reasonable procedure established by valid law.....

16. The question whether a prisoner under a lawful sentence of death or imprisonment could claim Fundamental Rights was considered in Bhuvan Mohan Patnaik v. State of A. P.((1975) 2 SCR 24 : 1974 SCC (Cri) 803 : (1975) 3 SCC 185 : AIR 1974 SC 2092) Chandrachud, J. (as he then was) declared : [SCC (Cri) para 6 pp. 804-05 : SCC pp. 186-87]

> Convicts are not, by mere reason of 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 "practice" 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.

17. The declaration of Chandrachud, J. in Bhuvan Mohan Patnaik case 15 was quoted with approval and accepted by the Constitution Bench in Sunil Batra v. Delhi Administration.

18. We may also refer here to State of Maharashtra v. Prabhakar Pandurang Sangzgiri((1966) 1 SCR 702 : AIR 1966 SC 424 : (1966) 1 SCJ 679: 1966 Cri LJ 311) where a Constitution Bench repelled the argument that the Bombay Conditions of Detention Order, 1951 conferred privileges but not rights on the detenu with the observation :

> 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.

19. The court has also recongnised that the right to life and liberty guaranteed by Article 21 of the Constitution includes the right to a speedy trial. The right to a speedy trial may not be an expressly guaranteed Constitutional right in India, but it is implicit in the right to a fair trial which has been held to be part of the right to life and liberty guaranteed by Article 21 of the Constitution. After referring to situations where an accused person may be seriously jeopardised in the conduct of his defence with the passage of time, it was observed by one of us (Channappa Reddy, J.) in State of Maharashtra v. Champalal Punjaji Shah(AIR 1981 SC 1675 : (1981) 3 SCC 610 : 1981 SCC (Cri) 762) : [SCC para 1, p. 612 : SCC (Cri) p. 764]

> In such situations, in appropriate cases, we may readily infer an infringement of the right to life and liberty guaranteed by Article 21 of the Constitution. Denial of a speedy trial may with or without proof of something more lead to an inevitable inference of prejudice and denial of justice. It is prejudice to a man to be detained without trial. It is prejudice to a man to be denied a fair trial. A fair trial implies a speedy trial. ...

Earlier in Hussainara Khatoon (I) v. Home Secretary, State of Bihar((1980) 1 SCC 81 : 1980 SCC (Cri) 23), it was observed by Bhagwati, J. : [SCC para 5, p. 89 : SCC (Cri) p. 31]

> If a person is deprived of his liberty under a procedure which is not 'reasonable, fair or just', such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21....

> In Husainara Khatoon (IV) v. Home Secretary, State of Bihar((1980) 1 SCC 98 : 1980 SCC (Cri) 40), the principle was reaffirmed and Bhagwati, J. added : [SCC para 10, p. 107 : SCC (Cri) p. 49]
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> Speedy trial is, as held by us in our earlier judgment dated February 26, 1979, an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to device such a procedure as would ensure speedy trial to the accused. ...

In the same case, it was further observed that the right to free legal services was implicit in Article 21 as no procedure could be said to be reasonable, fair and just which did not provide for legal services to those who could not secure themselves. That free legal services to the poor and the needy was an essential element of any reasonable, fair and just procedure had already been decided in M. H. Hoskot v. State of Maharashtra((1978) 3 SCC 544 : 1978 SCC (Cri) 468).

20. So, what do we have now ? Article 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out Fundamental Rights. A person under sentence of death may also claim Fundamental Rights. The flat of Article 21, as explained, is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies a right to a speedy trial. It implies humane conditions of detention, preventive or punitive.'Procedure established by law' does not end with the pronouncement of sentence; it includes the carrying out of sentence. That is as far as we have gone so far. It seems to us but a short step, but a step in the right direction, to hold that prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death. In the United State of America where the right to a speedy trial is a Constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence (vide Strunk v. United States((1973) 37 L Ed 2d 56)). Analogy of America law is not permissible, but interpreting our Constitution sui generis, as we are bound to do, we find no impediment in holding that the dehumanising factor of prolonged delay in the execution of a sentence of death has the Constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the Constitutional guarantee that no person shall be deprived of his life or personal liberty expect according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death.

21. What may be considered prolonged delay so as to attract the Constitutional protection of Article 21 against the execution of a sentence of death is a ticklish question. In Ediga Anamma case, delay of two years was considered sufficient to justify interference with the sentence of death. In Bhagwan Bux case, two and a half years and in Sadhu Singh case, three and a half years were taken as sufficient to justify altering the sentence of death into one imprisonment for life. The Code of Criminal Procedure provides that a sentence of death imposed by a Court of Session must be confirmed by the High Court. The practice, to our knowledge, has always been to give top priority to the hearing of such cases by the High Courts. So also in this Court. There are provisions in the Constitution (Articles 72 and 161) which invest the President and the Governor with power to suspend, remit or commute a sentence of death. Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death. We, therefore,

accept the special leave petition, allow the appeal as also the writ petition and quash the sentence of death. In the place of the sentence of death, we substitute the sentence of imprisonment for life.

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