Jumman Khan

Vs

State of U.P.

Writ Petn. (Cri) No. 493 of 1988

(S.R. Pandian, K. Jayachandra Reddy JJ)

JUDGMENT

30.11.1990

S. RATNAVEL PANDIAN, J.:-

1. "To be or not to be hanged" - is the tormenting question that comes up for consideration in this present Writ Petition.

2. The petitioner, Jumman Khan who is facing the gallows on being condemned to death is seeking issuance of a writ of mandamus commanding the respondent (State of U.P.) through its Secretary, Home Department not to carry out the sentence of death awarded to him in case No. 367/ 84 by the Additional District and Sessions Judge, Agra as confirmed by the judgment and order of the High Court of Allahabad as well as the order of this Court dated 20-3-1986, dismissing the Special Leave Petition (Criminal) No. 558/ 86 and also for a direction directing the respondent to commute the sentence of death to one of imprisonment for life. The indubitable factual matrix leading to the filing of the present Writ Petition may be recapitulated.

3. On the fateful day of the occurrence i.e. 22-6-1983 at about 4.00 p.m. the petitioner went to the house of his neighbour Ausaf Khan while he was away and requested Dulhey Khan Begum, wife of Ausaf Khan to allow her six years old daughter, Sakina who, was an unfortunate victim in this case, on the pretext that he wanted her to bring some ice from the market. Dulhey Khan Begum all owed her daughter to accompany the petitioner and fell asleep. When she woke up after about an hour, she found that her daughter had not returned. Though at first, she thought that Sakina might be playing along with other children in the neighbourhood outside the house, as time passed-by she became panicky. Finding the child not returned, she made a futile search. When she went to the petitioner's house, it was found locked. After her husband returned from work at 7.00 p.m. an unsuccessful incisive and frantic search for the child was made in the neighbourhood. Hearing the information of the missing of the child, a crowd collected. When Ausaf Khan again went to the petitioner's house in search of his daughter, he was told by a neighbour that at about 4.30 p.m. when he was passing by the petitioner's house he noticed Sakina entering that house with ice wrapped in a cloth and the petitioner taking her inside holding her hands. One of the persons of the locality further informed Ausaf Khan that while he was passing the petitioner's house, he heard the screaming of a child emanating from the house of the petitioner. The irate crowd went to the petitioner's house and flashed a torch through the crevice in the door and found a dead body lying on a cot wrapped in a veil (burka). Then the public effected entry and shockingly found that it was the dead body of Sakina with extensive marks of injuries on her body. Ausaf Khan made a written report on the basis

of which a case was registered under Sections 302 and 37 , IP The petitioner was arrested at Aligarh on 25 6-1983. The post-mortem examination of Sakina revealed that she had been brutally raped and strangulated to death. The police after completing the investigation filed the charge sheet. The petitioner took his trial under charges Ss. 376 and 302, IPC. The trial court found the petitioner guilty under both the charges and sentenced him to life imprisonment under Section 376, IPC and to death under Section 302, IPC. The High Court on appeal confirmed the conviction and sentences passed by the trial Court, holding as follows:

> "Considering the nature and most gruesome and beastly act perpetrated by the appellant, the appellant deserves no leniency. He had committed premeditated rape on a helpless child aged about six years and he had gone to the extent of strangulating her to death."

4. Feeling aggrieved by the judgment of the High Court, the petitioner filed SLP (Criminal) No. 558/86. This Court by its Order dated 20th March, 1986 dismissed the SLP observing thus:

> "Although the conviction of the petitioner under Section 302 of the Indian Penal Code, 1860 rests on circumstantial evidence, the circumstantial evidence against the petitioner leads to no other inference except that of his guilt and excludes every hypothesis of his innocence. Apart from the circumstances brought out by the prosecution, each one of which has been proved, there is no extra judicial confession which lends support to the prosecution case that the child had been raped by the petitioner and thereafter strangulated to death.

Failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by S. 302 of the Indian Penal Code. It is the duty of the Court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders. The sentence of death is confirmed.

5. The petitioner presented a mercy petition dated 12-4-1986 praying for clemency but it was rejected by the Governor on 18-2-1988 as seen from the connected files produced from the Home Ministry. The petitioner filed a review petition against the order of rejection of his mercy petition. Though initially there was a stay of his execution, the stay was vacated on 6/ 7th November, 1988. The mercy petition addressed to the President of India was received in the Ministry of Home Affairs along with the connected papers on 28-3-1988 and the same was rejected by the President on 10-6-1988. Subsequently, another mercy petition dated 15-7-1988 addressed to the President was received by the Ministry of Home Affairs through the State Government and the same was also rejected in the month of October, 1988. While it is so, the petitioner filed this Writ Petition. This Court by an Order dated 10-1 1-1988 stayed the execution and thus the sentence of death imposed on the petitioner is now under suspension consequent upon the stay order.

6. Mr. Jain, the learned senior counsel, appearing on behalf of the petitioner though initially advanced an argument that capital punishment should not be imposed in a case where the conviction is based exclusively on circumstantial evidence did not press that argument when it was brought to his notice that such an argument is not available to him, in the present case on the face of the

dismissal of the S.L.P. by this Court confirming the death sentence on the basis of the circumstantial evidence and that judgment is not open for review. However, he strongly pressed the following submissions in support of the reliefs sought for, namely:-

> (1) There was substantial non-compliance with the mandatory provisions of Section 235(2) of the Code of Criminal Procedure of 1973, vitiating the imposition of the sentence of death.
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> (2) Drawing strength on the dissenting judgment of P. N. Bhagwati, J. (as he then was) Bachan Singh v. State of Punjab, (1982) 3 SCC 24: (AIR 1982 SC 1325) holding that Section 302 of the Indian Penal Code in so far as it provides for imposition of death penalty as an alternative to life imprisonment is ultra vires and void as being violative of Articles 14. and 21 of the Constitution, since it does not provide any legislative guidelines when life should be permitted to be extinguished by imposition of death sentence, Mr. Jain pleaded that the judgment of the majority in Bachan Singh's case,(1980) 2 SCC 684 : (AIR 1980 SC 898) deserves to be reviewed by a larger Bench in view of the fact that the said decision which upheld the death penalty was rendered in the context of foremost restrictive interpretation of Article 21 and, therefore, it is not only proper, but also just and necessary that the vires of Section 302, IPC has to be re-examined taking into account all subsequent decisions of this Court rendered in the context of Article 21, the dimensions of which have been truly expanded in Maneka Gandhi v. Union of India, (1978) 2 SCR 621 (AIR 1978 SC 597) and Sunil Batra v. Delhi Administration, (1979) 1 SCR. 392 (AIR 1978 SC 1675).
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> (3) As there has been an undue delay in consideration of the mercy petitions submitted by the petitioner praying for clemency both to President as well as the Governor, the petitioner is entitled for commutation of the death sentence to one of imprisonment for life.

7. Now we shall examine the above sub missions in seriatim. The mandatory provision of Section 235(2) of the Code provides that the accused must be given an opportunity in regard to the sentence and it is only after hearing him the Court has to pass the sentence according to law. The strict compliance of this provision is a statutory mandate but not a mere formality and so it must be scrupulously followed in its true spirit. See Santa Singh v. State of Punjab, (1977) 1 SCR 229 : (AIR 1977 SC 2386) Muniappan v. State of Tamil Nadu, (1981) 3 SCR 270: (AIR 1981 SC 1220) and Allauddin Mian v. State of Bihar, (1989). 3 SCC 5: (AIR 1989 SC 1456).

8. Admittedly, the present contention that Section 235(2) of the Code has not been complied with, was neither raised before the High Court nor before this Court in the SLP. Moreover, this plea has not been taken initially even in the present Writ Petition, but only in the additional grounds. Mr. Dalveer Bhandari, learned counsel appearing on behalf of the respondent drew our attention to the relevant portion of the judgment and order of the trial Court whereunder the trial Court after finding the appellant guilty under both the charges made a note that the appellant would be heard about the sentence by 2.30p.m. In the same judgment, there, is another note reading that at 2.30 p.m. the appellant was heard on the question of sentence and besides' the learned counsel appearing for the appellant was also permitted to address arguments on that question.

9. In addition to that Mr. Dalveer Bhandari stated that the petitioner has not been prejudiced in any

manner nor any prejudice to the petitioner by such a course has been shown now to this Court and hence this argument cannot be countenanced. Having regard to the facts that this plea is raised only for the first time and that the trial Court in fact has heard the petitioner on the question of sentence, but of course on the same day, we hold that this submission made on behalf of the petitioner does not merit consideration.

10. Mr. Jain, advocating the views of abolitionists contended with vehemence and persistence that death penalty is not only outmoded, unreasonable, cruel or unusual punishment but also defiles 'the dignity of the individual' within the preamble to the Constitution and also violates the basic structure of the Constitution. Added to that, the learned counsel with strong intensity of conviction made a fervent but inexorable plea that the question of death penalty cannot be foreclosed for ever on the doctrine of stare decisis and that that question still needs reconsideration by a larger Bench afresh, especially in view of the expanding horizon of Article 21 of the Constitution which Article stands like sentinel over human misery, degradation and oppression. According to the learned counsel. unfortunately all those decisions upholding the constitutional validity of the sentence of death becloud more than they clarify the constitutionality of capital punishment.

11. Be it noted, save the dissenting view of Bhagwati, J. (as he then was) in Bachan Singh's case (the majority judgment of which is reported in (1980) 2 SCC 684: (AIR 1980 SC 898) with a dissenting order of Bhagwati, J. and the full text of the dissenting view of the learned Judge is reported in (1 982) 3 SCC 24: (AIR 1982 SC 1325) not even a single decision of this Court which has caused the slightest shadow of doubt on the constitutionality of capital punishment was brought to ' our notice. It is pertinent to note that the submission of the death penalty violates Articles 14 and 21 of the Constitution was totally negatived by the majority in Bachan Singh's case, (1980) 2 SCC 684: (AIR 1980 SC 898). On the other hand Chandrachud, C.J. speaking for the bench comprised of three Judges in Sher Singh v. State of Punjab, (1983) 2 SCC 344: (AIR 1983 SC 465) has been assertive in expressing the following view with regard to the constitutional validity of death sentence, which view is as follows (Para 14 of AIR):

> "Death sentence is constitutionally valid and permissible within the constraints of the rule in Bachan Singh (AIR 1980 SC 898). This has to be accepted as the law of the land. We do not all of us, share the views of every one of Us. and that is natural because, every one of us has his own philosophy of law and life, moulded and conditioned by his own assessment of the performance and potentials of law and the garnered experiences of life. But the decisions rendered by this Court after a full debate have to be accepted without mental reservations until they are set aside."

12. The Constitution Bench of this Court in Smt. Triveniben v. State of Gujarat, (1 989) 1 SCC 678 : (AIR 1989 SC 1335) has reaffirmed the constitutional validity of death sentence. See also Allauddin's case (AIR 1989 SC 1456) (albeit). Thus, virtually on every occasion, any challenge touching on the constitutionality of the death sentence, it has been asserted affirmatively that the constitution does not prohibit the death penalty.

13. In Allauddin's case (AIR 1989 SC 1456), this Court has held that "the Judge may visit the convict with the extreme punishment provided there exist special reasons for so doing" and summarily rejected the plea for setting aside the capital sentence observing (at. p. 1465):

> "In the face of this statutory provision which is consistent with Article 21 of the: Constitution which enjoins that the personal liberty or life of an individual shall not

> be taken except according to the procedure established by law, we are unable to countenance counsel's extreme submission of death in no case."

14. We are in full agreement with the view chronologically expressed in Sher Singh's case (AIR 1983 SC 465), Bachan Singh's case (AIR 1980 SC 898) and Allauddin's case (AIR 1989 SC 1456) holding that the death sentence is constitutionally valid. In that view, we are of the firm opinion that the decision of the majority in Bachan Singh's case needs no reconsideration. The submission made by Mr. Jain is unpersuasive. In fact, a similar question urged in Allauddin's case did not find favour and it was rejected.

15. The sentence in every criminal case when confirmed by this Court is justified and, therefore, normally it is not open for review or reconsideration. However, this Court on several occasions in appropriate cases even after the imposition of sentence of death reached its finality has commuted that sentence to one of life imprisonment by exercising its extraordinary powers when this Court felt that the execution of that sentence was not justified on account of the subsequent supervening circumstances namely, the undue long delay which has elapsed since the confirmation of that sentence by this Court. This is based on the principle that sentence of death is something and the sentence of death followed by lengthy imprisonment prior to execution is another. See Sher Singh's case (AIR 1983 SC 465) (albeit).

16. The next question that arises for our consideration is whether any rigid and inflexible rule can be laid down as to the period of delay that would be sufficient to justify interference with the sentence of death and the commutation of that sentence to one of life imprisonment.

17. Chinnappa Reddy, J. in T. V. Vatheeswaran v. State of Tamil Nadu, (1983) 2 SCC 68: (AIR 1983 SC 361 (2)) while considering the implications of prolonged delay in execution of sentence of death observed thus (Para 21 of AIR):

> "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."

18. The above view was not accepted in Sher Singh's Case (AIR 1983 SC 465) wherein it has been held that no hard and fast rule can be laid down as has been done in T. V. Vatheeswaran's case (AIR 1983 SC 361 (2)) (supra). Further in Sher Singh's case (AIR 1983 SC 465) the following dictum has been laid down (Paras 18 and 19).

> "Therefore, with respect, the fixation of the time limit of two years does not seem to us to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive.
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> Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities, we are of the opinion that no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence, the sentence must be substituted by the sentence of life imprisonment. There are several other factors which must be taken into account while considering the question as to whether the death sentence

should be vacated.

> ..... Therefore, it is understandable that a convict sentenced to death will take recourse to every remedy which is available to him under the law to ask for the commutation of his sentence, even after the death sentence is finally confirmed by this Court by dismissing his special leave petition or appeal. But, it is, at least, relevant to consider whether the delay in the execution of the death sentence is attributable to the fact that he has resorted to a series of untenable proceedings which have the effect of defeating the ends of justice. It is not uncommon that a series of review petitions and writ petitions are filed in this Court to challenge judgments and orders which have assumed finality, without any seeming justification. Stay orders are obtained in those proceedings and then, at the end of it all, comes the argument that there has been prolonged delay in implementing the judgment or order. We believe that the Court called upon to vacate a death sentence on the ground of delay caused in executing that sentence must find why the delay was cause and who is responsible for it. If this is not done, the law laid down by this Court will become an object of ridicule by permitting a person to defeat it by resorting to frivolous proceedings in order to delay its implementation. And then, the rule of two years will become a handy tool for defeating justice. The death sentence should not, as far as possible, be imposed. But, in that rare and exceptional class of cases wherein that sentence is upheld by this Court, the judgment or order of this Court ought not to be allowed to be defeated by applying any rule of thumb."

19. The Constitution Bench of this Court in Triveniben's case (AIR 1989 SC 1335) considered in detail the questions relating to, (1) delay in execution of sentence of death; (2)what should be the starting point for computing this delay? (3) what are rights of a condemned prisoner who has been sentenced to death but not executed? and (4) what could be the circumstances which could be considered along with the time that has been taken before the sentence is executed, and finally recorded its conclusion thus (Para 23):

> "Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensured after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the Court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case (AIR 1983 SC 361 (2)) cannot be said to lay down the correct law and, therefore, to that extent stands overruled."

20. We shall now examine the submission of Mr. Jain and see whether there has been undue delay in the present case which would be sufficient to justify interference with the sentence of death imposed on the petitioner. The SLP was disposed of on 28-3-1986. The petition for clemency was presented by the petitioner on 12-4-86 which was rejected by the Governor on 18-2-88. It has been stated before us that the mercy petition addressed to the President simultaneously through the Governor was received in the Ministry of Home Affairs along with the connected papers on 28-3-88 but the same was rejected by the President on 10-6-88 i.e. in less than three months. Meanwhile, on the

review petition presented before the Governor, a stay of the execution was granted but that stay was vacated on 6/7th November, 1988. The second mercy petition dated 15-7-88 addressed to the President was also rejected in the month of October, 1988. It was only thereafter, he filed this writ petition on 10-11-88 and the sentence of death imposed on him is kept under suspension pursuant to the stay order passed by this Court. Therefore, the alleged delay when examined in the light of the principles enunciated in Triveniben's case (AIR 1989 SC 1335) we are constrained to hold that there is no undue delay and consequently the impugned sentence of death does not call for interference on the ground of delay in execution of the death sentence.

21. Lastly, it has been requested by the learned counsel that the mercy petitions already rejected by the President require reconsideration as per the ratio in Kehar Singh v. Union of India, (1989) 1 SCC 204: (AIR 1989 SC 653). To examine that request, we sent for the entire file from the Ministry of Home Affairs and waded through it very carefully and we are satisfied that there is absolutely no ground to accede to this request.

22. In the result, for the above mentioned reasons, we reject all the contentions raised on behalf of the petitioner and dismiss the writ petition as devoid of any merit.

Petition dismissed.

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