

Raj Deo Sharma

Vs

State of Bihar

Criminal Appeal No. 1045 of 1998

(CJI M.M. Punchhi, K.T. Thomas, M. Srinivasan JJ)

08.10.1998

JUDGMENT

1. Leave granted.

2. On 2-11-1982, a case was registered against the petitioner regarding an offence under Section 5(2) read with Section 5(1)(e) of the Prevention of Corruption Act, 1947 (Act 11 of 1974). A charge-sheet was submitted on 30-8-1985 by the CBI in which the alleged disproportionate assets of the petitioner as on 5-11-1982 amounted to Rs. 9,10,932.41 along with a list of 40 witnesses and 20 documents. The Special Judge, CBI, South Bihar, Patna took cognizance of the offences on 14-11-1986 and issued summons fixing 2-12-1986 as the date for appearance. On 24-4-1987, the petitioner appeared before the Court, applied for and obtained bail. The charges were framed by the Special Judge on 4-3-1983. Three witnesses were examined by the prosecution till 1-6-1995.

3. The petitioner filed a writ petition in the High Court of Patna on 5-12-1985 praying inter alia for quashing the entire prosecution including the FIR on the ground that more than 13 years had elapsed since the institution of the FIR and thus the right of the petitioner to speedy trial was violated. The petition registered as CrWJC No. 809 of 1995 was dismissed by the High Court on 7-12-1995 on the ground that the delay was due to the fact that there was only one Special Court of the CBI functioning and a large number of cases were pending before it. It is the said order which is challenged in this petition.

4. After service of notice and appearance of the respondent, the Superintendent of Police, CBI, Patna was arrayed as second respondent. By order dated 9-12-1996, a report was called for from the Special Judge as to the condition of the present case as well as other cases similarly blocked up. The report of the Special Judge dated 25-12-1996 has disclosed a shocking state of affairs. As regards the present case, the relevant part of the report reads as follows :

"According to the charge-sheet there are as many as forty witnesses out of whom the prosecution has examined till today only three witness. The last witness was examined on 3-9-1993. Thereafter 36 adjournments were given to the prosecution for examination of the remaining witnesses. However, the prosecution has failed to examine any of the remaining witnesses. The next date fixed in the case for production of witnesses by the prosecution is 6-1-1997. It would not be out of place that myself joined as Special Judge only on 21-9-1996, thereafter I also directed the CBI to produce witnesses."

5. The report contains details of other pending cases. There are as many as 52 cases ranging from

1975 to 1996 pending at the stage of evidence relating to CBI, South Bihar and 44 cases ranging from 1972 to 1992 relating to CBI, North Bihar. By order dated 6-1-1997, we directed the Superintendent of Police to file a counter-affidavit explanatory to the remarks made by the Special Judge in his report with regard to the pendency of matters. The counter-affidavit filed by the Superintendent of Police in February 1997 has attempted to throw the blame on the accused. In para 9 thereof, it is stated as follows :

"However, on perusal of the order-sheet it would appear that all the times despite the police papers being made available and inspection being completed, the accused with a view to delay framing of the charge, filed petition after petition for supply of police papers. Such petitions on behalf of the accused were nothing but a dilatory device to delay framing of the charge. Ultimately, charge was framed on 4-3-1993; it is also true that only 3 PWs have been examined till date for the only reason that there has been only one Court of Special Judge at Patna hearing special cases of CBI since 19-4-1994 till date. It is also submitted that on a number of occasions the accused remained absent. Noailable warrant or non-ailable warrant could be obtained against the witnesses, as the trial court always remained busy in other cases. It is pertinent to mention that the Special Judge for CBI is also the Special Judge for vigilance cases of the State of Bihar, Special Judge for atrocities on Harijan cases. The Special Court for CBI also hears sessions trials and civil appeals and as such the Court is hardly left with time to hear exclusively the cases of anti-corruption matters. Over and above, CBI had 256 cases pending before the Special Judge in June 1995, besides cases of Vigilance Department, Government of Bihar and other regular cases such as criminal appeals, sessions trials entrusted to him by the District and Sessions Judge, Patna."

6. A rejoinder has been filed by the petitioner refuting the allegations in the counter-affidavit and reiterating that the delay in this case is entirely due to the fault of the prosecution which has prejudiced his fundamental right to speedy trial. It is stated therein that the prosecution failed to produce the documents on 48 occasions and failed to produce witnesses on 46 occasions.

7. The question before us is whether on the facts and circumstances of the case, the prosecution against the petitioner is to be quashed on the ground of delay in the conduct of trial. The petitioner has never suffered incarceration. As stated earlier, his application for bail was ordered on the day he appeared before the Court and presented the same.

8. The entitlement of the accused to speedy trial has been repeatedly emphasised by this Court. Though it is not enumerated as a fundamental right in the Constitution, this Court has recognized the same to be implicit in the spectrum of Article 21. In *Hussainara Khatoon (I) v. Home Secy., State of Bihar* ((1980) 1 SCC 81 : 1980 SCC (Cri) 23) the Court while dealing with the cases of undertrials who had suffered long incarceration held that a procedure which keeps such large number of people behind bars without trial for so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with requirement of Article 21. The Court laid stress upon the need for enactment of a law to ensure reasonable, just and fair procedure which has creative connotation after *Maneka Gandhi case* (*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248) in the matter of criminal trials.

9. In *Hussainara Khatoon (IV) v. Home Secy., State of Bihar* ((1980) 1 SCC 98 : 1980 SCC (Cri) 40) this Court held that financial constraints and priorities in expenditure would not enable the

Government to avoid its duty to ensure speedy trial to the accused.

10. In *State of Maharashtra v. Champalal Punjaji Shah* ((1981) 3 SCC 610 : 1981 SCC (Cri) 762) the Court took cognizance of the fact that the prosecution would in some cases deliberately adopt delaying tactics to keep the accused persons in jail as long as possible and to harass them particularly when the evidence is of a weak character and the conviction is not a probable result. The Court also pointed out that the accused person may be seriously jeopardised in the conduct of his defence with the passage of time as witnesses for the defence may become unavailable and their memories may fail. However, the Court pointed out that a delayed trial is not necessarily an unfair trial and the delay may be occasioned by the tactics or the conduct of the accused himself.

11. In *Madhu Mehta v. Union of India* ((1989) 4 SCC 62 : 1989 SCC (Cri) 705) this Court commuted the death sentence to life imprisonment while holding that inordinate delay should be taken into account for the purpose of deciding whether the execution of the sentence should be carried out or should be altered into imprisonment for life. The Court also observed that no fixed period of delay would be considered to be decisive.

12. In *Abdul Rehman Antulay v. R. S. Nayak* ((1992) 1 SCC 225 : 1992 SCC (Cri) 93) the Constitution Bench of this Court dealt with this aspect of the matter and laid down certain guidelines. The relevant passages in the judgment are as follows : (SCC pp. 269-73, paras 85-86)

"85. Another question seriously canvassed before us related to the consequence flowing from an infringement of right to speedy trial. Counsel for accused argued on the basis of the observations in *Sheela Barse (Sheela Barse (II) v. Union of India*, (1986) 3 SCC 632 : 1986 SCC (Cri) 352) and *Strunk (Strunk v. United States, 37 L Ed 2d 56 : 412 US 434 (1973))* that the only consequence is quashing of charges and/or conviction, as the case may be. Normally, it may be so. But we do not think that that is the only order open to court. In a given case, the facts - including the nature of offence - may be such that quashing of charges may not be in the interest of justice. After all, every offence - more so economic offences, those relating to public officials and food adulteration - is an offence against society. It is really the society - the State - that prosecutes the offender. We may in this connection recall the observations of this Court in *Champalal Punjaji Shah* ((1981) 3 SCC 610 : 1981 SCC (Cri) 762). In cases, where quashing of charges/convictions may not be in the interest of justice, it shall be open to the court to pass such appropriate orders as may be deemed just in the circumstances of the case. Such orders may, for example, take the shape of order for expedition of trial and its conclusion within a particular prescribed period, reduction of sentence when the matter comes up after conclusion of trial and conviction, and so on.

86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are :

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the

interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are :

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, 'delay is a known defence tactic'. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is - who is responsible for the delay ? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on - what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker

(Barker v. John Wingo, 33 L Ed 2d 101 : 407 US 514 (1972)) 'it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate'. The same ideal has been stated by White, J. in United States v. Ewell (15 L Ed 2d 627 : 383 US 116 (1966)) in the following words :

'... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in Barker (Barker v. John Wingo, 33 L Ed 2d 101 : 407 US 514 (1972)) and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors - 'balancing test' or 'balancing process' - and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order - including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be a qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

(13) In Kartar Singh v. State of Punjab ((1994) 3 SCC 569 : 1994 SCC (Cri) 899) another Constitution Bench to which one of us (M. M. Punchhi, J. as he then was) was a party observed thus : (SCC pp. 638 & 639-40, paras 86 & 92)

"86. The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, enquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

* * *###

92. Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors - (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay. However, the fact of delay is dependent on the circumstances of each case because reasons for delay will vary, such as delay in investigation on account of the widespread ramification of crimes and its designed network either nationally or internationally, the deliberate absence of witness or witnesses, crowded dockets on the file of the court etc."

14. The above observations have to be understood in the backdrop of the issues involved in that case. The constitutional validity of Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) was questioned and a five-Judge Bench was then considering various contentions including the possibility of persons accused of offences under TADA remaining in jail as undertrial prisoners for a long period on account of harsher and more stringent provisions relating to grant of bail. The observations made therein cannot, therefore, be read as in any way different from the observations made by the seven-Judge Bench in A. R. Antulay ((1992) 1 SCC 225 : 1992 SCC (Cri) 93). Hence, the legal position adumbrated by this Court in A. R. Antulay ((1992) 1 SCC 225 : 1992 SCC (Cri) 93) that the right to speedy trial flows from Article 21 and it encompasses the stages right from the date of registration of the FIR and onwards remains unaltered.

15. But it has become necessary to consider the matter at some length and lay down the additional guidelines in view of the large pendency of the cases before the Special Court, Patna for more than

two decades by now. There may be similar pendency in other States also.

16. The Code of Criminal Procedure is comprehensive enough to enable the Magistrate to close the prosecution if the prosecution is unable to produce its witnesses in spite of repeated opportunities. Section 309(1) CrPC supports the above view as it enjoins expeditious holding of the proceedings and continuous examination of witnesses from day to day. The section also provides for recording reasons for adjourning the case beyond the following day.

17. After deep consideration of the matter, we proceed to supplement the propositions laid down by the Constitution Bench in Antulay case ((1992) 1 SCC 225 : 1992 SCC (Cri) 93) with the following directions :

(i) In cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witnesses or not within the said period and the court can proceed to the next step provided by law for the trial of the case.

(ii) In such cases as mentioned above, if the accused has been in jail for a period of not less than one-half of the maximum period of punishment prescribed for the offence, the trial court shall release the accused on bail forthwith on such conditions as it deems fit.

(iii) If the offence under trial is punishable with imprisonment for a period exceeding 7 years, whether the accused is in jail or not, the court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the court can proceed to the next step provided by law for the trial of the case, unless for very exceptional reasons to be recorded and in the interest of justice the court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time-limit.

(iv) But if the inability for completing the prosecution within the aforesaid period is attributable to the conduct of the accused in protracting the trial, no court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clauses (i) to (iii).

(v) Where the trial has been stayed by orders of the court or by operation of law, such time during which the stay was in force shall be excluded from the aforesaid period for closing the prosecution evidence. The above directions will be in addition to and without prejudice to the directions issued by this Court in "Common Cause" A Registered Society v. Union of India ((1996) 4 SCC 33 : 1996 SCC (Cri) 589) as modified by the same Bench through the order reported in "Common Cause" A Registered Society v. Union of India ((1996) 6 SCC 775 : 1997 SCC (Cri) 42).

18. In the result, we set aside the impugned order passed by the High Court and direct the Special Judge, CBI, South Bihar, Patna to pass appropriate orders in the case of the petitioner in pursuance of this judgment. The appeal is allowed accordingly.

19. We issue the following additional direction insofar as the State of Bihar is concerned :

The State of Bihar shall constitute, within a period of three months from today, at least five Special Courts, to try the cases involving offences under the Prevention of Corruption Act, 1988 or its corresponding previous Act with or without other offences allied to them.