SUPREME COURT OF INDIA

Suthenthiraraja @ Santhan

Vs.

State Through Dsp/Cbi, Sit,

(K Thomas, D Wadhwa and S S Quadri JJ.)

08.10.1999

ORDER

D.P. WADHWA, J.

1. There are two sets of review petitions. They are against judgment of this Court dated May 11, 1999 in Death Reference Case No. 1 of 1998 and Criminal Appeal Nos. 321-325 of 1998. One set has been Filed by the convicts Nalini (A-1), Murughan (A-3), Santhan (A-2) and Arivu (A-18), Death sentence awarded to them by the Designated Court has been confirmed by this Court. Petitioners in their review petitions are not challenging their conviction. The review is only on question of sentence. There were, however, 26 accused who faced trial and they were all sentenced to death under the provisions of the Terrorist and Disruptive Activities Act (TADA) and Indian Penal Code (IPC) and also sentenced to varying terms of imprisonment on various other charges. Sentence of death awarded to them by the Designated Court was submitted to this Court for confirmation. The convicts also filed appeals against their conviction and sentence. After hearing elaborate arguments and examining the record, this Court passed the following order:

The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA Act are set aside in respect of all those appellants who were found guilty by the trial court under the said counts.

The conviction and sentence passed by the trial court of the offences under Sections 212 and 216 of the Indian Penal Code, Section 14 of the Foreigners Act, 1946, Section 25(1-B) of the Arms Act, Section 5 of the Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of the Wireless and Telegraphy Act, 1933, in respect of those accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those counts it

is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed.

The conviction for the offence under Section 120-B read with Section 302 Indian Penal Code as against A-1 (Nalini), A-2 (Santhan @ Raviraj), A-3 (Murugan @ Thas), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivalan @ Arivu) is confirmed.

We set aside the conviction and sentence of the offences under Section 302 read with Section 120-B passed by the trial court on the remaining accused.

The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed. The death sentence passed on A-9 (Robert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The reference is answered accordingly.

In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu), all the remaining appellants shall be set at liberty forthwith.

2. While the four petitioners are aggrieved by the award of sentence of death to them, State, through CBI in the second set of review petitions filed by it, is aggrieved with that part of the judgment where this Court held that the offence was not committed by the accused with intent to strike terror in people or any section of people and on that account no offence under Section 3(3) of TADA had been made out. State in its review petitions is not challenging findings of this Court that offence under Section 3(3) of TADA is not committed with intent to overawe the Government as by law established or that no offence under Section 4 of TADA which provides punishment for disruptive activities, has been committed.

3. Review petitions have been filed under Article 137 of the Constitution read with Order XL of the Supreme Court Rules, 1966 as amended. Under Article 137 of the Constitution, Supreme Court has power to review any judgment pronounced or order made by it subject to the provisions of any law made by the Parliament or any Rule made under Article 145 of the Constitution. Supreme Court Rules have been framed in exercise of those powers. Rules 1 and 2 of Order XL of the Supreme Court Rules are relevant and we may set out the same as under:

1. The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII, Rule 1 of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

2. An application for review shall be by a petition, and shall be filed within thirty days from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review.

4. As to the scope of review in criminal proceedings under Rule 1 it has been considered by the Constitution Bench in P.N. Eswara Iyer and Ors. v. Registrar, Supreme Court of India . This is how this Court considered its power of review in criminal proceedings:

The Rule 1 of Order XL, on its face, affords a wider set of grounds for review for orders in civil proceedings, but limits the ground vis-a-vis criminal proceedings to 'errors apparent on the face of the record'. If at all, the concern of the law to avoid judicial error should be heightened when life or

liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the 'deceased' shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The rule merely canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here 'record' means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

The purpose is plain, the language is elastic and interpretation of a necessary power must naturally be expansive. The substantive power is derived from Article 137 and is as wide for criminal as for civil proceedings. Even the difference in phraseology in the rule (Order 40, Rule 2) must, therefore, be read to encompass the same area and not to engraft an artificial divergence productive of anomaly, if the expression 'record' is read to mean, in its semantic sweep, any material even later brought on record, with the leave of the court, it will embrace subsequent events, new light and other grounds which we find in Order 47, Rule 1, CPC. We see no insuperable difficulty in equating the area in civil and criminal proceedings when review power is invoked from the same source.

5. It would be seen that scope of review in criminal proceedings has been considerably widened by pronouncement in the aforesaid judgment. In any case review is not rehearing of the appeal all over again and to maintain a review petition it has to be shown that there has been miscarriage of justice. Of course, the expression "miscarriage of justice" is all embracing. Ordinarily application for review shall be disposed of by circulation without any detailed arguments unless otherwise ordered by the court (Rule 3). Considering that review petitioners had been awarded death sentence we had heard the arguments in considerable detail in the appeals and we confirmed the award of death sentence on the review petitioners even so we thought it prudent that we should hear the arguments in review petitions as well.

6. Mr. Natarajan, who appeared for the convict review petitioners, submitted that he was not challenging the finding of guilt of the petitioners and was confining the review petitions only on question of award of death sentence. He said that cases of these four review petitioners were no different from those of A-9 (Robert Payas), A-10 (Jayakumar) and A-16 (Ravi), who were also found guilty under Section 120-B read with Section 302 IPC along with four review petitioners, but award of sentence of death to them had been altered to imprisonment for life. We may, however, note that in the case of A-1 (Nalini) the confirmation of award of death sentence was by majority and on three other review petitioners it was unanimous. In the case of A-1 (Nalini), one of us Thomas, J. was of the view that A-1 (Nalini) could be saved from the gallows and for that he gave reasons. This view was not shared by two of us (Wadhwa and Quadri, JJ.)

7. Mr. Natarajan again took us to the role of each of the review petitioners and the philosophy of award of death sentence as considered by the Constitution Bench of this Court in Bachan Singh v. State of Punjab . He said that the evidence which had been led to prove the charges under TADA could not be used while appreciating the evidence regarding commission of offences under IPC and on that consideration awarding death sentence for those offences. Mr. Natarajan also pointed out two or three errors in the judgment in recording of the name or otherwise of the accused which he

said could have bearing on the award of sentence. Finally, he again contended that the planners and perpetrators of the crime were all dead and three of the seven accused also held guilty for offence under Section 120-B/302 IPC have been sentenced to life imprisonment and so far the case of four review petitioners is concerned they be also awarded sentence of life imprisonment. It is difficult to accept the arguments of Mr. Natarajan. All the three Judges constituting the Bench gave separate judgments and each one of us considered the role of each one of the accused in great detail. The errors pointed out by Mr. Natarajan are not even contradictions and are inconsequential or insignificant not affecting the ultimate result. It is only after examining the role of each of the accused on the basis of the evidence on record that the role of four review petitioners was found different than the three others who have been sentenced to life imprisonment.

8. Mr. Altaf Ahmed, Additional Solicitor General for India, questioned the very maintainability of the review petitions. He said no error has been pointed out which could be said to have led to miscarriage of justice. He said the Judges had examined the role of the accused from all angles and it was only after that death sentence was confirmed on the four review petitioners. Theory of sentencing was also fully considered in all the three judgments separately given and nothing new has been pointed.

9. Having considered the scope of review and the rival contentions we find no merit in the review petition by the four convicts sentenced to suffer the extreme penalty provided under the law.

10. In the review petitions filed by the State through CBI Mr. Soli J. Sorabjee, learned Attorney General for India, said that relevant considerations have not been taken into account to hold that the accused did not commit the offence with intent to strike terror in people or in any section of the people. He said earlier decisions of this Court in Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijjaya ; Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors. and Girdhari Parmanand Vadhava v. State of Maharashtra , were not considered in proper perspective by this Court. He made following submissions:

1. The well-settled principle that a person is presumed to intend the natural and probable consequence of his act. The greater the probability of a consequence, the more likely it is that the consequence was foreseen and, if that consequence was foreseen, the more likely it is that that consequence was also intended.

2. A crucial part of the reasoning in Niranjan Singh's case , as also in Girdhari's case , has not been adverted to at all and has been overlooked.

3. There is clear mis-appreciation of the ratio of this Hon'ble Court's judgment in Hitendra Vishnu . The authority supports the case of the prosecution that the offence committed is a terrorist act with a view to strike terror.

4. The conclusion arrived at that the act in question was not committed with an intent to strike terror in the people or any section of the people is not in conformity with the admitted facts on record and findings recorded in the judgment.

11. Mr. Sorabjee also referred to English law on the question of proof of intention and quoted para 16 from Halsburry's Law or England (Fourth Edition), Volume 11(1), which is as under:

16. Proof of intention and foresight. Whenever an offence is defined so as to require proof that a person intended or foresaw a particular result, the court or jury is not bound in law to infer that such person intended or foresaw that result by reason only of its being a natural and probable consequence of his actions, but must decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as may be proper in the circumstances. Foresight of the consequences of an act does not necessarily imply the existence of intention but it may be a factor from which, when considered together with all the other evidence, the jury may infer that the accused had the alleged intention. The probability of the result is another factor, and an important one, for the jury to consider when deciding whether the result was intended. When directing juries about the mental element in any crime of specific intent, judges should avoid any elaboration or paraphrase as to what is meant by intent. Some further direction may, however, be necessary if the prosecution invites the jury to infer intent from the foresight of a consequence. As a matter of evidence, the greater the probability of a consequence, the more likely it is that the consequence was foreseen and, if that consequence was foreseen, the more likely it is that that consequence was also intended.

In Niranjan Singh's case , which was quoted in the case of Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors. this Court had said that intention of the accused was clearly to eliminate the rivals and gain supremacy in the underworld so that they may be known as the bullies of the locality and would be dreaded as such. In that case the intention was not to strike terror in the people or any section of people. This Court added, "It would have been a different matter if to strike terror some innocent persons were killed. In that case the intention would be to strike terror and the killings would be to achieve that objective. In that case the intention was to liquidate Raju and Keshav and thereby achieve the objective of gaining supremacy in the underworld. The consequence of such violence is bound to cause panic and fear but the intention of committing the crime cannot be said to be strike terror in the people or any section of the people."

12. In Girdhari Parmanand Vadhava v. State of Maharashtra , this Court again referred to the aforesaid observations made by this Court in Niranjan Singh's case. It was thus the submission of Mr. Sorabjee that in the present case where so many innocent persons had been killed the intention could be gathered that the accused had committed the crime with intent to strike terror in the people or any section of people. Mr. Natarajan in his reply submitted that there was no quarrel with the statement of law as propounded by this Court, but he said that mens rea was vital in the criminal trial and this Court on evidence came to the conclusion that the accused did not commit the crime with an intention to strike terror in the people or any section of people.

13. We do not think Mr. Sorabjee is right in his submission. All the judgments of this Court were duly considered and so was the law on the subject and it was only then on the basis of the evidence that this Court concluded that the accused did not commit the crime with intent to strike terror in the people or any section of the people. This Court made no general statement. In recent judgment in State through CBI, Delhi v. Gian Singh , where the accused were sentenced to death under Section 3(3)(I) of TADA for offence of murder of Sant Harcharan Singh Longowal, this Court did conclude on the basis of evidence on record that the main intention of the accused was to administer a terror or shock wave to the people at large when Sant Harcharan Singh Longowal was not the only target of the shooters though perhaps he was one of the principal targets.

14. We find no error in the judgment sought to be reviewed on the ground that we were wrong in holding that the accused did not intent to strike terror in the people or any section of the people and

on that account they did not commit any offence under Section 3 of TADA.

15. Accordingly, review petitions are dismissed.

Thomas, J.

16. I am in respectful agreement with the reasons by which my learned brother Wadhwa, J. has concluded that the Review Petitions are to be dismissed, though I have a dissent in regard to the sentence aspect concerning A-1 Nalini. On that score, apart from reiterating my reasons for awarding imprisonment for life as the sentence for the offence under Section 302 read with Section 120B of Indian Penal Code to A-1 Nalini, I wish to express my separate stand regarding the Review Petition filed by her.

17. The Constitution Bench in Bachan Singh v. State of Punjab has narrowed down the scope for awarding death sentence to the extremely restricted radius of "rarest of rare cases" in which the alternative lesser sentence of imprisonment for life is unquestionably foreclosed.

18. In the main Judgment in the present case one of the three Judges found that sentence of imprisonment for life would be sufficient to meet the ends of justice as for A-l Nalini.

19. In a case where a Bench of three Judges delivered judgment in which the opinion of at least one judge is in favour of preferring imprisonment for life to death penalty as for any particular accused, I think it would be a proper premise for the Bench to review the order of sentence of death in respect of that accused. Such an approach is consistent with Article 21 of the Constitution as it helps saving a human life from gallows and at the same time putting the guilty accused behind bars for life. In my opinion, it would be a sound proposition to make a precedent that when one of the three judges refrains from awarding death penalty to an accused on stated reasons in preference to the sentence of life imprisonment that fact can be regarded sufficient to treat the case as not falling within the narrowed ambit of "rarest of rare cases when the alternative option is unquestionably foreclosed".

20. I may add as an explanatory note that the reasoning is not to be understood as a suggestion that a minority opinion in the judgment can supersede the majority view therein. In the realm of making a choice between life imprisonment and death penalty the above consideration is germane when the scope for awarding death penalty has now shrunk to the narrowest circle and that too only when the alternative option is "unquestionably foreclosed". In a special situation where one of the three deciding judges held the view that sentence of life imprisonment is sufficient to meet the ends of justice it is a very relevant consideration for the Court to finally pronounce that the prisoner can be saved from death as the lesser option is not "unquestionably foreclosed" in respect of that prisoner.

21. So in my view the Review Petition filed in respect of A-l Nalini should be allowed and her sentence should be altered to imprisonment for life. I, therefore, allow the Review Petition to the aforesaid limited extent.

Syed Shah Mohammed Quadri, J.

22. On reading the draft order prepared by my learned brother Wadhwa, J. I endorsed my agreement thereto as I felt that the order in a Review Petition should neither reiterate nor add to the reasons

contained in the judgment under review. But thereafter I received the order of my learned brother Thomas, J. containing his dissenting note regarding the sentence passed on A-l Nalini and suggesting us to review the order of sentence of death. The learned

Judge observed:

In a case where a Bench of three Judges delivered judgment in which the opinion of at least one Judge is in favour of preferring imprisonment for life to death penalty as for any particular accused, I think it would be a proper premise for the Bench to review the order of sentence of death in respect of that accused.

23. The ambit of Rule XL(1) of Supreme Court Rules which provides grounds for Review, as interpreted by this Court in P.N. Eswara Iyer and Ors. v. Registrar, Supreme Court of India , vis-a-vis criminal proceedings, is not confined to "an error apparent on the face of the record". Even so by process of interpretation it cannot be stretched to embrace the premise indicated by my learned brother as a ground for review. That apart there are two difficulties in the way. The first is that the acceptance of the said proposition would result in equating the opinion of the majority to a ground analogous to 'an error apparent on the face of the record' and secondly in a bench of three Judges or of greater strength if a learned Judge is not inclined to confirm the death sentence imposed on a convict, the majority will be precluded from confirming the death sentence as that per se would become open to review.

24. In this view of the matter, agreeing with brother Wadhwa, J. I dismiss the Review Petitions.

25. In view of the orders of the Court taking the majority view the review petitions are dismissed.