SUPREME COURT OF INDIA

Mohd. Arif @ Ashfaq

Vs.

The Registrar,Supreme Court of India

(R.M.Lodha CJI., Jagdish Singh Khehar, J. Chelameswar, A.K. Sikri and Rohinton Fali Nariman JJ.)

02.09.2014

JUDGMENT

CHELAMESWAR, J.

1. I have had the privilege of reading the draft judgment prepared by my esteemed brother Rohinton Fali Nariman, J. With utmost respect, I am unable to agree with the view taken by him that a review petition filed by a convict whose death penalty is affirmed by this Court is required to be heard in open Court but cannot be decided by circulation. The background facts and the submissions are elaborately mentioned by my learned brother. I do not propose to repeat them.

2. Extinguishment of life of a subject by the State as a punishment for an offence is still sanctioned by law in this country. Article 21 of the Constitution itself recognizes the authority of the State to deprive a person of his life. No doubt, such authority is circumscribed by many constitutional limitations. Article 21 mandates that a person cannot be deprived of his life except according to procedure established by law. Whether Article 21 is the sole repository of the constitutional guarantee against the deprivation of life and whether it is sufficient for the State to merely prescribe a procedure for the deprivation of life by a law, or whether such a law is required to comply with certain other constitutional requirements are questions which have been the subject matter of debate by this Court in various decisions starting from A.K. Gopalan v. State of Madras, AIR 1950 SC 27. The history of such debate and the

historical background in which such constitutional protections are felt necessary have been very elaborately discussed by my learned brother. Therefore, I do not propose to deal with the said aspect of the matter.

3. Section 53[1] of the Indian Penal Code, 1860 (hereinafter referred to as IPC) prescribes various punishments to which offenders are liable under the provisions of the IPC. Death is one of the punishments so prescribed. Provisions of the IPC prescribe death penalty for various offences as one of the alternative punishments for these offences[2]. For example, Section 302 prescribes death or imprisonment for life as alternative punishments for a person who commits murder. Similarly, Section 121 prescribes death penalty as one of the alternatives for an offence of waging or attempting to wage or abetting to waging of war against the Government of India.

4. Apart from the Penal Code, some other special enactments also create offences for which death penalty is one of the punishments. Unless, a special procedure is prescribed by such special law, all persons accused of offences are tried in accordance with the procedure prescribed under the Code of Criminal Procedure, 1973 (hereinafter referred to as the CrPC). Under the scheme of the CrPC, only the High Court and the Court of Sessions are the courts authorized to award punishment of death. The other subordinate courts such as Chief Judicial Magistrates and Magistrates are expressly debarred to award death penalty. Sections 28[3] and 29[4] of the CrPC prescribe the punishment which the various courts in the hierarchy of the criminal justice administration system can pass.

5. Some special enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987, Narcotic Drugs and Psychotropic Substances Act, 1985, the Unlawful Activities Prevention Act, 1967 etc. also create offences for which death penalty is one of the alternative punishments prescribed. Though some of the offences are triable by special courts constituted under these Acts, generally the CrPC is made applicable to the proceedings before the special courts and such special courts are generally manned by persons who are either Sessions Judges or Addl. Sessions Judges.

6. Legislature, as a matter of policy, entrusted the trial of serious offences for which death penalty is one of the possible penalties, to relatively more experienced members of the subordinate judiciary.

7. Even though Sessions Courts are authorized to award punishment of death in an appropriate case, the authority of the Sessions Court is further subjected to two limitations:-

> Under sub-section (3) of Section 354 of the CrPC, the judgment by which the punishment of death is awarded, is required to give special reasons for such sentence .
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> 354. Language and contents of judgment." (1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353," ********* ******* ******** ********** (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.
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> ********** ********* ********** ********** The second limitation is contained in chapter XXVIII of the CrPC. Section 366(1) thereof mandates that a Court of Session passing a sentence of death shall submit the proceedings to the High Court and the sentence so imposed by the Sessions Court shall not be executed unless the High Court confirms the punishment awarded.

8. Section 367 of the CrPC authorises the High Court to make a further enquiry into the matter or take additional evidence. Under Section 368 of the CrPC, the High Court is precluded from confirming the sentence until the period allowed for preferring an appeal (by the accused) has expired or if an appeal is already presented within the period of limitation prescribed under law, until such appeal is disposed of. In other words, before confirming the award of death sentence, the High Court is required to examine the correctness of the finding of the guilt of the accused recorded by the Sessions Court, if the accused chooses to challenge the correctness of the finding of the guilt by the Sessions Court. In theory, the role of the High Court in confirming or declining to confirm the sentence of death awarded by the Sessions Court is limited to the examination of the correctness or the appropriateness of the sentence. The correctness and legality of the finding of guilt recorded by the Sessions Court, is required to be examined in the appeal, if preferred against such finding by the

accused. Hence, the requirement under Section 368 is to await the decision in the appeal preferred by the accused against the finding of guilt.

9. However, in practice when a reference is made under Section 366, the High Court invariably examines the correctness of the finding of the guilt recorded by the Sessions Court. In fact such a duty is mandated in Subbaiah Ambalam v. State of Tamil Nadu, AIR 1977 SC 2046“ It is well settled that in a Reference under S.374 of the Code of Criminal Procedure for confirming death sentence, the High Court has to consider the evidence afresh and to arrive at its independent finding with regard to the guilt of the accused. and in Surjit Singh & Others v. The State of Punjab, Criminal Appeal No.77 of 1968 decided by this Court on 15th October, 1968“ It is clear from a perusal of these provisions that on a reference under s.374, Criminal Procedure Code, the entire case is before the High Court. In hearing such a reference the High Court has to satisfy itself as to whether a case beyond a reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In other words, in hearing the reference, it is the duty of the High Court to reappraise and to reassess the entire evidence and to come to an independent conclusion as to the guilt or innocence of each of the accused persons mentioned in the reference.

10. Section 369 CrPC further stipulates that every case referred under Section 366 to the High Court shall be heard and decided by at least two judges of the High Court, if that High Court consists of two or more judges.

11. In a case where the penalty of death is confirmed by the High Court in accordance with the CrPC, the decision is final except for two categories of cases. Under Article 134[5], a right of appeal to this Court is created in criminal cases where the High Court on appeal reverses an order of acquittal of an accused person recorded by the Sessions Court and sentences him to death or where the High Court withdraws for trial before itself any case pending before a court subordinate to it and convicts the accused person and awards death sentence to such an accused person. I may also state that apart from such a constitutional right of appeal, as a matter of practice, this Court has been granting special leave under Article 136 in almost, as a matter of course, every case where a penalty of death is awarded.

12. In this Court, appeals, whether civil or criminal, have always been heard by at least two judges.

13. The authority of the courts to examine and adjudicate the disputes between the sovereign and its subjects and subjects inter se is conferred by law, be it the superior Law of Constitution or the ordinary statutory law. Such jurisdiction can be either original or appellate. A court™s jurisdiction to review its own earlier judgment is normally conferred by law. The jurisdiction of this Court to review its own judgments is expressly conferred under Article 137 of the Constitution.
137. Review of judgments or orders by the Supreme Court:- Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

14. The question on hand is as to the procedure to be followed in exercising such jurisdiction. Article 145 of the Constitution authorizes the making of rules by this Court regarding the practice and procedure of the court, of course such authority of this Court is made subject to the provisions of any law made by Parliament. Article 145(1)(e) expressly authorizes this Court to make rules as to the conditions subject to which a judgment or order made by this Court be reviewed and the procedure for such review.

> Article 145 : Rules of Court, etc." (1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procedure of the Court including;
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> ***** ***** *****
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> (e) Rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;
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> ***** ***** *****

15. In exercise of such power, this Court made Rules from time to time. The Rules in vogue are called the Supreme Court Rules, 1966[6]. Order XL of the said Rules occurring in Part VIII deals with the subject of review. Rule 1 thereof stipulates that

no application for review in a criminal proceeding be entertained by this Court except on the ground of an error apparent on the face of the record.

> Rule 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 I of the Code, and in a criminal proceeding except on the ground of an error apparent on the face of the record.

16. Rule 3 stipulates that an application for review shall be disposed of by circulation without any oral arguments.

> Rule 3. Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgment or order sought to be reviewed.
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> Rule 3 as it exists today was added on 9th August, 1978 with effect from 19th August, 1978.

17. The constitutionality of the said rule was promptly challenged and repelled by a Constitution Bench of this Court in P.N. Eswara Iyer & Others v. Registrar, Supreme Court of India, (1980) 4 SCC 680.

18. This Court took note of the fact that in a departure from the existing system, the new rules eliminate oral hearing in a review application and mandate that a review application shall be disposed of by circulation. The Court also noticed that even the new Rules do not totally eliminate the possibility of an oral hearing, the discretion is preserved in the Court to grant an oral hearing in an appropriate case. The Court negated the submission that the scuttling of oral presentation and open hearing is subversive of the basic creed that public justice shall be rendered from the public seat, not in secret conclave ..

19. Such a conclusion is reached by the Court on the ground that a review is not the original proceeding in this Court. It is preceded by an antecedent judicial hearing,

therefore, such a second consideration need not be plenary. This Court categorically recorded, rejecting the challenge that the rule of audi alteram partem demands a hearing in open court;

19..The right to be heard is of the essence but hearing does not mean more than fair opportunity to present one™s point on a dispute, followed by a fair consideration thereof by fair minded judges. Let us not romanticize this process nor stretch it to snap it. Presentation can be written or oral, depending on the justice of the situation.. It further held;

20. ..Granting basic bona fides in the judges of the highest court it is impossible to argue that partial foreclosure of oral arguments in court is either unfair or unreasonable or so vicious an invasion of natural justice as to be ostracized from our constitution jurisprudence. This Court held that the purpose behind amendment of the rule eliminating oral hearing is that the demands of court management strategies require this Court to examine from time to time the procedure to be followed in various classes of cases brought before it and make suitable rules. 25. . The balancing of oral advocacy and written presentation is as much a matter of principle as of pragmatism. The compulsions of realities, without compromise on basics, offer the sound solution in a given situation. There are no absolutes in a universe of relativity. The pressure of the case-load on the Judges' limited time, the serious responsibility to bestow the best thought on the great issues of the country projected on the court's agenda, the deep study and large research which must lend wisdom to the pronouncements of the Supreme Court which enjoy awesome finality and the unconscionable backlog of chronic litigation which converts the expensive end-product through sheer protraction into sour injustice - all these emphasise the urgency of rationalising and streamlining court management with a view to saving court time for the most number of cases with the least sacrifice of quality and turnover. If, without much injury, a certain class of cases can be disposed of without oral hearing, there is no good reason for not making such an experiment. If, on a close perusal of the paper-book, the Judges find that there is no merit or statable case, there is no special virtue in sanctifying the dismissal by an oral ritual. The problem really is to find out which class of cases may, without risk of injustice, be disposed of without oral presentation. This is the final court of provisional infallibility, the summit court, which not merely disposes of cases beyond challenge, but is also the judicial institution entrusted with the constitutional responsibility of authoritatively declaring the law of the land. Therefore, if oral hearing will perfect the

process it should not be dispensed with. Even so, where issues of national moment which the Supreme Court alone can adequately tackle are not involved, and if a considerable oral hearing and considered order have already been rendered, a review petition may not be so demanding upon the Judge's Bench attention, especially if, on the face of it, there is nothing new, nothing grave at stake. Even here, if there is some case calling for examination or suggestive of an earlier error, the court may well post the case for an oral hearing. (Disposal by circulation is a calculated risk where no problem or peril is visible.) The Bench also observed:

> 37. We do not claim that orality can be given a permanent holiday. Such an attitude is an over-reaction to argumentum ad nauseum. But we must importantly underscore that while lawyer's advocacy cannot be made to judicial measure especially if judges are impatient, there is a strong case for processing argumentation by rationalisation, streamlining, abbreviation and in, special situations, elimination. Review proceedings in the Supreme Court belongs to the last category. There is no rigidity about forensic strategies and the court must retain a flexible power in regard to limiting the time of oral arguments or, in exceptional cases, eliminating orality altogether, the paramount principle being fair justice..

20. The reasons given by my learned brother in support of his conclusion that a limited oral hearing should be granted to the accused are:

> (i) that there is a possibility of (given the same set of facts) two judicial minds reaching different conclusions either to award or decline to award death sentence.
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> (ii) that the death penalty once executed becomes irreversible and therefore every opportunity must be given to the condemned convict to establish that his life ought not to be extinguished. The obligation to give such an opportunity takes within its sweep, that an oral hearing be given in a review petition, as a part of a reasonable procedure flowing from the mandate of Article 21.
>
> (iii) that even a remote chance of deviating from the original decision would justify an oral hearing in a review petition.

21. I agree with my learned brother that death penalty results in deprivation of the

most fundamental liberty guaranteed by the Constitution resulting in an irreversible situation. Therefore, such deprivation should be only in accordance with the law (both substantive and procedural) which is consistent with the constitutional guarantee under Articles 14 and 21 etc.

22. But, I am not able to agree with the proposition that such an obligation extends so far as to compulsorily giving an oral hearing in every case where review is sought by a condemned convict.

23. I have already explained the various safeguards provided by the Constitution and the law of this country against awarding death penalty. Barring the contingency contemplated under Article 134, the makers of the Constitution did not even think it fit to provide an appeal to this Court even in cases of death penalty. In cases other than which are brought before this Court as of right under Article 134, this Court™s jurisdiction is discretionary. No doubt, such discretion is to be exercised on the basis of certain established principles of law. It is a matter of record that this Court in almost every case of death penalty undertakes the examination of the correctness of such decision.

24. Article 137 does not confer any right to seek review of any judgment of this Court in any person. On the other hand, it only recognizes the authority of this Court to review its own judgments. It is a settled position of law that the Courts of limited jurisdiction don™t have any inherent power of review. Though this Court is the apex constitutional court with plenary jurisdiction, the makers of the Constitution thought it fit to expressly confer such a power on this Court as they were aware that if an error creeps into the judgment of this Court, there is no way of correcting it. Therefore, perhaps they did not want to leave scope for any doubt regarding the jurisdiction of this Court to review its judgments in appropriate cases. They also authorized this Court under Article 145(1)(e)[7] to make rules as to the conditions subject to which a judgment of this Court could be reviewed and also make rules regarding the procedure for such review. Both Articles 137 and 145 give this Court the authority to review its judgments subject to any law made by the Parliament.

25. As observed by this Court in Eswara Iyer™s case, it has never been held, either in this country or elsewhere, that the rule of audi alteram partem takes within its sweep the right to make oral submissions in every case. It all depends upon the demands of

justice in a given case. Eswara Iyer™s case clearly held that review applications in this Court form a class where an oral hearing could be eliminated without violating any constitutional provision. Therefore, I regret my inability to agree with the conclusion recorded by my learned brother Justice Nariman that the need for an oral hearing flows from the mandate of Article 21.

26. In my opinion, in the absence of any obligation flowing from Article 21 to grant an oral hearing, there is no need to grant an oral hearing on any one of the grounds recorded by my learned brother for the following reasons " That review petitions are normally heard by the same Bench which heard the appeal. Therefore, the possibility of different judicial minds reaching different conclusions on the same set of facts does not arise.

> The possibility of the remote chance of deviation from the conclusion already reached in my view is " though emotionally very appealing in the context of the extinguishment of life " equally applicable to all cases of review.

27. Prior to the amendment of Order XL of the Supreme Court Rules in 1978 (which was the subject matter of challenge in Eswara Iyer™s case) this Court granted oral hearings even at the stage of review. It was by the amendment that the oral hearings were eliminated at the review stage. As explained by Eswara Iyer™s case, such an amendment was necessitated as a result of unwarranted review baby boom. This Court, in exercise of its authority under Article 145 as a part of the Court management strategy, thought it fit to eliminate the oral hearings at the review stage while preserving the discretion in the Bench considering a review application to grant an oral hearing in an appropriate case. The Constitution Bench itself, while upholding the constitutionality of the amended rule of Order XL, observed;

> All that we mean to indicate is that the mode of ˜hearing™, whether it should be oral or written or both, whether it should be full-length or rationed, must depend on myriad factors and future developments. ˜Judges of the Supreme Court must be trusted in this regard and the Bar will ordinarily be associated when decisions affecting processual justice are taken™. (para 37 page 696)

28. I do not see any reason to take a different view - whether the developments subsequent to Eswara Iyer™s case, either in law or practice of this Court, demand a

reconsideration of the rule, in my opinion, should be left to the Court™s jurisdiction under Article 145.