

CASE COMMENTS

SHATRUGHAN CHAUHAN V. UNION OF INDIA: EXAMINING THE ROLE OF SUPERVENING FACTORS IN COMMUTATION OF DEATH SENTENCE

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I. INTRODUCTION

The Supreme Court of India has constantly attempted to widen the paradigm of "right to life" under Article 21 of the Constitution of India and expand its horizons to give it the widest import. *Shatrughan Chauhan and Anr. v. Union of India and Ors.*

¹ is another milestone in the history of Indian judiciary as it exhorts the commutation of death sentence on the ground of existence of supervening circumstances. The Court has affirmed that the "right to life" of a person subsists even after he has been sentenced to death and continues till his last breath, and that *it will protect that right even if the noose is being tied on the condemned prisoner's neck.*² The rights of the death row convicts, who in the instant case have been magnanimously recognised as victims by the honourable Supreme Court, emanate from the Constitution of India and standards prescribed by the International law. The most important ground for commutation of death sentence was considered to be an inordinate delay in disposal of mercy petition by the President. Thus, the Court overruled its own decision and line of reasoning in the *Bhullar Case*³ which was also declared to be *per incuriam*. The death sentence of 15 convicts was commuted in the instant case.

Justice VR Krishna Iyer described death penalty as a judicial murder which was no different from a criminal murder. It may also be characterised as inhuman, excessive and also irreversible, offering the accused no chance of reformation. Thus, more than two-third countries of the world have abolished death penalty.⁴ This judgment may be perceived as the first step towards the abolition of death penalty in India. The Court has also laid down certain guidelines for

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¹ *Shatrughan Chauhan and Anr. v. Union of India and Ors.* MANU/SC/0043/2014. (The case is yet to be reported by AIR or SCC)

² Ibid.

³ *Devendar Pal Singh Bhullar v. State (NCT) of Delhi* (2013) 6 SCC 195

⁴ <http://www.amnestyusa.org/our-work/issues/death-penalty> [accessed on February 20, 2014]

safeguarding the interests of the death row convicts, and ensures that that the mercy petitions are dealt with expeditiously.

II. COMMUTATION OF DEATH SENTENCE BY THE COURT -- OVER RIDING THE PRESIDENT'S/GOVERNOR'S POWER UNDER ARTICLE 72/161?

The power of the President/Governor to grant pardon, reprieves, respites or remissions under Article 72/161 is a constitutional responsibility of great significance. It has been reposed by the people through the Constitution in the Head of the State.⁵ The power of pardon is executive in nature, and is essentially distinct from the judicial power exercised by the Courts. This special power does not operate to alter the judicial records or absolve the guilt of the accused. The edifice of the quasi federal polity in our country is built upon the cornerstone of separation of powers between the executive, judiciary and the legislature. The Court's decision to commute the death sentence of 15 convicts unilaterally was considered to be upsetting this balance.

The Supreme Court has time and again reiterated that Article 21 is the paramount principle on which the rights of accused are based.⁶ Article 21 guarantees that *no person shall be deprived of his life or personal liberty except according to a procedure established by law*. The protection under this Article is available to all the persons, including convicts and continues till their last breath. Unexplained and inordinate delay in disposal of mercy petitions subjects the convict to an excruciatingly long wait, along with severe mental, physical and psychological suffering. Delay in execution of death sentence has a dehumanizing effect on the person, and is in contravention to Article 21 as it deprives a person of his "*right to life*" without any compliance to the procedure established by law. The expeditious disposal of mercy petitions would be acting as per the the procedure established by law.

Thus, the Court was merely acting as the protector of the very fundamental rights to which the convicts are entitled, and this must not be seen as overriding the President's power to pardon. The Court intervened in the instant matter on the grounds of infringement of the fundamental right accorded by Article 21.

⁵ *Kehar Singh v. Union of India and Anr.* (1989) 1 SCC 204

⁶ *Shatrughan Chauhan v. Union of India*, MANU/SC/0043/2014

LIMITED JUDICIAL REVIEW

The Court was of the opinion that the President's power was discretionary in nature, and there was a presumption that the constitutional authority acts with application of mind.⁷ Therefore, the executive orders under articles 72 and 161 are subject to limited judicial review. The Court has maintained that the executive orders may be challenged, if found to be suffering from mala fide, arbitrariness and extraneous or wholly irrelevant considerations.⁸

In the instant case, Court examined the claims of the petitioners to find the effect of supervening circumstances and whether they fell within the ambit of the limited judicial review. These supervening events were Delay, Insanity, Solitary Confinement, Judgments declared per incuriam and procedural lapses.

III. SUPERVENING EVENTS: GROUNDS FOR COMMUTATION OF DEATH SENTENCE

The Court examined following events as grounds for commutation of death sentence:

DELAY

The Court accentuated a disturbing trend in the disposal of mercy petitions. The average time taken for disposal of mercy petitions had gone up from an average of 5 months to 4 years, and in some exceptional circumstances even up to 12 years. Such unexplained, unreasonable and inordinate delay in execution of death sentence would be an infringement of Article 21. The procedure which deprives a person of his life and liberty must be just, fair and reasonable.⁹ The Court emphasised that a condemned prisoner has the right to a fair procedure at all stages of the judicial process. Inexplicable delay in execution of death sentence subjects the condemned person to severe mental agony, psychological stress and creates adverse physical conditions for the accused. Such a lapse on part of constitutional and statutory authorities is inexcusable.

⁷ *Bikas Chatterjee v. Union of India* (2004) 7 SCC 634

⁸ *Narayan Dutt v. State of Punjab* (2011) 4 SCC 353

⁹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. The ambit of Article 21 covers not only the procedural aspect, but also the substantive aspect. Therefore, the Courts have given a wide interpretation to Article 21 in subsequent cases.

The Court relied upon *Vatheeswaran*¹⁰ and *Triveniben*¹¹ and reiterated that it will examine the nature of delay caused and the circumstances that ensued after the sentence was finally confirmed by the judicial process. This case has been followed as a precedent in many commonwealth countries.¹² The Universal Declaration of Human Rights, 1948 and United Nations Covenant on Civil and Political Rights have declared cruel and degrading treatment of prisoners as unlawful. India is a signatory of both these declarations. Thus, the philosophy of humane treatment of prisoners is enshrined in the Constitution, as well as the international law. Therefore, Court has recognised delay as an important supervening factor for the commutation of death sentence.

INSANITY/MENTAL ILLNESS

Out of all the writ petitions filed in the present case, two convicts filed for the commutation of death sentence on the ground of mental illness. They contended that the unusual delay in processing of the mercy petition has caused them unfathomable mental agony and severe psychotic suffering. According to a well settled principle of criminal law, and human rights jurisprudence, a person suffering from any form of mental illness is not deemed fit for infliction of such punishment. The major question before the apex court was to consider insanity as a ground for commutation of death sentence.

India is a member of the United Nations (U.N.) and has ratified numerous conventions and covenants passed by the same. Clause 3(e)¹³ of one such Resolution 2000/65 of the U.N. Commission on Human Rights titled '*The question of Death Penalty*' posits that death penalty should not be imposed/executed on a person who was suffering from any mental disorder.

A similar report¹⁴ published by U.N. Human Rights in its clause 89 stated that infliction of capital punishment on pregnant ladies, recent mothers and mentally retarded convicts is prohibited.

¹⁰ *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68

¹¹ *Smt. Triveniben v. State of Gujarat*, (1988) 4 SCC 574

¹² *Earl Pratt v. AG for Jamaica*, (1994) 2 AC 1-Privy Council; Catholic Commission for Justice & Peace in Zimbabwe v. *Attorney General* 1993 (4) S.A. 239- Supreme Court of Zimbabwe; *Attorney General v. Susan Kigula*, Constitutional Appeal No. 3 of 2006- Supreme Court of Uganda; *Herman Mejia and Nicholas Guevara v. Attorney General*, AD 2000 Action No. 296-Supreme Court of Belize.

¹³ Clause 3(e) Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person;

¹⁴ The report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions, Dated 24-12-1996.

Furthermore, Clause 116 of the same report suggested that the state should have legislations which would bring them in line with the international standards with respect to treatment given to the minors' delinquents and mentally retarded convicts¹⁵. William Blackstone in his treatise "*Commentary on the Laws of England*", suggested that idiots and lunatics must not be punished for their acts, if committed when they are not in a sound state. Execution must be stayed if the prisoner is found to be suffering from mental illness or insanity.

Sections 386¹⁶ and 387¹⁷ of the State Jail Manuals of Uttar Pradesh and Uttarakhand provide that a convict should not be executed if he develops insanity after conviction, and should not be executed unless he is fit. Taking cue from various U.N. published documents, treaties signed by India, International Laws, our own territorial legislations, European conventions and 8th Amendment of the U.S. (which prohibits the execution of an insane person), the Supreme Court was of the view that Insanity/ Mental Illness/ Schizophrenia were indeed a part of the supervening circumstances which warrant for commutation of death sentence.

SOLITARY CONFINEMENT¹⁸

It was contended by most of the Petitioners that they were kept in Solitary Confinement since the death penalty was confirmed by the Apex Court. Such act would be a violation Articles 14, 19 and 21 of the Indian Constitution and amounts to torture. The State submitted an affidavit to the effect that the convicts were kept in Statutory Segregation, which was different from solitary confinement for security reasons.

¹⁵Eric Prokosch, *Human Rights V. Death Penalty Abolition and restriction in Law and Practice*, <http://www.amnesty.org/en/library/asset/ACT50/013/1998/fr/76c3bb34-e77d-11dd-9edc-8be7e550cfe5/act500131998en.pdf> (24-02-2014)

¹⁶ Section 386: Condemned convicts developing insanity:

When a convict under sentence of death develops insanity after conviction, the Superintendent shall stay the execution of the sentence of death and inform the District Magistrate, who shall submit immediately a report, through session judge, for orders of the State Government.

¹⁷ Section 387: Postponement of execution in certain cases:

The execution for a convict under sentence of death shall not be carried out on the date fixed if he is physically unfit to receive the punishment, but shall not be postponed unless the illness is both serious and acute (i.e. not chronic). A report giving full particulars of the illness necessitating postponement of execution should at once made to the Secretary to the State Government, Judicial (A) Department for the orders of the Government.

¹⁸ Section 73 of IPC provides that Solitary Confinement is '*Confinement in a room where the prisoner is not even permitted to have a sight of the other human-beings*' *Prabhudas Tribhavandas Sanghvi V. The State Of Maharashtra and Anr.* (1976 CriLJ 1788)

In a landmark judgment¹⁹, the Court had distinguished between solitary confinement and non-punitive custodial isolation of a prisoner awaiting execution. The Supreme Court laid down a clear distinction between Section 30(2)²⁰ of the Prison Rules Act and Sections 73-74 of IPC. The court was of the view that a convict on death row cannot be given solitary confinement unless directed by the court. The court gave a plentiful interpretation to Section 30(2). The expression ‘to be confined in a cell’ and ‘apart from all other prisoners’ does not imply that the confinement should be in a solitary cell. The convict may be confined to the limits of the same cell, apart from the other prisoners and yet not being solitary confined. The Court held that a prisoner should not be considered ‘under the sentence of death’, until his mercy petition has been rejected by the President. Therefore, prisoners who are awaiting a response to their plea of mercy, do not fall under the purview of this section. Thus, the scope of Section 30 has been defined very clearly by the honorable Court.

Supreme Court was of the view that solitary confinement is a rigorous form of punishment and should not be given unless expressly specified by the court. The apex court in *Triveniben case*²¹ was of the view that keeping a convict in solitary confinement amounts to ‘additional and separate’ punishment, which is contrary to the intent of the court as established in *Sunil Batra case*²². They observed that the actual implementation of provisions is far from the reality and directed the jail authorities to comprehend and implement the actual intent of the judgment. However, the Court did not consider it as one of the supervening circumstances which may warrant for commutation of the death sentence.

JUDGMENTS DECLARED PER INCURIAM²³

The Supreme Court was of the view that the judgments which were contended to be per incuriam by the parties were not wrongly decided. The Court did not rely upon them because of the peculiar

¹⁹ *Sunil Batra v. Delhi Administration and Ors. Etc* (1978) 4 SCC 494

²⁰ Section 30(2) of the Prison rules act: Every such prisoner, shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under charge of a guard.

²¹ *Smt Triveniben v. State of Gujarat* (1989) 1 SCC 678

²² (1978) 4 SCC 494

²³ According to the BLACK'S LAW DICTIONARY, *Per Incuriam* means ‘Through inadvertence; ignorance of the relevant law.’; BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 651 (second edition, Oxford University Press 1987) (1995) In the case of *Morrelle Ltd. v. Wakeling*, [1955] 2 Q.B. 389, 406, it was held that “As a general rule the only cases in which the decisions should be held to have given per incuriam are those of decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned”; “When the essence of a previous decision with which a judge disagrees cannot so easily be

facts and different circumstances of the case. Thus, the court was of the view that this contention was not of great significance with respect to the present case.

PROCEDURAL LAPSES

The Home Ministry has laid down an elaborate procedure with respect to the handling of mercy petitions.²⁴ The Prison Manuals of various states also provide for the manner in which a convict in death row is to be treated till a final decision is taken by the President of India. These guidelines lay down a strict responsibility upon the Ministry of Home Affairs and the Jail Superintendents. The elaborate procedure clearly shows that the convicts are entitled to be treated fairly in light of Article 21 of Constitution of India. However, the Apex Court decided that they will look into the alleged procedural lapses on a case to case basis, and did not lay down any specific instruction with respect to this supervening factor.

IV. CONCLUSION

In the instant case, the Supreme Court commuted the death sentence of 13 convicts on ground of delay and of 2 convicts on the ground of insanity. The Court has done a commendable job by adopting a humanistic approach and recognising the fundamental rights of prisoners and death row convicts. Justice Satahasivam opined that *retribution has no place in the constitutional scheme of our country*. The Court has responded to the evolving human rights jurisprudence which has urged various countries to abolish death sentence. The Court has laid certain guidelines²⁵ to ensure an efficient disposal of mercy petitions. However, it refrained from providing a specific time frame for the processing of mercy pleas. The judgment may be viewed as a progressive step, and the first one towards the abolition of death penalty in India.

dismissed as *obiter dictum*, the judge may, as a desperate last resort, categorize the previous decisions as per incuriam (an acceptable legal euphemism for a judgment [that] was obviously wrong).” David Pannick, *Judges* 159 (1987)

²⁴ Discussed in paragraph 91 and 92 of *Shatrughan Chauhan and Anr. v. Union of India and Ors.* MANU/SC/0043/2014.

²⁵ Certain guidelines issued by the Court in this case: 1. Solitary Confinement prior to the rejection of mercy petition by President was declared as unconstitutional. 2. Legal Aid was recognised as a fundamental right of such prisoner. 3. Post mortem was made obligatory. 4. Prison authorities must facilitate and allow a final meeting between the prisoner and his family. 5. There should be a regular evaluation of the mental health of death row convicts.