(1990) 04 OHC CK 0046

Orissa High Court

Case No: Jail Criminal Appeal No. 137 of 1985

Leti ' Jayadeb Roy and Another	APPELLANT
Vs	
The State	RESPONDENT

Date of Decision: April 10, 1990

Acts Referred:

- Constitution of India, 1950 - Article 19, 21
- Criminal Procedure Code, 1973 (CrPC) - Section 167(2), 339
- Penal Code, 1860 (IPC) - Section 302

Citation: (1990) 2 OLR 219

Hon'ble Judges: B.L. Hansaria, C.J; R.C. Patnaik, J

Bench: Division Bench

Advocate: Sovesh Roy, General, S. Mohapatra and Aditya Narayan Misra, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

B.L. Hansaria, C.J.
"Give me liberty or give me death, thundered Patrick Henry, more than two hundred years ago, in the virginia Convention." This is how one of us (Patnaik, J.) prefaced his judgment i Mangal Hemrum and Others Vs. State of Orissa, when confronted with the detention of a person pending investigation in violation of the right made available under the proviso to Section 167(2) of the Code of Criminal Procedure (shortly, "the Code"). It is the same concern for liberty which has necessitated examination of the question as to whether the convicts who are languishing in jails due to the inability of this Court in disposing of their appeals should be released on bail de hors the provision of Section 339 of the Code; and if so, when and under what circumstances. This liberty loaded question has much relevance so far as this Court is concerned inasmuch as it has not been able to dispose of jail Criminal Appeals even of 1989. The total Jail Criminal Appeals pending till the end of the year

1989 being 435, the aforesaid question has assumed greater significance. There must be many more Criminal Appeals filed by convicts from outside jail wherein prayers for release on bail were rejected by this Court

2. Before proceeding further, we may say that as between funeral fire and mental worry, it is the latter which is more devastatinu, for funeral fire burns only the dead body whereas mental worry burns the living one''. We are told about this reality of life, noted by Shotty, J. in Triveniben Vs. State of Gujarat, by Mr. S. Mohapatra, a learned member of the Bar who voluntarily come forward to assist the Court in answering the important question at hand.

3. Lest the concern shown for convicts be misunderstood, may we remind ourselves what was stated by the Apex Court in Kadra Pahadiya v. State of Bihar, AIR 1981 SC 939 .

We fail to understand why our justice system has become so dehumanised that lawyers and Judges do not feel a sense of revolt at caging people in jail for years without a trial.

4. That has been stated in the aforesaid case relating to under trial prisoners would apply to the convicts as well whose appeals remain pending for years. Though we may not agree in this connection with what was stated in Anama Rout and Others Vs. Trilochan Das, to which our attention has been invited by Mr. S. Mohapatra, that the presumption of innocence continues all throughout the trial and till the dispose of the case in the final Court of appeal, there can be no denial that the right of speedy trial Which is available to an under trial prisoner by the force of Article 21 of the Constitution would be available to the convicts also. In this connection we feel tempted to quite what was stated by Sandhawalia, C.J. in Anurag v. State AIR 1987 Pat 74 (F.B.) in paragraph 11:

...If Article 21 and the right to speedy public trial is not merely a twinkling star in the high heavens to be worshipped and rendered vociferous lip-service only but indeed is an actually meaningful protective provision I then a fortiori expeditious hearing of substantive appeals against convictions is fairly and squarely within the mandate of the said Article.

We agree with the Learned Chief Justice in the view taken by him that the constitutional right of speedy trial includes within its sweep the expeditious hearing of substantive appeal against conviction as well, inasmuch as Article 21 cannot stop short at the end of the trial but continues to extend its protective shield even after the post-conviction stage.

5. Indeed, the highest Court of the land has invoked Article 21 even while dealing with the cases of execution of sentence following final pronouncement on the question of conviction. The communication of death sentence to imprisonment for life because of delay in execution of the sentence is the result of this line of thinking.

Though there has been some debate regarding the period of delay in executing the sentence of death which would require the commutation of the sentence of death to one of Imprisonment for life (See Triveniben, supra), the availability of Article 21 in such a case has not been disputed. Not only this even delay in disposal of mercy petition following final adjudication of conviction by the judicial forum has also been taken into consideration in commuting the death sentence and this has been done keeping in mind the fiat of Article 21. Reference may be made in this connection to the latest decision of the Supreme Court in Madhu Mehta Vs. Union of India and Others, .

6. To the sub-human conditions in jails where convicts languish, no Nelson''s eye can be turned. If any description of cellular life in prison condition is needed, the same cannot be described better than by quoting what Krishna Iyer, J. stated in Sunil Batra v. Delhi Administration AIR 1978 S.C. 1075 where the position of Tihar Jail, which is perhaps the best in India, was summed up by stating:

...the Tihar prison is an arena of tension, traumas, tantrums and crimes of violence, vulgarity and corruption there is a large network of criminals, officials and non-officials in the house of correction....

In other cases the Supreme Court had described the jail conditions infernal, lower world under world; in other words, "hell".

7. It is the above poignant situation in which convicts are lodged in jail that led us to examine the question of release of convicts on bail whose substantive appeals are pending before this Court. The ever increasing importance given to the concept of liberty enshrined in Article 21 of the Constitution provided the bedrock of examining the question at hand.

8. Let us have a look as to how the Supreme Court has viewed the matter. In Kashmira Singh Vs. The State of Punjab, the Appellant convicted u/s 302, I.P.C. was released on bail as he had spent about 41/2 years in jail. It was observed that if the Court was not in a position to hear the appeal of an accused within a reasonable period of time or within a measurable distance of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail. In this connection it was observed as below:

...It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person:

We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?

What confidence, would such administration of justice inspire in the mind of the public?

9. The question of "bailor jail?" came again before the highest Court of the land in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh, and in his inimitable style Krishna Iyer, J. stated as below:

...Personal liberty deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially with lively concern for the cost to the individual and the community After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of ''procedure established by law

It is also pointed out in this decision that the significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable even-handed and geared to the goals of community good and the State necessity spelt out in Article 19. Being of this view, the Petitioner who was before the Court was released on bail who had suffered imprisonment for about a year as it was felt that the hearing of the appeal might take a few years.

10. It is, however, Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , which has set the tone in this regard, as it was observed as below in paragraph 5:

We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be ''reasonable, fair and just'' Obviously, procedure prescribed by law for depriving a person of his liberty cannot be ''reasonable, fair or just'' unless that procedure ensures a speedy trial for determination of the guilt of such person....

11. After all these pronouncements of the Apex Court, there can be no doubt that a speedy trial has to be ensured to every Indian learned Advocate-General appearing for the State has, however, drawn our attention to Raghubir Singh and Others Vs. State of Bihar, , in which it was stated that whether the right of speedy trial guaranteed by Article 21 had been infringed or not would ultimately depend upon facts and circumstances of each case and several questions would arise, for consideration in this connection: Was there delay? How long was the delay? Was the delay inevitable having regard to the nature of the case? Was the delay unreasonable? Was any part of the delay caused by the wilfulness or the negligence of the prosecuting agency? Was any part of the delay caused by the tactics of the defence? Was the delay due to causes beyond the control of the prosecuting and

defending agencies? Did the accused have the ability and opportunity to assert his right to a speedy trial? Was there likelihood of the accused being prejudiced in his defence? Irrespective of any likelihood of pre judice in the conduct of his defence, was the very length of delay sufficiently prejudicial to the accused?

12. As to this case and the factors enumerated in it for deciding whether the right guaranteed by Article 21 had been infringed or not, we would like to say that the same are not very relevant for deciding the question at hand inasmuch as for the delay in disposal of the appeals filed by the convicts many of the considerations noted in the aforesaid case would be found absent.

13. Learned Advocate-General also referred us to State of Maharashtra Vs. Champalal Punjaji Shah, , wherein it was observed that the delayed trial is not necessarily an unfair trial. As to this" decision, we may point out that we are not much concerned in answering the question at hand as to whether delay in dispose of the appeal would result in negation of justice in the sense that the disposal may not be fair and proper. What we are rather concerned is the question of release of the convicts on bail due to the delay in disposal of the appeals.

14. Our attention has also been invited on behalf of the State to what was stated in Shyam Sahu and Others Vs. State of Orissa, and Kumud Mahapatra and Another Vs. Abhina Mallick and Others, . In these cases two learned single Judges of this Court took the view that delay in trial may not be a good ground for release on bail. Reference to paragraph 16 of Shyam Sahu''s case, however, shows that this observation had been made having regard to the nature of the offence and the materials against the accused placed by the investigating agency. Even while saying so, the learned Judge, having noted the inordinate delay and the disquieting features of the case, had observed in paragraph 15 that cases involving under-trial prisoners must be taken up and concluded as expeditiously as possible. In Kumud, the delay in commitment was only of about six months because of which it was stated that the delay was not such as to warrant release of the accused persons on bail.

15. The thrust of Article 21, the concern for human liberty and the improbability of compensating the convict for his incarceration if the same is found to be unjustified, coupled with the sub-human condition in which the convicts live in jail and the suffering which the members of their family undergo, leave no doubt in bur mind that a way has to be found out to secure their liberty if it be not possible for this Court for one reason or the other to hear the appeals within a reasonable period of time or a measurable distance of time. This is not to say that efforts should not be made to expedite hearing of the appeals by taking such steps as are necessary in this regard. But then if delay cannot be avoided, what should we do ? Can we ignore the call of Art 21 ? We think, not.

16. While expressing our concern for the convicts languishing in jails, we may point out that we are not oblivious of the fact that this Court should show equal concern for the protection of the society which consists of not only of the criminals alone but of innocent law-abiding and law-fearing people whose interest has also to be safeguarded as urged by the Learned Advocate General and was pointed out by Abidi, J. in Anurag (supra). We are thus to harmonise the conflicting claim of the convicts and the larger interest of the society in seeing that no harm is caused to the innocent person by release of criminals on bail.

17. We have given our anxious thought to the aforesaid question. To us it appears that a balance can be struck between ensuring of personal liberty of convicts and protection of larger interest of the society following release of criminals involved in capital cases as well on bail by considering the cases of those convicts alone for release on bail due to delay in disposal of appeals who are involved in run-of-mill cases and by taking care to see that where the convicts have committed horrendous crimes, they are not given the benefit contemplated by us. This part, if the Court considering the question of release of the convict be of the view that in a particular case the release may endanger the society because of the possibility of the convict indulging in crime, his release on bail may be refused.

18. In what class of cases the benefit contemplated by us should be denied cannot be exhaustively enumerated. The same can only be listed, as was done by Sandhawalia, C.J. in Anurag (supra). Reference to this decision shows that the following classes of capital crimes were regarded as shocking to the conscience of the society and the general rule hid down by the majority was not made applicable:

(a) Multiple and mass murders on caste and tribe considerations.

(b) Dacoity coupled with murder.

(c) Rape with murder.

(d) Bride burning.

(e) Terrorist crime.

(f) Daylight bank robbery.

(g) Abduction for ransom followed be murder.

(h) Indiscriminate use of firearms and bombs in murders disturbing public order.

19. Reference may usefully be made in this connection to Nur Chand v. State of Assam (1987) 1 G.L.R. 126, wherein also the question whether a lifer should be lodged in jail until disposal of his appeal had come up for consideration, and learned Acting Chief Justice Lahiri took the view that under the prevailing conditions of jail and counter-balancing the same with the effect of granting freedom to a convict, a liberal view should be taken unless the case falls within "the special class of cases of

saboteurs, terrorists, public enemies, hardened criminals or convicts having criminal background or previous conviction and cases of the like nature."

20. Before we finally resolve the issue involved, we may examine the question whether any time limit can be set after expiry of which call of Article 21 would require release of the convicts on bail; and if so, what should be the same. The majority in Anurag (supra) laid down the limit of one year in this connection. This had" been done following what was stated by the Supreme Court in Hussainara Khatoon and Kadra pehadiya (supra). In Hussainara Khatoon, it was observed that even a delay of one year in the commencement of trial was bad. In Kadra Pehadiya, a view was taken that sessions trials should end within one year. Though the learned Advocate-General would not favour fixation of any time limit as such and would like liberal approach to the question of release on bail of the persons convicted in run-of-mill cases after they have been in jail for some years, we are of the view, that a time limit has to be set, otherwise there are chances of discriminatory treatment being meted out to cases which are otherwise similarly situated. Having considered the background of criminal litigation as existing in the State and other local factors, we are of the view that a period of three years should be fixed in this regard for the present.

21. Stage has reached to express our view on the question whether the convicts who have been in jail for three years because of non-disposal of their appeals could claim their release on bail with the aid of Article 21 of the Constitution? According to us Article 21 demands that the cases of such convicts have to be liberally viewed while examining the question of their release on bail and in run-of-mill cases enlargement on bail in the first instance for a temporary period of say three months for cogent personal reasons may not be refused. We have mentioned about temporary release in the first instance, to enable all concerned to watch the performance of the convict during the interregnum. If it would be found that he has misused the liberty, the period of his release on bail would not be enlarged. If, however, there be nothing against the convict, he would merit release on bail till the disposal of his appeal of course, for special reasons, which would include the nature of the crime and the antecedents of the convict, the benefit of release on bail even for a temporary period may be denied. The types of cases in which this benefit should be denied cannot be laid down exhaustively but should be akin to those about which reference has been made earlier. This apart, if the character and antecedent of the convict be such as would give grounds to believe that his release on bail may not be safe, he too may be denied the protective shield of Article 21.

22. The above is our broad view. It is apparent that each case shall have to be decided on its own facts and circumstances. That shall, however, be done keeping in mind the aforesaid mandate of Article 21 of the Constitution.

R.C. Patnaik, J.

Ordered accordingly.

23. I agree.