(1955) 01 BOM CK 0006

Bombay High Court

Case No: Criminal Revision Application No. 1074 of 1953

State		APPELLANT
	Vs	
Lachman Kevalram Ahuja		RESPONDENT

Date of Decision: Jan. 6, 1955

Acts Referred:

- Bombay Police Act, 1951 - Section 68
- Penal Code, 1860 (IPC) - Section 302, 324, 326, 34, 394

Citation: AIR 1955 Bom 373 : (1955) 57 BOMLR 777

Hon'ble Judges: Yyas, J; Gajendragadkar, J

Bench: Division Bench

Judgement

Yyas J.

1. [His Lordship after considering the evidence in the case proceeded.] Accordingly the convictions of both the accused u/s 394 read with Section 397, Indian Penal Code, u/s 302 read with Section 34, Indian Penal Code, u/s 326 read with Section 34, Indian Penal Code, and u/s 324 read with Section 34, Indian Penal Code, is perfectly correct. Since we have come to the conclusion on evidence that accused No. 1 had carried and fired revolvers and accused No. 2 had carried and fired a pistol, and since they had no licence to carry and possess fire-arms, their convictions u/s 19(e) of the Indian Arms Act and u/s 68(7) of the Bombay District Police Act are also correct. In the result, Appeals Nos. 1408 and 1423 of 1953 fail and are dismissed.

2. We next proceed to deal with Criminal Revisional Application No. 1074 of 1953 filed by the State. This revisional application raises the question whether the sentences of transportation for life passed on the two accused u/s 302 read with Section 34 of the Indian Penal Code for the murders of Bhika and Lalkhan should be enhanced to sentences of death on both the accused. The learned Additional Sessions Judge has said in the course of his judgment that on merits both the accused would deserve the sentence of death. Bat he has passed a lesser sentence

in view of the fact that both the accused were under sentence of death for two years and two months from March 13, 1950, to May 20, 1952, on which date the Supreme Court reversed the order of conviction and sentence passed on both the accused on a technical ground that, after the coming into force of the Constitution, the Court of the Special Judge had no jurisdiction to try the case of the accused. To quote the words of the learned Judge, he was

inclined to accept Shri Pandya''s plea on a consideration of the fact that the death sentence awarded to the accused by the Special Judge remained hanging over them for over two years.

3. Now, we are not unaware of a settled principle of law that the passing of sentence is a matter for the discretion of the trial Court and that the appellate Court will not interfere with the said discretion except in very rare cases where it is satisfied that the trial Court has exercised its discretion improperly. That an appellate Court would have imposed a higher sentence if it had tried the case itself is wholly immaterial on a question of enhancement of sentence. The usual rule thus is that an appellate Court will not superimpose its own discretion upon the discretion of the trial Court, except in most exceptional cases. So, the question which falls to be determined in this revisional application is whether the learned Extra Additional Sessions Judge exercised his discretion improperly in declining to pass a sentence of death, though on merits he was satisfied that the sentence of death was deservedly called for, on the sole ground that the accused had remained under a sentence of death for two years and two months from March 13, 1950, to May 20, 1952. The answer to this question would depend upon an answer to the question, which If a point of law, whether in cases where merits demand a sentence of death, the mere fact that the accused had remained under a sentence of death for a year or more would be a good ground for commuting the s6ntence of death to a lesser sentence. We answer this question in the negative. It is true that a person sentenced to death would suffer acute mental anguish and suffering and would remain in a state of painful suspense from the time that the sentence is passed upon him. But, the mere fact that the said state of suspense and suffering has continued for a year and more is no good ground in law for commuting the sentence of death to one of transportation for life, though, with respect, a contrary view has been taken by some High Courts in India. In most cases in which a death sentence is passed a lapse of a year at least is inevitable between the passing of the said sentence by the Sessions Court and its eventual confirmation by the highest judicial tribunal in the land. A sentence of death passed by a Court of Session comes up to the High Court for confirmation, and though this High Court has always been particularly keen to see that confirmation cases are disposed of with utmost expedition, it usually takes a minimum period of six months before the sentence of death is confirmed. Thereafter, if the matter goes up to the Supreme Court, it is not unreasonable to assume that at least an equal amount of time would usually elapse before the case is finally decided by the Supreme Court-. Thus, for at least a year, and sometimes it

may be even longer, a condemned person has to remain under a sentence of death, and if that fact by itself is to be considered a good ground for not confirming the death sentence, no death sentence can ever be passed, howsoever eminently fit a case may be on merits for imposing a death sentence. In a gross case of a calculated, cold-blooded, ghastly murder, it is obligatory upon a Sessions Judge to pass a sentence of death upon the accused in the absence of any extenuating circumstances connected with the murder. In such a case, the Judge cannot say to himself that, although there are no extenuating circumstances relating to the crime itself which could justify the mitigation of the sentence of death and although the sentence of death is demanded on merits, he will not pass the said sentence because of the sole reason that, the accused had been previously in the same case under a sentence of death for some time. A sentence of death previously passed in a case in which a retrial has been ordered is a circumstance extraneous to the crime of murder. It cannot in any manner be said to be one of the circumstances of the case and cannot, therefore, be considered an extenuating circumstance. It is not a factor personal to the accused either, in the sense of their being persons of tender age or old age or the like, which circumstances are sometimes looked upon by some Judges as extenuating circumstances. Now, what has happened in this case is that the only reason which weighed with the learned Judge for not passing a sentence of death was that he took into consideration a circumstance entirely extraneous to the crimes committed on that fateful morning in the city of Ahmedabad and virtually treated it as an extenuating circumstance. We are of the view that in doing so he exercised his discretion improperly. If an accused person pleads that a sentence of death should not be imposed upon him because he had, previously been under a sentence of death in the same case for some time, he pleads in effect for mercy and the grant of mercy is within the province of the Executive (vide the observations of Spens C.J. in Piare Dusadh v. Emperor [1944] A.I.B.F.C. 1 to which I will presently refer). In this connection how-ever, it must be noted that neither of the accused has made a plea for mercy in this case. In fact, accused No. 2 said that he was not asking for mercy and while, in reply to the revisional application, lie delivered e discourse on the impermanence of life, he added that he would not like to die of old age or disease, but would wish to die earlier and that too a quick death. He did not give any grounds why we should not enhance the sentence to death. Accused No. 1 also, when asked whether he wished to say anything against the enhancement of the sentence of transportation for life imposed upon him by the Extra Additional Sessions Judge, indicated by a violent clicking of his right-hand fingers that he had nothing to say. It is needless to point out that our judgment, in deciding this criminal revisional application, has not been influenced in the slightest degree by such an attitude of the accused. We have been guided solely by the grossness of the case and the atrocity of the crime and we have been convinced that the discretion was erroneously exercised by the learned Judge when he passed the sentence of transportation for life on these accused on the sole ground that they had remained under a sentence of death for some time in the past in this case before the Supreme

Court set aside the said sentence. Even if a plea for mercy had been made before us by the accused and even if we had the power to entertain such a plea, we would have rejected it in view of the extreme grossness of the case.

4. The true principle which would govern the question of enhancement of sentence from transportation for life to one of death is laid down by the Supreme Court in Dalip Singh v. The State of Punjab (1953) 16 S.C.J. 532. It was observed by their Lordships in this case as follows (p. 538):

...The power to enhance a sentence from transportation to death should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate Court to say, or think, that if left to itself it Would have awarded the greater penalty because the discretion does not belong to the appellate Court but to the trial Judge and the only ground on which an appellate Court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can. be inferred from the circumstances of the case, or where th. 9 facts are so gross that no normal judicial mind would have awarded the lesser penalty.

Then their Lordships proceeded to say that it was impossible to lay down a hard and fast rule for every case and that each case must depend on its own facts. It is, therefore, clear that there is no settled rule and there can be none that whenever a person is under a sentence of death for a year or two, the sentence of death should not be confirmed or the sentence of transportation for life should not be enhanced to death. Indeed, as I have already said, a lapse of a year at least is inevitable in most cases between the passing of the sentence of death and its eventual confirmation by the Supreme Court.

5. Now, in this case it is true that both the accused have been convicted of an offence u/s 302 read with Section 34 of the Indian Penal Code, but from the point of view of atrocity of crime, perversity of mind and criminality of intention, no distinction could be drawn between the two and the conduct of both the accused was equally heinous, reprehensible and criminal. Accordingly, it would not matter at all whether it was accused No. 1''s bullet or accused No. 2''s bullet which hit Bhika and Lalkhan. This is not a case where only one person was actively concerned in the commission of the crime and the other, though a sharer in the fullest measure in the common intention to commit the crime and therefore liable u/s 34, was not doing any overt act. It has been conclusively established by the evidence in the case that both the accused were freely and indiscriminately using the firearms which were in their possession. The evidence has shown that accused Nos. 1 and 2 both were firing shots in front of the bank''s building on the Richey Road. They were doing so even while driving away the motor van. Near Ramdevji Temple also they were both seen firing shots. I have already shown that the bullets which were extracted from the bodies of Takhatsing and Baba Shiva must have been fired from the revolver of accused No. 1. Those bullets were similar to the bullets contained in

the cartridges which were found from the pockets of accused No. 1''s coat. Cartridges which were found scattered about near the Central Bank, in the van itself and on the Mirzapur Road must have been fired from the pistol of accused No. 2. The fact that although accused No. 1 had used his revolver as many as eleven times, he was even at the end of the incident found in possession of as many as 331ive cartridges, and the fact that although accused No. 2 had freely used his pistol near the Central Bank and in the van and on the Mirzapur Road, he was at the end of the incident found in possession of 12 live cartridges of the automatic pistol, would show that this is a case in which no distinction could be made between the criminality of accused No. 1 and accused No. 2, although on the evidence before us we may not be in a position to say whether the bullets which hit Lalkhan and Bhikha were fired by accused No. 1 or accused No. 2. The conduct of both the accused was so grossly criminal that, but for providential grace, there would have been a much greater and much more horrid manifestation of the fury of death on the streets of Ahmedabad that morning and many more dead bodies would have been found lying about in the streets. It was just fortunate that Takhat-singh, Trilokinath and Indravadan did not die but survived their injuries. It was also providential mercy that while the accused were firing their revolvers and pistol as they were driving the van away, no passer-by was mortally wounded.

6. It is also pertinent to note that, notwithstanding the fact that the charge against the accused was u/s 302 read with Section 34, the learned Judge was satisfied that on merits the sentence of death was deserved by both the accused. As I have said, what weighed with him was only one circumstance, namely, that the accused were under a, sentence of death for two years and two months between March 13, 1950, and May 20, 1952. That circumstance by itself, as I have pointed out, cannot in law be a good ground for not enhancing the sentence of transportation for life to one of death or for commuting the sentence of death to one of transportation for life. Therefore as, on merits, the learned Additional Sessions Judge himself thought that the sentence of death was eminently deserved by both the accused and as there is no good ground in law for not passing the capital punishment on both of them and as the case is of the grossest kind, we are of the view that the discretion which the learned Sessions Judge exercised in not passing the capital punishment was improperly exercised by him.

7. In Bissu Mahgoo Vs. State of Uttar Pradesh, special leave was granted to the appellant to file his appeal which was limited to the question of sentence only. It was urged before the Supreme Court that after the learned Sessions Judge had pronounced his judgment and awarded to the appellant the sentence of transportation for life, the State had not filed any revisional application against that sentence, but it was the complainant himself who had moved the High Court in revision and the High Court in revision had enhanced the sentence from transportation for life to death. It was also urged that after the decision was pronounced by the High Court on April 16, 1951, enhancing the sentence on the

appellant to death, the appellant had filed an application for leave to appeal to the Supreme Court on May 15, 1951. The said application, for some reason or the other, was not disposed of by the Allahabad High Court till March 13, 1953. In these circumstances, it was contended that the sentence of death which was awarded to the appellant should be commuted to one of transportation for life. This was, therefore, a case in which originally the sentence of transportation for life was imposed upon the appellant. At the instance of the complainant the said sentence was enhanced to one of death and the appellant had remained under the said sentence of death for one year and ten months, that is to say, from May 15, 1951, to March 13, 1953, and yet the Supreme Court ordered the appeal of the appellant to be dismissed. In other words, the Supreme Court did not consider the time-factor alone, namely, the fact that the appellant had been under a sentence of death for one year and ten months, as a circumstance justifying the commutation of the capital sentence to one of transportation for life. This decision would, therefore, show that it would not be laid down as an inflexible principle of law that whenever an accused person has remained for a year or two under a sentence of death, the said sentence should be commuted to one of transportation for life.

8. In support of his view that in a case in which an accused person has remained under a sentence of death for some time, a lesser sentence of transportation for life should be passed, the learned Judge has relied on certain cases and those cases are Pakhar Singh v. Emperor (1928) 31 Cr. L.J. 41 Autor Singh v. Emperor (1913) 17 C.W.N., 1213 Buta Singh v. Emperor [1926] A.I.K. Lah. 582 and Piare Dusadh v. Emperor [1944] A.I.R.F.C.I. We have considered these cases, but are of the view that the principle of these decisions does not apply to the facts of this case. One important feature which distinguishes the present case from all these cases is that in this case there has been an interval of as long as two years and seven months occasioned by a fresh trial of the appellants, during which interval the effect of the mental anguish and suffering, consequent upon a prior sentence of death which was passed upon the appellants by the Special Judge and was subsequently reversed by the Supreme Court, was set at nought.

9. In Pakhar Singh v. Emperor one Kesra had killed two men, Magha and Waryam Singh, and the prosecution story was that immediately after having committed the double murder Kesra, in company with Bachna, Pakhar Singh, the son of Bachna, Julli and another person went to the house of Gurdial Singh to steal his camels. Seeing them come, the inmates of Gurdial Singh''s house hid themselves in a room. Ganpat, the deceased, who was a servant of Gurdial Singh, happened to go outside at that time and he was fired at and wounded in the right arm and left leg. The leg was smashed nearly two inches below the knee-joint. As a result of those injuries Ganpat died the next day. Pakhar Singh, Krsra and Julli were convicted of an offence u/s 302 of the Indian Penal Code and were sentenced to transportation for life. An application for enhancement of the sentence was made by the State and that application was rejected and the ground for the rejection was that the real object of

the culprits was to steal the camels and not to kill anybody. In the present case, and the common object of the two accused and the third man was, not only to commit robbery, but both to commit robbery and kill whomsoever who resisted them or obstructed them in the commission of the robbery and subsequent escape. For instance, the murder of Lalkhan was committed, not because he resisted the accused in the commission of the robbery, but because he challenged them as they were going away or escaping.

10. In Autor Singh v. Emperor (1913) 17 C.W.N. 1213 the Sessions Judge had convicted the appellants u/s 302 of the Indian Penal Code and had sentenced them to death. Upon the matter going to the High Court for confirmation of the sentence, there was a difference of opinion between the two learned Judge? as to the guilt itself of the appellants. The matter was then referred t) a third Judge. In this manner the appellants remained under the sentence of death for six months and that weighed with the learned Judge, who finally heard the case and found the appellants guilty u/s 302, Indian Penal Code, in passing a lesser sentence. The learned Judge who finally disposed of the case was "oppressed by the feeling" that the appellants through no fault of theirs had the capital sentences suspended over their heads for nearly six months and he observed (p. 1221):

...I believe I am right in saying that delay such as this has before now been, regarded by-Judges as a sufficient reason for refraining from imposing the extreme penalty. In this view I will not confirm the sentences of death but direct that they by altered into sentences of transportation for life.

Now, in the present case, it is true that both the accused remained under the sentence of death for two years and two months between March 13, 1950, and May 20, 1952. But ultimately on May 20, 1952, the state of suspense and mental suffering was put an end to when the Supreme Court sot aside the order of conviction and sentence passed upon them by the Special Judge and ordered a retrial. This, in our view, is a distinguishing feature which must differentiate the present case from those cases where the accused, having consistently remained under a sentence of death for a long time, the sentence was eventually commuted to a lesser sentence. Here when the Supreme Court set aside the order of conviction and the sentence of death passed upon the two accused and ordered fresh proceedings, a position came into existence in which the previous mental sufferings undergone by the accused were counteracted and a situation was created in which they might have hoped for a better result than the previous one. This situation was accentuated and hope must have been raised and the state of suspense must have been mitigated when Percha, the alleged third companion of these two accused, was tried for this very offence and was acquitted on July 27, 1951. From then onwards at any rate the accused had at least as much reason to remain in hope as to fear the worst. This is not, therefore, a case in which, the accused have since long remained continuously under a sentence of death till now. Between the period during which they were under

sentence of death and now there has been an interval of two years and seven months during which the sentence of death was not hovering over their heads. For one thing, Percha''s trial had ended in the acquittal of Percha. Secondly, a new committing Magistrate had to apply his mind to the proceedings and a new jury had to judge the case on facts. All these circumstances were sufficient, in our opinion, to set at naught the state of suspense in which they were between March 13, 1950, and May 20, 1952.

11. In Buta Singh v. Emperor AIR [1920] Lah. 582 one Buta Singh of village Manga in the Lahore District and Karam Singh of village Matta in Faridkot State were sentenced to death by the Sessions Judge, Ferozepore, for the murder of Attarpuri of village Gholia Kalan in the Ferozepore District. On appeal to the High Court they were discharged on December 16, 1922, on the ground that the proceedings were without jurisdiction as the murder had been committed within the boundary of the native State of Kalsia. It was suggested that Karan Singh should be handed over to the Kalsia authorities and that was done. He was tried in that State and sentenced to transportation for life. In regard to Buta Singh, who was a native Indian subject, it was left to the Police authorities to take action u/s 188, Orimnal Procedure Code. The certificate required by the first proviso to Section 181, Criminal Procedure Code, was obtained and Buta Singh was again tried and sentenced to death for the same murder by the Sessions Judge of Ferozepore on November 30, 1925. The long delay in trying him for the second time was not explained. On these facts the learned Judges of the Lahore High Court allowed the appeal of Buta Singh to the extent of reducing the sentence passed upon him from death to transportation for life. In the concluding paragraph of their judgment the learned Judges observed thus (p. 584):
We are of opinion, however, that the capital sentence should not be imposed as this is his second trial for an offence committed in August 1921, i.e., four and a half years ago.

It would thus be noticed that a delay of 4J years was not satisfactorily explained in that case. In the present case the delay is easily explicable. There was in the first instance the trial of the accused before the Special Judge, who passed the sentence of death upon them. The matter then came to this Court for confirmation of the sentences of death. The sentences of death were confirmed. The accused went to the Supreme Court and the Supreme Court set aside the order of conviction and sentence on a technical ground of jurisdiction and ordered a retrial. As to the reason why the fresh trial has taken so long we have only to turn to the record and look at the cross, examination of witnesses by the accused to an extent which was inordinately long, unreasonable and unnecessary and which entailed a considerable waste of public time. With respect, we are unable to accept the principle that the benefit of protraction of the trial should be given to the accused when the accused themselves are mainly responsible for the protraction. For instance, these appeals could quite easily have been disposed of when they came up for hearing before this

Court on July 26, 1954. On that date, as I have said already, accused No. 1 withdrew the authority which he had given to Mr. Naraindas and accused No. 2 put in a transfer application with the sole object of delaying the proceedings and ultimately urging the delay as a ground for not passing the sentence of death. Even on January 3, 1955, when the matters came up before us for hearing and final disposal, accused No. 2 was not willing to go on. He said that he had not had notice of the hearing of the appeal. He even said that he was not ready with the appeal although we have found that as a matter of fact he was thoroughly ready with every detail appearing on the evidence in the case. If the mere fact that the offence was committed, say, five years ago is to be taken as the sole ground for not passing the sentence of death, it would encourage accused persons of the type of the present accused to resort to delaying, obstructive tactics by asking for adjournments on flimsy, frivolous grounds, by unnecessary and unreasonably long cross-examination, and so on. We, therefore, with respect, are unable to accept the principle that simply because four or five years have elapsed since the offence was committed, that by itself would be a ground for not passing the capital punishment on the accused, who otherwise deserve the said punishment.

12. In Piare Dusadh v. Emperor AIR [1944] F.C.I. it was urged for the appellants that the death sentence imposed on them should be reduced to transportation for life on account of the time that had elapsed since the sentences were first pronounced. It was urged that the death sentences were imposed upon the appellants several months previously and that the appellants had been lying ever since under the threat of execution. Chief Justice Spens, in the course of his judgment, observed (p. 14):

...We do not doubt that this Court has power, where there has been inordinate delay in executing death sentences in cases which come before it to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts. It is a jurisdiction which any Court should be slow to exercise.

The learned Chief Justice then made observations which would suggest that if the Federal Court had exercised the power his Lordship would have commuted the death sentence to a sentence of transportation for life. But the important point to be noted for the purpose of the present revisional application is that in that case the Federal Court did not commute the sentences of death passed on the appellants, but confirmed the said sentences and dismissed the appeals. Besides, it is to be noted that in that case, between the imposition of the death sentence on the appellants and the hearing of the appeals by the Federal Court, there did not intervene a period during which the state of suspense and suffering was substituted by one in which the accused might have hoped for a better result, in other words,

for an acquittal, by reason of fresh proceedings before a different Judge and a different jury altogether. This, in our view, would distinguish the above-mentioned Federal Court case also from the present case.

13. In view of the principles laid down in Dalip Singh v. The State of Punjab the question that we have to decide in this case is whether the facts are so gross that no normal judicial mind would have awarded the lesser penalty, namely, the penalty of transportation for life, in this case. Now, there is no doubt that this was a desperate crime committed in a brutal, calculated, cold-blooded manner. Three revolvers and a pistol were used. Two out of the said three revolvers were produced in Court, namely, Articles 48 and 49. AH the six chambers of the revolver Article 48 had empty cartridges, indicating clearly thereby that this particular revolver had been fired six times. Five out of the six chambers of the revolver Article 49 had also empty cartridges in them, indicating once again that the said revolver had been fired five times. This is a case in which, therefore, eleven shots had been fired from the two revolvers during the course of the commission of the crime and yet at the end of the incident the pockets of the coat of accused No. 1 contained 33 live cartridges which were apparently meant for the two revolvers Articles 48 and 49. There is also the pistol Article 45. There is evidence to show that the pistol was repeatedly fired near the Central Bank, in the van and on the Mirzapur Road, because cartridges which could be fired from such an automatic pistol were found lying scattered about on the Richey Road near the Central Bank, in the motor van and on the Mirzapur Road. Accused No. 2 also at the end of the incident had a packet with him, which he threw away about the time when he was on the point of being apprehended and which contained 12 live cartridges which were apparently meant for this pistol. This is, therefore, a case in which deadly fire-arms were freely and indiscriminately used by the accused. It was a very serious offence. Richey Road is a very busy and crowded locality in the City of Ahmedabad. The offence was committed in a dastardly manner in broad daylight without any regard being paid to human life. Two persons were killed: Bhikha was practically killed on the spot and Lalkhan, who was mortally wounded on the Mirzapur Road on May 26, 1949, succumbed to his injuries on May 28, in the Civil Hospital. Three other persons, namely, Trilokinath, Indravadan and Takhatsingh, were also seriously injured. The dying declarations of Takhat-singh and Indravadan were recorded and it was only their good fortune that they happened to survive. Two other persons, namely Police Head Constable Dinkarrai and Baba Shiva, also received bullet injuries on their persons. Baba Shiva was grievously hurt and hurt was caused to Dinkarrai by a bullet injury. After committing the robbery of the motor van and certain articles belonging to the Bank, the accused drove away the van and were firing their revolvers and pistol even while driving away. The evidence shows that accused No. 1''s left-hand was at the steering wheel of the van and his right hand was projecting outside and with that hand he was firing from his revolver. There was no provocation whatever for this crime. There was deliberation behind it and there is no doubt that the facts of the case disclose gross perversity of

the minds of the culprits. These facts are peculiar to this case, and, in our opinion, it is difficult to conceive of a grosser case where the facts would justify the imposition of the penalty of death.

14. The net result, therefore, is that, in view of the extreme grossness of the crimes and the calculated cold-bloodedness of the manner in which they wore committed by the appellants, we are of the opinion that no normal judicial mind would consider any other sentence except the sentence of death as an adequate punishment. We are not interfering with the sentence passed by the learned Judge below on any such consideration that if we had tried the case we would have sentenced the accused to death. We are interfering because we feel that the discretion exercised by the learned Judge below in not passing the capital punishment on both the accused in such a gross case was improperly exercised. Accordingly, while confirming the order of conviction of accused Nos. 1 and 2 u/s 302 read with Section 34, Indian Penal Code, and while dismissing their appeals, we enhance the sentence passed upon them and direct that they be hanged by their necks until they are dead.

Gajendragadkar J.

15. I agree. My learned brother has exhaustively dealt with all the points raised before us by accused No. 2 on the merits and I do not wish to cover the same ground over gain. However, I propose to add a few words on the question of sentence.

16. Accused No. 2, who argued his appeal with ability and thoroughness, adopted a somewhat inexplicable attitude when he addressed us on the question of sentence. He told us that even after the sentence of death which had been passed against him by the Special Judge was confirmed by this Court he never thought of applying for mercy, and in fact he expressly stated that speaking for himself he preferred to meet sharp and swift death rather than face a long period of transportation in jail. He did not seek to rely on any circumstance in mitigation of his offence, and from the manner in which he addressed us in regard to this question it appeared as if he was disposed to invite a sentence of death rather than argue in support of the order of transportation passed by the learned trial Judge. I have, however, no doubt that the attitude thus adopted by accused No. 2 must be ignored altogether and this question considered on its own merits.

17. On the facts proved against the appellants, the question of sentence would normally present no difficulty at all. The common intention of the two appellants and their third companion obviously was to commit robbery, and, while doing so and while effecting their escape after committing robbery, to terrorise the public by indiscriminate and free use of fire-arms with which they had armed themselves. The object of the offenders was to commit robbery and they were obviously determined to carry out their object whatever may be the cost in terms of human lives that they may have to sacrifice for their purpose. As my learned brother has pointed out, on

May 26, 1949, the offenders virtually let loose a reign of terror on the public streets of Ahmedabad, and if the number of persons who died in consequence of the shots fired by the appellants did not exceed two, it is not thanks to them. Bhika and Lalkhan died, while Trilokinath, Takhatsingh and Indravadan received grievous injuries, and Dinkarrai and Baba Shiva received simple hurt. It is quite possible that, if the shots fired by the appellants bad succeeded in their object, the death roll might have leapt up to four or five. It is true that the conviction of the appellants for the offence of murder is baaed on their constructive liability inasmuch as we have held them guilty of the said offence u/s 302 read with Section 34 of the Indian Penal Code. Technically it is not easy to hold whose shots actually killed Bhikha and Lal-khan. It is also true that ordinarily, in cases where the offenders are convicted of the offence of murder on grounds of constructive liability, Courts are reluctant to impose a sentence of death. But on the facts of this case such a theoretical approach would obviously be inappropriate. When criminal Courts deal with cases of constructive liability, they would necessarily have to take into account the nature of the offence and of the common intention, the part played by each one of the accused and other relevant circumstances attending the commission of the offence. In the present case, I feel no doubt whatever that both the appellants were equally determined to use their fire-arms for carrying out their well-planned design of committing robbery and for effecting their escape thereafter. Both of them have shown equal callousness towards human life and both have so indiscriminately and freely used their fire-arms and so mercilessly taken part in terrorising the passers-by that it seems to me impossible to distinguish between their respective degrees of guilt. I apprehend that it would not be reasonable to hold that as a general rule in no case where accused persons are held guilty of murder u/s 302 read with Section 34, Indian Penal Code, would a Criminal Court be justified in passing the sentence of death. In my opinion, if ever a case of constructive liability for murder deserved the sentence of death, it is the present one. Indeed, it seems to me that in dealing with an offence of this kind, if the sentence of death were not imposed, the administration of justice itself may come into disrepute. This was also the view of the learned trial Judge himself. He has expressly stated in his judgment that he saw no extenuating circumstance and he, therefore felt no difficulty in coming to the conclusion that the gravity of the offence of murder in the present case would call for the sentence of death. However, he felt that there was one circumstance on which the accused were entitled to rely and it is solely on the strength of this circumstance that he was persuaded to impose the lesser sentence on them for the offence of murder. As has been already pointed out by my learned brother, the case against the appellants was first tried by a Special Judge who convicted the appellants of the offence of murder amongst other offences and sentenced them to death on March 13, 1950. This sentence ''f death was submitted to this Court for confirmation and an appeal had also been preferred by the accused against their conviction in regard to the offence of murder as well as the other offences charged at the trial. The appeals preferred by the accused were dismissed and the sentence

of death was confirmed by this Court on May 19, 1950. The matter then went to the Supreme Court and it was held by their Lordships of the Supreme Court that the Special Court which had been constituted to try the case against the appellants was invalid and so the order of conviction and sentence passed by the Special Court and confirmed by this Court was set aside and a fresh trial was ordered to be held. It was urged before the learned trial Judge in the present proceedings that since the two appellants were under a sentence of death from March 13, 1950, to May 20, 1952, that itself should be regarded as a circumstance of such overriding importance in the matter of sentence that it would be injudicious to require the appellants to pay the maximum penalty of death for the offence of murder. The learned Judge accepted this argument and it is only on this argument that he felt compelled to impose the sentence of transportation for life. In other words, but for this consideration the learned Judge would obviously have imposed the sentence of death against the appellants.

18. In considering the question of the adequacy of the sentence imposed by the learned Judge on the appellants, we must bear in mind the well-known principle that the sentence in a criminal trial is normally a matter of discretion for the learned trial Judge himself. As a Court of appeal we would not interfere with the order of sentence unless we are satisfied that the order of sentence under appeal represents an improper exercise of his discretion by the learned trial Judge. It would not be enough for us to hold that if we were trying the case ourselves we might have imposed a higher sentence than the one imposed by the learned trial Judge. This conclusion would be inadequate to justify our interference with the order of sentence passed by the learned trial Judge. Considerations of a compelling and over-riding nature must be present before a Court of appeal should interfere with the order of sentence. In this connection, I may with advantage refer to the observations made by Mr. Justice Bose, who delivered the judgment of the Bench in Dalip Singh v. The State of Punjab (1953) 16 S.C.J. 532:

...The power to enhance a sentence from transportation to death", observes Mr. Justice Bose "should very rarely be exercised and only for the strongest possible reasons. It is not enough for an appellate Court to say, or think, that if loft to itself it would have awarded the greater penalty because the discretion does not belong to the appellate Court but to the trial Judge and the only ground on which an appellate Court can interfere is that the discretion has been improperly exercised, as for example where no reasons are given and none can be inferred from the circumstances of the case, or where the facts are so gross that no normal judicial mind would have awarded the lesser penalty.

It is, therefore, necessary for us to consider whether we would be justified in interfering with the order of sentence under appeal by applying the tests laid down in this judgment. The question thus raised lies within a very narrow compass in the present appeal. The learned Judge himself was obviously inclined to hold that the

gravity of the offence and the brutality of the attending circumstances would have justified the sentence of death. But he refrained from imposing this sentence only on one ground and the point which falls to be considered by us in dealing with the question of sentence is whether the learned Judge was right in coming to the conclusion that it would be injudicious to impose the sentence of death against the appellants only on the ground that they suffered terrible suspense by reason of the fact that they were under a sentence of death for over two years. If the view taken by the learned Judge is erroneous, then clearly our interference with the order of sentence passed by him would be justified.

19. It may be conceded in favour of the view taken by the learned Judge that some decisions do indicate judicial reluctance to impose a sentence of death where the execution of the sentence of death originally passed has been unduly postponed. In Autor Singh v. Emperor (1913) 17 C.W.N. 1213 Mr. Justice Carnduff has observed that he believed that he was right in saying that delay in carrying out the sentence of death has been regarded by itself as a sufficient reason for refraining from imposing the extreme penalty. These observations however, were made in a case where there was a difference of opinion between two learned Judges of the Calcutta High Court who first heard the matter and the case was, therefore, referred to Mr. Justice Carnduff. This fact naturally weighed with the learned Judge in deciding the question as to sentence. However, he has also referred to the fact that the capital sentence had suspended over the heads of the accused for nearly six months. The learned Judge below, before whom this case had been cited, thought that the judgment of Carnduff J. supported the conclusion that if the sentence of death had suspended over the heads of the accused for nearly six months that by itself may be taken as a ground for converting the sentence of death into one of transportation for life. With respect, the learned Judge has failed to notice that, as the judgment delivered by Mr. Justice Carnduff stands, it is apparent that what weighed with the learned Judge more decisively in reducing the sentence from death to transportation was the fact that there was a difference of opinion between his two colleagues on the question of the guilt of the accused itself. Even so, it may be conceded that there are certain observations made in this judgment which support the argument that the delay in carrying out the sentence of death maybe considered in deciding whether the sentence of death should be confirmed or not. In Buta Singh v. Emperor [1926] Lah. 582 where the accused had to stand a second trial for the offence of murder, the learned Judges took the view that the capital sentence should not be imposed for the offence of murder which had been committed 4 1/2 years before the date of hearing of the appeal. That is why the sentence of death which had been passed by the learned trial Judge was reduced by the Court of appeal to one of transportation for life. In this connection, it would be relevant to refer to the observations made by Chief Justice Spens is Piare Dusadh v. Emperor AIR [1944] F.C.I. Several matters were taken before the Federal Court in this case and it was urged that the sentence of death imposed against the

appellants should be reduced because the said sentences had been imposed on them several months back and the appellants had been living ever since under the threat of execution. The long delay which had been caused in carrying out the sentence of death was largely the result of proceedings over legal points in respect of the constitution of the Courts before which the appellants were tried and of the validity of the sentences themselves. Chief Justice Spens observed that the Federal Court had power, where there had been inordinate delay in executing death sentences in cases which came before it, to allow the appeal in so far as the death sentence was concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. The learned Chief Justice, however, was disposed to take the view that this jurisdiction very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts, and he added that, in his opinion, this was a jurisdiction which any Court should be slow to exercise. In fact, excepting Case No. 47 in which the sentence of death was reduced to one for transportation because of certain extenuating circumstances mentioned in the judgment, in all other cases the sentences of death which had been passed by the trial Judge were confirmed notwithstanding the fact that the appellants had been living under the threat of execution for a long period taken by the proceedings. The observations made by Chief Justice Spens, therefore, indicate that in a proper case the appellate Court may reduce the sentence of death to transportation on account of lapse of time, though the learned Chief Justice thought that this was a matter more for the executive to consider in carrying out the sentences after they are passed by Criminal Courts. It may, therefore, be urged in support of the view taken by the learned Judge be low that there is authority for the proposition that lapse of time between the date of imposition of the original sentence of death and its execution may be considered as a ground for reducing the sentence from one of death to transportation for life.

20. Looking at this question on principle apart from authorities, it seems a little difficult to accept the unqualified general proposition that where the sentence of death originally imposed on the accused for the offence of murder is not immediately carried into effect the accused should be given the lesser sentence by the Court of appeal. In India a sentence of death passed by a Sessions Judge has to be submitted to the High Court for confirmation and inevitably confirmation proceedings take some time. So far as this Court is concerned, we have always given the highest priority to confirmation proceedings. Even in the matter of printing the record of such proceedings, priority is given, by the Government Press and confirmation cases are set down for hearing on the daily board even in the middle of the week as coon as the print is received. It may be stated that generally confirmation proceedings do not take more than three months and are rarely known to last for six months in this Court. Even so, three to six months'' time must inevitably lapse before the sentence passed by the Sessions Judge is confirmed by

the High Court. Then again, the accused may like to take his case to the Supreme Court, and if the appeal is admitted in the Supreme Court the final decision of the said appeal is likely to take some time. It would thus appear that where an accused person has been sentenced to death by the Sessions Court it is very unlikely that the said sentence would be carried out for at least a year after the date when it is imposed. If it is held that the fact that the accused person is living under the threat of execution for more than six months itself requires the reduction of the sentence of death to transportation for life, quite conceivably the sentence of death passed in every capital case may ultimately have to be converted into one for transportation for life. Besides, if this view is recognized as laying down a rule of law, it is quite likely that every person who is sentenced to death for the offence of murder would be interested in taking the matter right up to the Supreme Court and would naturally like to take steps permissible under the law to prolong the life of these appeals. The appeals before us are themselves an instance in point. My learned brother has referred to the attitude adopted by the appellants in the matter of prosecuting the present appeals in this Court and I agree with the view expressed by him that this attitude was adopted by the appellants solely for the purpose of prolonging the life of these appeals. The longer the dealy in the final decision of these appeals the stronger would be the case for imposing the lesser penalty for the offence of murder. It would indeed be surprising if an accused person, who is found guilty of murder and who has been ordered to be hanged by the Court of Session, escapes the said penalty merely by prolonging the life of the proceedings which under the criminal law it is open to him to take. I am conscious of the fact that the pendency of the sentence of death against an accused person is bound to cause mental torture to the convict and it may be assumed that in a proper case the fact that the sentence of death has hung over the head of a convict for an inordinately long period of time may perhaps be considered by the appellate Court in deciding whether the sentence of death should be confirmed or not. But, with respect, it seems to me that that is a consideration which may well be left to be borne in mind by the executive, as observed by Chief Justice Spens. If this consideration received unqualified approval by Criminal Courts, it is bound to lead to undesirable results, as I have just indicated.

21. In dealing with this point, we are fortunately able to receive guidance from a recent decision of the Supreme Court itself. In Bissu Mahgoo Vs. State of Uttar Pradesh, two points were raised before the Supreme Court by the convict who had been sentenced to death by the Allahabad High Court. The learned trial Judge had convicted him of the offence of murder, but had sentenced him to transportation for life. Against the order of sentence thus imposed on the accused by the learned trial Judge, the complainant, and not the State, preferred a revisional application and the High Court entertained the complainant''s application and enhanced the sentence from transportation to death. It was urged by the accused that the High Court erred in law in enhancing the sentence at the instance of a private complainant. Mr. Justice

Bhagwati, who delivered the judgment of the Supreme Court, rejected this contention. The second contention raised by the accused was that the proceedings for obtaining a certificate to move the Supreme Court in the matter of sentence had taken an inordinately long time inasmuch as they were not disposed of for one year and ten months, and the argument was that since the accused was under a sentence of death for this inordinately long period the Supreme Court should, reduce the sentence from death to transportation on that ground alone. Mr. Justice Bhagwati, in his judgment has characterised this contention as a serious one. The learned Judge expressed surprise that an application for leave to appeal to the Supreme Court should have been delayed in disposal for about a year and ten months and, with respect, the learned Judge has rightly advised the High Courts to deal with confirmation cases and proceedings subsidiary to such cases with despatch so that the accused should know his fate and not be left with a feeling of oppression for a longer time than necessary. Even so, the Supreme Court held that this would not be a consideration for their interfering with the sentence of death imposed by the High Court. It would thus be noticed that if the Supreme Court had been impressed by the argument that the pendency of the sentence of death over the head of an accused person for a long period like one year and ten months must always and in every case result in the reduction of the sentence of death to one of transportation, they would undoubtedly have interfered with the sentence of death imposed against Bissu Mahgoo. It is significant that the sentence of death had been imposed by the Allahabad High Court after entertaining the complainant''s application for enhancement, and yet the Supreme Court refused to interfere with the said sentence. With respect, it seems to us that from this decision it would be reasonable to infer that the Supreme Court did not accept the argument that the dealy in carrying out the sentence of death by itself can be regarded as such an extenuating circumstance of an extraneous type that the sentence of death must in consequence be reduced to one of transportation for life.

22. If that be the true position, then the question of sentence in the present appeals would present no difficulty. If the learned Judge had not wrongly appreciated the legal effect of the pendency of the sentence of death against the appellants for about two years, he would undoubtedly have imposed the sentence of death against them. He thought that since the appellants were under a sentence of death for about two years, that itself was a reason why he could not, and should not, impose the sentence of death on them. I am disposed to think that the learned Judge erred in law in taking this view. It would be relevant to remember in this connection that his suspense came to an end when the Supreme Court set aside the original order of sentence and directed a retrial. It is not as if the appellants have been continuously under the strain of the said suspense till to-day. That is why I agree with my learned brother in holding that the revisional application made by the State against the appellants must be allowed and the sentence of transportation passed against them must be enhanced to the sentence of death.

23. It is indeed very unfortunate that the appellants, who appear to be young educated men, should have committed this heinous offence. The deliberation which obviously preceded the commission of this offence speaks for itself. The three offenders had armed themselves with fire-arms, and while carrying out their object of committing robbery they showed no scruples in the matter of using their fire-arms. All of them rained bullets on passers-by on the public roads of Ahmedabad and it seemed clear from their conduct that if necessary they were prepared to give a blood-bath to the citizens of Ahmedabad that morning. It seems to me that offences of this kind must be dealt with very sternly, and unless the sentence of death is imposed on reckless and coldblooded adventurers like the appellants, the administration of law itself may come into disrepute. That is why I have come to the conclusion that the ends of justice require that the application for enhancement of sentence made by the State must be allowed.

24. Per Curiam. No order on the contempt application.