CASE NO.:
Review Petition (crl.) 1105 of 2000

PETITIONER:
RAM DEO CHAUHAN @ RAJ NATH CHAUHAN

Vs.

RESPONDENT:
STATE OF ASSAM

DATE OF JUDGMENT: 10/05/2001

BENCH:
K.T. Thomas

JUDGMENT:

THOMAS, J.
L...I...T.....T.....T.....T.....T.....T.....T..J

After reading the draft judgment prepared by my esteemed brother Sethi, J. supported by reasons forcefully and lucidly advanced there could not have been much difficulty for me to concur with it. However, having regard to certain aspects revolving on the issue whether a young man should be hanged by neck till he is dead pursuant to the judgment pronounced by us, I am unble to resist the urge to look at the question of sentence once again in an effort to see whether there is any legally permissible outlet through which his life can be spared from the hangmans noose. In my thoughtful rumination on that alternative option I feel inclined to respectfully dissent from my learned brothers conclusion that there is no scope to alter the death penalty imposed on the petitioner.

At the outset I may state that I have no doubt in my mind regarding the correctness of the observations of Sethi, J, that the sentence cannot be altered on the reasoning that the trial court did not adjourn the proceedings, after pronouncing the conviction, for the purpose of providing the convicted person time to reflect on the question of sentence. The trial judge chose to pronounce the sentence on the same day of pronouncing the verdict of conviction. When the Code of Criminal Procedure was amended in 1978 (By Act 45 of 1978) a proviso was introduced to sub-section (2) of Section 309 of the Code by which an interdict has been added that no adjournment shall be granted for the purpose only of enabling the accused persons to show cause against the sentence proposed to be imposed on him. We make a note that the said proviso does not make a distinction between offences punishable with death or imprisonment for life and the other offences, in relation to the application of the said proviso. The proviso thus reflects the parliamentary concern that the rule in all cases must be that sentence shall be passed on the same day of pronouncement of judgment in criminal cases as far as possible, and perhaps by way of exception the said rule can be relaxed by adjourning the case to another day for passing orders on the sentence.

In Muniappan vs. State of Tamil Nadu {1981(3) SCC 11} this Court emphasised the need to make a genuine effort to elicit all relevant information from the accused for considering the question whether the extreme penalty is to be awarded or not. In Allauddin Mian and ors. vs. State of Bihar {1989(3) SCC 5} a two Judge Bench of this Court {S. Natarajan, J and A.M. Ahmadi, J (as he then was)} and again in Malkiat Singh and ors. vs. State of Punjab {1991(4) SCC 341} a three Judge Bench (A.M. Ahmadi, V. Ramaswamy and K Ramaswamy, JJ) have indicated the need to adjourn the case to a future date after pronouncing the verdict of conviction. In those two decisions the direction contained in the proviso to sub-section (2) of Section 309 of the Code was not considered, presumably because it was not brought to the notice of the court. Hence in State of Maharashtra vs. Sukhdev Singh and anr.{1992(3) SCC 700} the two Judge Bench (A.M. Ahmadi and K. Ramaswamy, JJ) considered the implication of the said proviso also. Learned judges observed that the proviso to Section 309(2) does not entitle an accused to adjourn though it does not prohibit the court from granting such adjournment in serious cases. This is what Ahmadi J (as he then was) observed for the Bench:

If the court feels that the interest of justice demands that the matter should be adjourned to enable both sides to place the relevant material touching on the question of sentence before the court, the above extracted proviso cannot preclude the court from doing so.

It must be remembered that two alternative sentences alone are permitted for imposition as for the offence under Section 302 IPC imprisonment for life or death. Thus no court is permitted to award a sentence less than imprisonment for life as for the offence of murder. The normal punishment for the offence is life imprisonment and death penalty is now permitted to be awarded only in the rarest of the rare cases when the lesser alternative is unquestionably foreclosed.{vide Bachan Singh vs. State of Punjab, 1980 (2) SCC 684}. The requirement contained in Section 235(2) of the Code (the obligation of the Judge to hear the accused on the question of sentence) is intended to achieve a purpose. The said legislative provision is meant for affording benefit to the convicted person in the matter of sentence. But when the Sessions judge does not propose to award death penalty to a person convicted of the offence under Section 302 IPC what is the benefit to be secured by hearing the accused on the question of sentence. However much it is argued the Sessions judge cannot award a sentence less than imprisonment for life for the said offence. If a Sessions Judge who convicts the accused under Section 302 IPC (with or without the aid of other sections) does not propose to award death penalty, we feel that the Court need not waste time on hearing the accused on the question of sentence. We therefore choose to use this occasion for reiterating the legal position regarding the necessity to afford opportunity for hearing to the accused on the question of sentence.

(1) When the conviction is under Section 302 IPC (with or without the aid of Section 34 or 149 or 120B of IPC) if the Sessions Judge does not propose to impose death penalty on the convicted person it is unnecessary to proceed to hear the accused on the question of sentence. Section 235(2) of the Code will not be violated if the sentence of life

imprisonment is awarded for that offence without hearing the accused on the question of sentence.

(2) In all other cases the accused must be given sufficient opportunity of hearing on the question of sentence.

(3) The normal rule is that after pronouncing the verdict of guilty the hearing should be made on the same day and the sentence shall also be pronounced on the same day.

(4) In cases where the Judge feels or if the accused demands more time for hearing on the question of sentence (especially when the Judge propose to impose death penalty) the proviso to Section 309(2) is not a bar for affording such time.

(5) For any reason the court is inclined to adjourn the case after pronouncing the verdict of guilty in grave offences the convicted person shall be committed to jail till the verdict on the sentence is pronounced. Further detention will depend upon the process of law.

But what causes concern to me is whether the new point advanced by Shri S. Muralidhar, learned counsel for the convicted person in this review petition, that the interdict contained in Section 22(1) of the Juvenile Justice Act, 1986 (for short the Juvenile Act) can have impact on the question of death penalty imposed on the petitioner. The power of review of Supreme Court as envisaged under Article 137 of the Constitution is no doubt wider than the review jurisdiction conferred by other statutes on the Court.

Article 137 of the Constitution empowers the Supreme court to review any judgment pronounced or order made, subject of course to the provisions of any law made by Parliament or any rule made under Article 145 of the constitution. Rule 1 or O.XL of the Supreme court Rules can be quoted:

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

A Constitution bench of this Court has considered the scope of the review jurisdiction of this court vis-a-vis the fore-quoted rule in PN Iswara Iyer vs. Registrar, Supreme Court of India (1980 (4) SCC 680.

The following observations made in the said decision are apposite now. Hence there are extracted below:

The rule, on its face, affords a wider set of grounds for review for orders in civil proceedings, but limits the ground vis-Ã -vis criminal proceedings to errors apparent on the face of the record. If at all, the concern of the law to avoid judicial error should be heightened when life or liberty is in peril since civil penalties are often less traumatic. So, it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders of judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the deceased shows up in court

and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in article 137 and it is equally wide in all proceedings. The rule merely canalises the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here record means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous.

In Suthendraraja vs. State {1999 (9) SCC 323} a three Judge Bench, following the aforesaid observations of the Constitution Bench, has said the scope of review in criminal proceedings has been considerably widened by the pronouncement in the aforesaid judgment. We are proceeding to consider the point raised by the learned counsel for the petitioner after informing ourselves of the width and dimensions of the review jurisdiction of this Court.

Shri S. Muralidhar, learned counsel, made a fervent plea for giving all the benefits to the petitioner as provided in Section 22(1) of the Juvenile Act. We made it clear to the learned counsel, during the arguments, that we were not inclined to reopen the whole gamut to such a far reaching extent. However, we offered to consider the contention based on Section 22(1) of the Juvenile Act for the limited purpose of deciding whether the death sentence imposed on the petitioner is liable to be reviewed and the lesser alternative can be awarded.

Section 22(1) of the Juvenile Act says that no delinquent juvenile shall be sentenced to death, (of course this sub-section also says that no juvenile shall be sentenced to imprisonment). We have already held on facts that petitioner did not succeed in proving that he was aged below 16 years on the date of occurrence. As petitioner was arrested on the same day of occurrence it is immaterial whether the crucial date for reckoning the age of juvenility is the date of occurrence or date of arrest. Hence we are not inclined to consider whether the petitioner was entitled to be treated as a juvenile for the purpose of dealing with him under the provisions of the Juvenile Act.

But I am inclined to approach the question from a different angle. Can death sentence be awarded to a person whose age is not positively established by the prosecution as above 16 on the crucial date. If the prosecution failed to prove positively that aspect, can a convicted person be allowed to be hanged by neck till death in view of the clear interdict contained in Section 22(1) of the Juvenile Act. A peep into the historical background of how death penalty survived Article 21 of the Constitution would be useful in this context.

Apart from the two schools of thought putting forward their respective points of view stridently - one pleading for retention of death penalty and the other for abolition of it a serious question arose whether the law enabling the State to take away the life of a person by way of punishment would be hit by the forbid contained in Article

21 of the Constitution. In Bachan Singh vs. State of Punjab (supra) the majority Judges of the Constitution Bench saved the death penalty from being chopped out of the statute book by ordering that death penalty should be strictly restricted to the tiniest category of the rarest of the rare cases in which the lesser alternative is unquestionably foreclosed.

The question here, therefore, is whether the plea of the petitioner that he was below the age of 16 on the date of his arrest could unquestionably be foreclosed. If it cannot be so foreclosed, then imposing death penalty on him would, in my view, be violative of Article 21 of the Constitution.

The fact that the trial court and the High Court did not accept his plea on that score, or the fact that in our judgment we did not upset such finding, is not enough to hold that petitioners plea regarding his juvenility as on the crucial date does not survive for consideration. In this context we may point out that the petitioner was defended in the trial court by a counsel provided by the Court. In the High Court when the appeal was heard the petitioner was unable to engage a counsel. Hence the High court appointed an advocate on State brief. In this Court also when we heard the appeal the petitioner did not have a counsel on his own engagement and hence we appointed an advocate as amicus curiae to argue for him. It is only now when the review petition is filed that the petitioner engaged his own counsel. The reason for pointing out those aspects is to inform ourselves as to the disability of the petitioner for effectively giving instructions to his counsel at least when the matter was before the High Court for the statutory appeal and in this Court for the appeal by special leave. It is reasonable to presume, in such circumstances, that the amicus curiae or the advocate appointed on State brief, would not have been able even to see the petitioner, much less to collect instructions from him, during the second and third tiers. We bear in mind the aforesaid handicap of the petitioner when we look back to the findings already rendered by the courts regarding the present claim based on juvenility.

In the High Court, the counsel appointed on State brief appeared to have conceded that the petitioner was above the age of 20. How could he have conceded on such a very crucial aspect, particularly when that counsel was not engaged by the party himself. The Division Bench of the High Court has skirted the issue concerning his age only on the strength of such concession made by the advocate appointed on State brief. In this Court, when this appeal was heard learned amicus curiae did not focus on the age factor and hence we did not go into that aspect in our judgment. For all these reasons we are now unable to sidestep that aspect when Shri S. Muralidhar, learned counsel for the petitioner, focussed on it and addressed detailed arguments.

There are four items of evidence with which the prosecution tried to establish that the petitioner was not a juvenile on 8.3.1992 (which is the relevant date). They are the following:

(1) Father of the petitioner was examined as DW-1 and during his cross examination it was elicited from him that his first child was born when he was aged 30; the

petitioner is his 4th child; the interval between the birth of each child was three years. On the basis of such answers prosecution worked out the age of the petitioner as 26 years on the date of occurrence.

(2) PW-4 in his evidence said that when accused petitioner worked as a domestic servant in the house of that witness he asked the petitioner about his age in 1991 and the petitioner then replied that he was then 20 years old.

(3) In Ext.25 the statement of the accused was recorded under Section 161 of the Code of Criminal Procedure on 8.3.1992. In that statement the accused said that he was then 20 years old.

(4) On the sheet where the statement of the accused was recorded by the trial court under Section 235 of the Code on 20.9.1997, the age of the accused was shown as 25 years and 6 months.

As against those materials Sh. S. Muralidhar, learned counsel, tried to project two materials:

(i) The school register proved by the Headmaster of the school concerned (DW-2) which shows the entry made against the name Ram Deo Chauhan which is said to be that of the accused. As per the said entry the date of birth was 1.2.1997 (if so he would have been eleven months short of the age of 16 on the relevant date).

(ii) Dr. B.C. Roy (a court witness) examined the petitioner on 23.12.1997 for ascertaining his age. In the opinion of that doctor the petitioner would have been within the range of 20 and 21 years on the said date. (This means that he would have been within the range of 15 to 16 years on the relevant date.

We are unable to act on any one of the materials projected by the prosecution for the purpose of reaching a conclusion regarding the age of the petitioner as on the relevant date. The exercise of hatching or brewing up possible date or year of birth with the help of scattered answers given by the father of the petitioner, all during cross-examination, is a very unsound course to be adopted. At any rate such an exercise cannot be sustained to the detriment of the person concerned. Nor can I rely on the testimony of PW-4 who said that the accused told him in 1991 that his age was 20. Such a statement cannot be regarded as reaching anywhere near the proximity of reliability for fixing up the correct age of a person. The statement recorded under Section 161 of the Code is not permitted by law to be used except for contradicting the author of the statement. Hence it is impermissible to look into that material also. The sheet on which the statement of the accused was recorded under Section 235 of the Code contains some columns in the prefatory portion, one among them was regarding the age. The statement of the accused actually starts only after making such entries in those prefatory columns. Unless the person who filled up such prefatory columns is examined for showing how he gathered the information regarding all such columns the entries therein cannot be regarded as legal evidence. At any rate, we cannot proceed on a presumption that such columns were

filled up by the accused himself.

Now, while switching over to the other side, if the school register can be accepted as reliable and the relevant entry can be taken as unmistakably referring to the petitioner-accused then he would certainly have been a juvenile on the relevant date. But the trial court did not accept that evidence due to the reasons mentioned in the judgment. Those reasons cannot be said to be weak. It is not shown that the school register was maintained by a public servant in the discharge of his official duty or by any other person in the performance of a duty specially enjoined by the law of the country in which such register is kept. Thus the entry in the school register remains away from the range of acceptability as proof positive regarding the date of birth of the petitioner.

But the evidence of the court witness (Dr.B.C. Roy) is a material which creates reasonable doubts in our mind as to the possibility of the petitioner having been below the age of 16 on the relevant date. Dr. B.C. Roy who reached the said conclusion was an Associate Professor in Forensic Medicine. He examined the petitioner on 20.12.1997 focussing on the anatomical features. He then subjected the petitioner to a radiological examination and obtained a report thereof. On the basis of the data collected from such examination he formed his opinion that petitioner could be above 20 years on the date of examination, but he could not be above the age of 21 years. If his opinion is acceptable it means that the petitioner could have been below the age of 16 years though it is possible that he could have been above that age also but not beyond 17.

In his report the doctor has detailed all the data on which he reached his conclusion. I do not propose to extract all such data here except pointing out that such data collected by Dr. B.C. Roy are in consonance with the guidelines provided in the text-books on medical jurisprudence. (vide Modis Medical Jurisprudence and Jhala & Rajus Medical Jurisprudence). Ossification test is done for multiple joints, for which the radiological report was obtained. The margin of error according to authorities on medical jurisprudence can be two years either way as the maximum. In this context it is useful to extract the relevant passage from Jhala & Rajus Medical Jurisprudence (6th Edn., page 198):

If ossification test is done for a single bone the error may be two years either way. But if the test is done for multiple joints with overlapping age of fusion the margin of error may be reduced. Sometimes this margin is reduced to six months on either side.

Of course the doctors estimates of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in the realm where we grope in the dark to find out what would possibly have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such opinion points to a reasonable possibility regarding the range of his age it has certainly to be considered. When the possibility of the petitioner having been a juvenile on the relevant date cannot be excluded from the conclusion by adopting such reasonable

standards, the interdict contained in Section 22(1) of the Juvenile Act cannot be bypassed for awarding death penalty to the petitioner so long as the death penalty is permitted to survive Article 21 only if the lesser alternative can be foreclosed unquestionably. In other words, if the age of the petitioner cannot be held to be unquestionably above 16 on the relevant date its corollary is that the lesser sentence also cannot unquestionably be foreclosed. We have to abide by the declaration of law made by the majority of Judges of the Constitution Bench in Bachan Singhs case (supra).

For the aforesaid reasons I am persuaded to allow this review petition and alter the sentence of death to imprisonment for life. The review petition is disposed in the above terms.