HIRALAL MALLICK

v.

STATE OF BIHAR

August 16, 1977

[V. R. KRISHNA IYER AND P. K. GOSWAMI, JJ.

Indian Penal Code, sections 302 *and* 34—*Vernier scale of mens rea, reasonable and probable consequences of the Act—Degree of criminality gauged by personalised approach to circumstances of involvement, doli capax, age and expectation of consequences by offender—Desideratum of sentence—Welfare and therapeutic orientation of jus juvenalis—Correction and rehabilitation of luvenile delinquent.*

Hiralal Mallick was 12 years old when he along with his two elder brothers, was convicted by the Trial Court under s. 302 read with s. 34, I.P.C., and sentenced for life. In appeal, the High Court directed the conversion of the convictions from s. 302 into one under s. 326 read with s. 34, I.P.C., and the appellants sentence was reduced to 4 years in consideration for his young age.

The appellant contended that his participation in the crime could only attract s. 324 I.P.C., that he was too infantine to understand the deadly import of the sword wounds delivered by him, that his involvement had been circumstanced by the fraternal company, and that he had only inflicted superficial injuries showing a lesser degree of intent.

Dismissing the appeal, but prescribing guidelines for the appellant's treatment in jail. the Court.

HELD : (1) The vernier scale of a man's *mens rea* is, the pragmatic one of the reasonable and probable consequences of his act. Except in pronounced categories, the intent is spelt out objectively by the rough-and-ready test of the prudent man and not with psychic sensitivity to retarded individuals. [303F, G]

Observation :

Man is a rational being, and law is a system of behavioral cybernetics where noetic niceties, if pressed too far, may defeat its societal efficacy. [303F]

(2) When a crime is committed by the concerted action of a plurality of persons, the degree of criminality may vary, depending not only on the injurious sequel but also on the part played and the circumstances present, a personalised approach with reference to each participant has to be made regarding the circumstances of involvement, his *doli capax,* age and expectation of consequences. [304-A, C]

Observation :

(i) Adult intent, automatically attributed to infant *mens* is an error, but at the same time, *doli capax* is not so much measured by years and days as by the strength of the delinquent's understanding and judgment. [304H, 305A]

Criminal Pleading, Evidence & Practice by Archibold; An Introduction in Criminal Law by Cross and Jones; R. v. *Owen* [1830] 4 C & P 236; *R.* v. *Kershaw* [1902] 18 T.L.R. 357; *Criminology Problems and Perspective,* page 127 by *Ahmad Siddique;* referred to.

(ii) The ultimate desideratum of most sentences is to make an offender a non-offender. The Indian legal system must be sensitized by juvenile justice. The Bench and the Bar should be alerted about *jus juvenalis.* The compassion of the penal law for juvenescents cannot be reduced to jeunity by forensic indifference, since justice to juvenile justice desiderates more from a lively judicial process. The establishment of a welfare oriented jurisdiction over juveniles is predicated and over-judicialisation and over-formalisation of Court proceedings is contra-indicated. Correctionally speaking, the perception of delinquency as indicative of the person's underlying difficulties, inner tensions and explosive stresses similar to those of mal-adjusted children, and the belief that court atmosphere is psychically traumatic and socially stigmatic, argues in favour of mor-

A informal treatment by a free mix of professional and social workers and experts operating within the framework of the law. Our nation can never be decriminalised until the States legislate a children Act, set up the curial and other infrastructure and give up retributivism in favour of restorative arts in the jurisdiction of young deviants, and the crime of punishing them is purged legislatively, administratively and judicatively. [305D-E, 306C, 307A-D]

'*Sentencing and Probation*' (*published by : National College of the State Judiciary, Reno, Nevada, U.S.A.*); *Kent* v. *United States*, 383 U.S. 541, 556 B [1966]; *Social Defence*, Vol. VII No. 25, July 1971 (published by : the Central Bureau of Correctional Services, Department of Social Welfare, Government of India) referred to.

Direction :

It is essential that the therapeutic orientation of the prison system, *vis-a-vis* the appellant, must be calculated to release stresses, resolve tensions and restore inner balance. Work designed constructively and curatively with special reference to the needs of the person involved, may have a healing effect and change the personality of the quondam criminal. It is correctionally desirable to grant parole to prisoners periodically, and it is important for the prison department to explore, experiment and organise gradually some reformative exercise like Transcendental Meditation, in order to eliminate recidivism, and induce rehabilitation. The brooding presence of judicial vigilance is the institutional price of prison justice. The sentencing process should be reformed with flexibility humanity, restoration and periodic review informing the system and involving the court in the healing directions and corrections affecting the sentencee whom judicial power has cast into the 'cage'. [310G-H, 313A-E, 314A-B]

Guidelines for sentencing (published by : the National Probation and Parole Association, New York 1957); *Rigveda* 1-89-i; *Bhavan's Journal*, July 17, 1977, page 57; Kentucky L. J., Vol. 60 1971-72 No. 2; *University of Maryland Law Forum*, Vol. III, No. 2, Winter 1973; *State of Arizona* v. *Jean Coston Presley* (Case No. 6878) Judgment dated 5-3-76; and *United States of America* v. *Robert Charles Rusch Jr.* (Criminal Action No. 4-8-1750 in the U.S. District Court for E Eastern District of Michigan) referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 256 of 1977.

Appeal by Special Leave from the Judgment and Order dated 29-10-76 of the Patna High Court in Criminal Appeal No. 464 of 1971.

F

D. Goburdhan for the Appellant.

U. P. Singh and *S. N. Jha* for the Respondent.

The following Judgments were delivered :

KRISHNA IYER, J.—This appeal involves an issue of criminal culp- G ability presenting mixed questions of fact and law and a theme of juvenile justice, a criminological Cinderella of the Indian law-in-action.

Hiralal Mallick, the sole appellant before us, was a 12-year old lad when he toddled into crime conjointly with his two elder brothers. The three, together, were charged with the homicide of one Arjan Mallick which ended in a conviction of all under s. 302 read with s. 34 H IPC. The trial judge impartially imposed on each one a punishment of imprisonment for life. On appeal by all the three, the High Court, taking note of some pecularities, directed the conversion of the convictions from s. 302 (read with s. 34) into one under s. 326 (read

with s. 34) IPC and, consequently, pared down the punishment awarded to the co-accused into rigorous imprisonment for 8 years. The third accused, the appellant before us, was shown consideration for his tender age of 12 years (at the time of commission of the crime) and the court, in a mood of compassion, softened the sentence on the boy into rigorous imprisonment for 4 years.

A close-up of the participatory role of the youthful offender, as distinguished from that of his elder brothers, discloses a junior partnership for him. For, argued Shri Goburdhan, while accused 1 and 2 caused the fatal stabs, the appellant was found to have inflicted superficial cuts on the victim with a sharp weapon, probably angered by the episode of an earlier attack on their father, induced by the stress of the reprisal urge and spurred by his brothers' rush after the foe, but all the same definitely helping them in their aggression. That he was too infantine to understand the deadly import of the sword blows he delivered is obvious; that he inflicted lesser injuries of a superficial nature is proved; that he, like the other two, chased and chopped and took to his heels, is evident. The immature age of the offender, the fraternal company which circumstanced his involvement, the degree of intent guaged by the depth of the wounds he caused and the other facts surrounding the occurrence, should persuade us to hold that this juvenile was guilty—not of death-dealing brutality—but of naughty criminality, in a violent spree. Measured by his intent and infancy, his sinister part in the macabre offence ran upto infliction of injury with a cutting weapon attracting s. 324 IPC, not more. Such was the mecaronic submission of counsel anxious to press for an extenuatory exoneration from incarceration.

This mix-up of degree of culpability and quantum of punishment is unscientific and so we have first to fix the appellant's guilt under the Penal Code and then turn to the punitory process. Criminality comes first, humanist sentence next.

Ordinarily, the vernier scale of a man's *mens rea* is the pragmatic one of the reasonable and probable consequences of his act. The weapon he has used, the situs of the anatomy on which he has inflicted the injury and the like, are inputs. If that be the mental standard of the turpitude, the offender's faculty of understanding becomes pertinent. Man is a rational being and law is a system of behavioral cybernetics where noetic niceties, if pressed too far, may defeat its societal efficacy. So, except in pronounced categories, which we will advert to presently, the intent is spelt out objectively by the rough-and-ready test of the prudent man and not with psychic sensitivity to retarded individuals. Viewed in this perspective, the materials present in the case, especially the medical evidence, shows that this young offender armed himself like his brothers with a cutting instrument and set upon the victim using the sword on his neck. The autopsy evidence discloses that the injuries caused by the appellant were not the lethal ones; but multiple sword cuts on the neck of a man, leave little room for doubt in the ordinary run of cases as to the intent of the assailant. When three persons, swords in hand, attack a single individual, fell him on the ground and strike on his neck and skull several times with a sharp

A weapon, it is not caressing but killing, in all conscience and commonsense. The turpitude cannot be attenuated, and the inference is inevitable that the least the parties sought to execute was to endanger the life of the target person. In this light, the malefic contribution of the appellant to the crime is substantially the same as that of the other two.

When a crime is committed by the concerted action of a plurality
B of persons constructive liability implicates each participant, but the degree of criminality may vary depending not only on the injurious sequel but also on the part played and the circumstances present, making a personalised approach with reference to each. Merely because of the fatal outcome, even those whose intention, otherwise made out to be far less than homicidal, cannot, by hindsight reading, be meant to have had a murderous or kindred *mens rea.* We have,
C therefore, to consider in an individualised manner the circumstances of the involvement of the appelant, his nonage and expectation of consequences. When a teenager, tensed by his elders or provoked by the stone-hit on the head of his father, avenges with dangerous sticks or swords, copying his brothers, we cannot altogether ignore his impaired understanding, his tender age and blinding environs and motivations causatory of his crime.

D

It is common ground that the appellant was twelve years old at the time of the occurrence. At common law in England, as noticed by Archbold in Criminal Pleading, Evidence and Practice, a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and pregnant evidence of a mischievous discretion... for the capacity to
E commit crime, do evil and contract guilt, is not so much measured by years and days as by the strength of the delinquent's understanding and judgment.

Cross & Jones in 'An Introduction to Criminal Law' state : "It is conclusively presumed that no child under the age of ten years can be guilty of any offence; a child of ten years or over, but under the age
F of fourteen, is presumed to be incapable of committing a crime, but this presumption may be rebutted by evidence of 'mischievous discretion' i.e., knowledge that what was done was morally wrong." *R. V. Owen* (1830) 4 C & P. 236. Cross & Jones further state : "The rebuttable presumption of innocence in the case of persons between the age of ten and fourteen is still wholly dependent on the common law. The Crown cannot, as in most other cases, rely on the *actus reus* as evidence of *mens rea;* other evidence that the child knew it was doing
G something morally wrong must be adduced." : *R. v. Kershaw* (1902) 18 T.L.R. 357.

In English Law, when an adolescent is charged with an offence, the prosecution has to prove more than the presence of a guilty mind but must go further to make out that 'when the boy did the act, he knew that he was doing what wrong—not merely what was wrong but
H *what was gravely wrong, seriously wrong'* (emphasis added).

Adult intent, automatically attributed to infant *mens,* is itself an adult error. It is everyday experience that little boys as a class have

less responsible appreciation of dangers to themselves or others by injurious acts and so it is that the new penology in many countries immunises crimes committed by children of and below ten years of age and those between the ages of 10 and 14 are 'in a twilight zone in which they are morally responsible not as a class, but as individuals when they know their act to be wrong'. The Indian Penal Code, which needs updating in many portions, extends total immunity upto the age of seven (s. 82) and partial absolution upto the age of twelve (s. 83). The latter provision reads :

> "83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

The venal solicitude of the law for vernal offenders is essentially a modern sensitivity of penology although from the Code of Hammurabi, the days of the Hebrews and vintage English law, this clement disposition is a criminological heritage, marred, of course, by some periods and some countries. Dr. Siddique mentions that there have been instances in England where children of tender years were given death sentences like the case where two kids of eight or nine years were given capital punishment for stealing a pair of shoes (p. 127, Criminology : Problems & Perspectives, by Ahmad Siddique : Eastern Book Co.). At least as mankind is approaching the International Year of the Child (1979), the Indian legal system must be sensitized by juvenile justice. This conscientious consciousness prompted us to counsel counsel to examine the statutory position and criminological projects in the 'child' area. We had to make-do with what assistance we got but hope that when a near-pubescent accused is marched into a criminal court, the Bench and the Bar will be alerted about *jus juvenalis,* if we may so call it. The compassion of the penal law for juvenescents cannot be reduced to jejunity by forensic indifference since the rule of law lives by law-in-action, not law in the books. Unfortunately, at no stage, from the charge-sheet to the petition for special leave, has awareness of s. 83 of the Panel Code, the Probation of Offenders Act, 1958 or the Bihar Children Act, 1970, been shown in this case. May be, the offence charged being under s. 302 IPC and the guilt ultimately found being of an offence punishable with life imprisonment, account for this non-consideration. Even so, justice to juvenile justice desiderates more from a lively judicial process.

Back to Hiralal Mallick and his crime and punishment. Was he guilty under s. 326 IPC as the High Court has found, or was he liable only under s. 324 as Shri Goburdhun urges He was twelve; he wielded a sword; he struck on the neck of the deceased; he rushed to avenge; he ran away like the rest. No evidence as to whether he was *under* twelve, as conditioned by s. 83 IPC is adduced; no attention to feeble understanding or youthful frolic is addressed. And we are past the judicial decks where factual questions like this can be investigated. The *prima facie* inference of intent to endanger the life of the deceased with a sharp weapon stands unrebutted. Indeed, robust realism easily imputes *doli capax* to a twelver who cuts on the neck of another with

A a sword; for, if he does not know this to be wrong or likely to rip open a vital part he must be very abnormal and in greater need of judicial intervention for normalisation. The conviction under s. 326, IPC, therefore, must be reluctantly sustained. When such is the law, we cannot innovate to attenuate, submit to spasmodic sentiment, or ride an unregulated benevolence. We cannot forget Benjamin Cardozo's caveat that "the Judge, even when he is free, is still not wholly free'. B Fettered by the law, we uphold the conviction.

Now to the issue of 'sentence'. Guidelines for sentencing are difficult to prescribe and more difficult to practice. Justice Henry Alfred McCardie succinctly puts it :

> "Trying a man is easy, as easy as falling off a log, compared with deciding what to do with him when he has been C found guilty."(1) (p. 362)

Speaking broadly, the ultimate desideratum of most sentences is 'to make an offender a non-offender. Only as judges impose effective sentences with a proper attitude and manner will they perform their expected function of decreasing the rising number of criminal and quasi-criminal activities in this nation'. (p. 364) (1) Penal humani- D tarianism has come to assert itself, although Sir Winston Churchill put the point of the common man and of the judge with forceful clarity :

> "The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. (p. 68) (1)

By that unfailing test we fail, if we betray brutality towards children E and burke the human hope of tomorrow and the current trust in our hands and hearts. So it is that in the words of the Archbishop of York in the House of Lords' debate in 1965 :

> "Society must say, through its officers of law, that it repudiates certain acts as utterly incompatible with civilized conduct and that it will exact retribution from those who F violate its ordered code. . ." (p. 18) (1)

It is a badge of our humanist culture that we hold fast to a national youth policy in criminology. The dignity and divinity, the self-worth and creative potential of every individual is a higher value of the Indian people; special protection for children is a constitutional guarantee writ into Art. 15(3) and 39(f). Therefore, without more, our judicial processes and sentencing paradigms must lead kindly light along G the correctional way. That is why Gandhiji emphasized the hospital setting, the patient's profile in dealing with 'criminals'. In-patient, out-patient and domiciliary treatment with curative orientation is the penological reverence to the Father of the Nation. A necessary blossom of this ideology is the legislative development of criminological pediatrics. And yet it is deeply regrettable that in Bihar, the land of the Buddha—the beacon-light whose compassion encompassed all living H beings—the delinquent child is inhospitably treated. Why did this

(1) All quotations from 'Sentencing and Probation'—Published by National College of the State Judiciary, Reno, Nevada, U.S.A.).

finer consciousness of juvenile justice not dawn on the Bihar legislators and government. Why did the State not pass a Children Act through its elected members ? And one blushes to think that a belated Children Act, passed in 1970 during President's rule, was allowed to lapse ! Today, may be, the barbarity of tender-age offenders being handcuffed like adult habituals, trooped into the crowded criminal court in hurtful humiliation and escorted by policemen, tried along with adults attended by court formalities, survives in that hallowed State; for, counsel for Bihar surprised us with the statement that there now exists no Children Act in that State. With all our boasts and all our hopes, our nation can never really be decriminalized until the crime of punishment of the young deviants is purged legislatively, administratively and judicatively. This twelve-year old delinquent would have had a holistic career ahead, instead of being branded a murderer, had a Children Act refined the Statute Book and the State set up Children's Courts and provided for healing the psyche of the little human.

Conceptually, the establishment of a welfare-oriented jurisdiction over juveniles is predicated and over-judicialisation and over-formalisation of court proceedings is contraindicated. Correctionally speaking, the perception of delinquency as indicative of the person's underlying difficulties, inner tensions and explosive stresses similar to those of mal-adjusted children, the belief that court atmosphere with forensic robes, gowns and uniforms and contentious disputes and frowning paraphernalia like docks and stands and crowds and other criminals marched in and out, are psychically traumatic and socially stigmatic, argues in favour of more informal treatment by a free mix of professional and social workers and experts operating within the framework of the law. There is a case to move away from the traditional punitive strategies in favour of the nourishing needs of juveniles being supplied by means of a treatment-oriented perspective. This radicalisation and humanisation of *jus juvenalis* has resulted in legislative projects which jettison procedural rigours and implant informal and flexible measures of freely negotiated non-judicial settlement of cases. These advances in juvenile criminology were reflected *inter alia* in the Children Act, 1960.

The rule of law in a Welfare State has to be operational and, if the State, after a make-believe legislative exercise, is too insoucient even to bring it into force by a simple notification, or renew it after its one-year brevity, it amounts to a breach of faith with the humanism of our *suprema lex,* an abandonment of the material and moral well-being promised to the children of the country in Art. 39(f) and a subtle discrimination between child and child depending on the State where it is tried. We hopefully speak for the neglected child and wish that Bihar—and, if there are other States placed in a similar dubiety or dilemma, they too—did make haste to legislate a Children Act, set up the curial and other infra-structure and give up retributivism in favour of restorative arts in the jurisdiction of young deviants. Often, the sinner is not the boy or girl but the broken or indigent family and the indifferent and elitist society. The law has a heart—or, at least, must

A have. Mr. Justice Fortas, speaking for the U.S. Supreme Court in *Kent* v. *United States,* said :

> "There may be grounds of concern that the child receives the worst of both worlds; that he gets neither the protection accorded to adults nor the solicitous care and regenerative treatment postulated for children."

B

> [383, U.S. 541, 556 (1966), quoted in Siddique, supra, p. 149]

The Indian child must have a new deal.

Now we move on to a realistic appraisal of the situation. The C absence of a Children Act leads to a search for the probation provisions as alternative methods of prophylaxis and healing. In 1951, the UNESCO recommended a policy of probation as a major instrument of therapeutic forensics. Far more comprehensive than s. 562 of the Code of Criminal Procedure, the Indian Act still leaves room for improvement in philosophy, application, education and periodical review through Treatment Tribunals, to mention but a few. We, as judges, D are concerned with the law as it is. And one should have thought that counsel in the courts below would have pleaded, when the appellant was convicted, for probationary liberation. The decisive date for fixing the age under s. 6 is when the youth is found guilty. But here the offence charged is one punishable with death or life imprisonment and the crime proved at the High Court level is one punishable with life-term. The Act therefore does not apply. We venture to suggest E that in marginal cases this age-punishability rigidity works hardship but making or modifying laws belongs to the Legislature. Even so, Chief Justice Sikri complained, inaugurating the Probation Year (1971) :

> "...But is it enough to pass a law and say that probation is a good thing ? Not only should the serious student and F Probation Officers be convinced of its advantages but the Judiciary and the Bar must also become its votaries. Unfortunately at present, very little serious attention is paid to this aspect by the Judiciary and the Bar. As a matter of fact I was shocked to see that in a number of cases, which came to the Supreme Court recently, even the existence of the local Probation of Offenders Act was not known, or easily G ascertainable. No reference to the relevant Probation Act was made in the court below but the point was for the first time taken in the grounds for special leave to appeal to the Supreme Court."

* * * *

H "It seems to me that if an accused person is likely to be covered by the Act, and his age appears to be about 21, efforts should be made by the investigating agency or the prosecuting counsel to collect material regarding the age.

You are all aware that the exact age is known to very few persons in rural areas. A

I also think that a Magistrate should himself try this question early, if there is any possibility of the applicability of the Probation of Offenders Act."

(Social Defence : Vol. VII, No. 25, July 1971—Quarterly review published by the Central Bureau of Correctional Services, Department of Social Welfare, Government of India). B

We repeat that liberal use of the law is its life.

Anyway, now that probation also is out of the way, what incarceratory impost is just? 'Prison should serve the purposes of confining people, not of punishing them' (Justinian). As the 'Guidelines for Sentencing' published by the National Probation and Parole Association, New York, 1957 states : C

"Imprisonment is the appropriate sentence when the offender must be isolated from the community in order to protect society or if he can learn to readjust his attitudes and patterns of behavior only in a closely controlled environment." D

So we come up to the harm of long shut-up behind the bars. Subjected to hard labour that rigorous imprisonment implies and exposed to the deleterious company of hardened adult criminals, a young person, even if now twentyone, returns a worse man, with more vices and vengeful attitude towards society. This is self-defeating from the correctional and deterrent angles. E

How then shall we rehabilitate this youth who has stood nine years of criminal proceedings, suffered some prison life and has the prospect of hardening years ahead? This is not a legal problem for traditional methods. A vehement critic, in overzealous emphasis, once said what may be exaggerated but carries a point which needs the attention of the Bench and the Bar. H. Barnes wrote : F

"The diagnosis and treatment of the criminal is a highly technical medical and sociological problem for which the lawyer is rarely any better fitted than a real estate agent or a plumber. We shall ultimately come to admit that society has been unfortunate in handing over criminals to lawyers and judges in the past as it once was in entrusting medicine to shamans and astrologers, and surgery to barbers. A hundred years ago we allowed lawyers and judges to have the same control of the insane classes as they still exert over the criminal groups, but we now recognize that insanity is a highly diversified and complex medical problem which we entrust to properly trained experts in the field of neurology and psychiatry. We may hope that in another hundred years the treatment of the criminal will be equally thoroughly and willingly submitted to medical and sociological experts." G H

(p. 74, Sentencing and Probation, supra)

A We have to turn to correctional and rehabilitative directions while confirming the four-year term. We affirm the period of the sentence since there is no particular reason why a very short term should be awarded. When a young person is being processed correctionally, a sufficient restorative period to heal the psychic wounds is necessary. From that angle also a term which is neither too short nor too long will be the optimum to be adopted by the sentencing judge. How-
B ever, the more sensitive question turns on how, behind the prison walls, behavioral techniques can be built in to repair the distortions of his mind. Stressologists tell us, by scientific and sociological research, that the cause of crime in most cases is inner stress, mental disharmony and unresolved tension. In this very case, the lad of twelve was tensed into irresponsible sword play as a result of fraternal provocation and paternal injury. It is, therefore, essential that the therapeu-
C tic orientation of the prison system, *vis a vis* the appellant, must be calculated to release stresses, resolve tensions and restore inner balance.

This is too complicated a question and, in some measure, beyond the judicial expertise, so that we have to borrow tools and techniques from specialists, researchers and sociologists. The ancient admonition
D of the Rigveda,

आ नो भद्राः क्रतवो यन्तु विश्वतः

('Let noble thoughts come to us from every side—Rigveda 1-89-i) is a good guideline here. From Lenin and Gandhi to leading sociologists, criminologists and prison-management officials, it is established that work designed constructively and curatively, with special reference
E to the needs of the person involved, may have a healing effect and change the personality of the quondam criminal. The mechanical chores and the soulless work performed in jail premises under the coercive presence of the prison warders and without reference to relaxation or relish may often be counter-productive. Even the apparel that the convict wears burns into him humiliatingly, being a distinguishing dress constantly reminding him that he is not an ordinary
F human but a criminal. We, therefore, take the view that within the limits of the prison rules obtaining in Bihar, reformatory type of work should be prescribed for the appellant in consultation with the medical officer of the jail. The visitorial team of the Central Prison will pay attention to see that this directive is carried out. The appellant, quite a young man, who was but a boy when the offence was committed, shall not be forced to wear convict costume provided his guardians
G supply him normal dress. These harsh obscurantisms must gradually be eroded from our jails by the humanizing winds that blow these days. We mentioned about stressology. One method of reducing tension is by providing for vital links between the prisoner and his family. A prisoner insulated from the world becomes bestial and, if his family ties are snapped for long, becomes de-humanised. Therefore we regard it as correctionally desirable that this appellant be granted
H parole and expect the authorities to give consideration to paroling out periodically prisoners, particularly of the present type for reasonable spells, subject to sufficient safeguards ensuring their prober behaviour outside and prompt return inside.

More positive efforts are needed to make the man whole, and this takes us to the domain of mind culture.

Modern scientific studies have validated ancient *vedic* insights bequeathing to mankind new meditational, yogic and other therapeutics, at once secular, empirically tested and trans-religious. The psychological, physiologic and sociological experiments conducted on the effects of Transcendental Meditation (TM, for short) have proved that this science of creative intelligence, in its meditational applications, transquillises the tense inside, helps meet stress without distress, overcome inactivities and instabilities and by holistic healing normalises the fevered and fatigued man. Rehabilitation of psychatric patients, restoration of juvenile offenders, augmentation of moral tone and temper and, more importantly, improvement of social behaviour of prisoners are among the proven findings recorded by researchers. Extensive studies of TM in many prisons in the U.S.A. Canada, Germany and other countries are reported to have yielded results of improved creativity, higher responsibility and better behaviour. Indeed, a few trial courts in the United States have actually prescribed(1) TM as a recipe for rehabilitation. As Dr. M. P. Pai, Principal of the Kasturba Medical College, Mangalore, has put down :

> "Meditation is a science and this should be learnt under guidance and cannot be just picked up from books. Objective studies on the effects of meditation on human body and mind is a modern observation and has been studied by various investigation at MERU—Maharishi European Research University. Its tranquillising effect on body and mind, ultimately leading to he greater goal of Cosmic Consciousness or universal awareness, has been studied by using over a hundred parameters. Transcendental Meditation practised for 15 minutes in the morning and evening every day brings about a host of beneficial effects. To name only a few :
>
> 1. Body and mind gets into a state of deep relaxation.
> 2. B. M. R. drops, less oxygen is consumed.
> 3. E.E.G. shows brain wave coherence with 'alpha' wave preponderance.
> 4. Automatic stability increases.
> 5. Normalisation of high blood pressure.
> 6. Reduced use of alcohol and tobacco.
> 7. Reduced stress, hence decreased plasma cortisol and blood lactate.
> 8. Slowing of the heart etc.

1. In the Superior Court of the State of Arizona—judgment d/5-3-76 in *State of Arizona* v. *Jean Coston Presley*—Case No. 6878;
Criminal Action No. 4-81750 in the U.S. District Court for Eastern District of Michigan—*United States of America* v. *Robert Charles Rusch* Jr.

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> The self of every man has been found to be his consciousness, and its full potential is found in the state of least excitation of consciousness, which is the most simple of awareness.
>
> To sum up, inadequacy of 'alpha' waves is disease, and mental health could be restored by increasing 'alpha' wave production in the cerebral hemisphere instead of other type of waves seen in disease. Five years' research has given encouraging results, and more work in this field is being done and results are awaited."
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> Lecture on 'Ancient Insights and Modern Discoveries delivered under the auspices of Bharatiya Vidhya Bhavan sponsored two-day symposium—Published in Bhavan's journal d/July 17, 1977 : P. 57 under the caption : The Mind of Man : Importance of Mental Health'.

A recent Article on TM and the Criminal Justice System in the Kentucky Law Journal and another one in the Maryland Law Forum highlight the potency of TM in the field of criminal rehabilitation (Kentucky L. J. Vol. 60, 1971-72 No. 2; and University of Maryland Law Forum, Vol. III, No. 2, Winter 1973). There is no reason, prima facie, if TM physiologically produces a deep state of restful alertness which rejuvenates and normalises the functioning of the nervous system, to reject the conclusion of David E. Sykes which he has summarized thus :

> "Physiologically, T.M. produces a deep state of restful alertness which rejuvenates and normalizes the functioning of the nervous system.
>
> Psychologically, T. M. eliminates mental stress, promotes clearer thinking and greater comprehension; it enriches perception, improves outlook and promotes efficiency and effectiveness in life.
>
> Sociologically, T. M. eliminates tension and discordance and promotes more harmonious and fulfilling interpersonal relationships, thus making every individual more useful to himself and others and bringing fulfilment to the purpose of society.
>
> The combined physiological, psychological and sociological changes produce an overall effect of fullness of life. The elimination of mental, physical and behavioral abnormalities through the release of deep stress produces a sense of fulfilment and internal harmony. It is interesting to note that this development of life in increasing values of contentment and fulfilment has long been understood in terms of spiritual development. With the tools of modern science, we can now systematically evaluate the objective causes and expressions of this inner, personal development produced by transcendental meditation."

It has been repeatedly pointed out in the literature bearing on the subject that TM is just *not religion,* and is like physics applied to human consciousness. Even so, it is not for the court, at the present stage, to prescribe what the prison authorities should do with the appellant while he is in their charge. Nevertheless, we emphasize how important it is for the prison department to explore, experiment and organize gradually some of these reformative exercises in order to eliminate recidivism and induce rehabilitation. We make these observations in the expectation that, facilities being available and the prisoner's consent being forthcoming, he will be given, under proper initiation and medical authorisation, courses which will refine his behaviour, develop his full potential and thereby justify the justice of his forced tenancy for four years.

An afterword on power. Within the limits of the Prison Act and rules, there is room for reform of the prisoner's progress. And the court, whose authority to sentence deprives the sentence of his constitutional freedoms to a degree, has the power—indeed, the duty—to invogorate the intra-mural man-management so that the citizen inside has spacious opportunity to unfold his potential without oversuch inhibition or sadistic overseeing. No traditional judicial hands-off doctrine nor Prison department's Monroe doctrine can dissuade or disentitle this Court from issuing directives, consistently with law, for the purpose of compelling the institutional confinement to conform to the spirit and standards of the fundamental rights which belong to the man walled off. We cannot, in all conscience, order him to be shut up and forget about him. The broading presence of judical vigilance is the institutional price of prison justice.

We have soujourned in the sentencing chapter of this judgment for so long, our anxiety being to work out purposeful incarceration shot with just and effective prescription. Red-hot rhetoric or flaming recommendations can have no more than romantic value since statutory authority is the only sanction behind a court's directive. So we requested counsel to search for the sections and rules under the Prisons Act bearing on constructive correction-oriented orders the Court has power to pass. Counsel for the State drew our attention to the vintage measures lost in the statute book like the Reformatory Schools Act as well as the Borstal Schools Act, apart from the Probation of Offenders Act and the rules under these laws. This study has served only to convince us that, while statutory guidelines to fix the quantum of punishment are marked by uncanalised fuidity, the court's correctional role in meaningful sentencing is marginal, justifying Judge Marvin E. Frankel's cynical expression—Criminal Sentences : Law without Order. The Raj prisons continue gerentologically in their grimy grimness; the dress, diet, bed, drill, organisation and discipline—why, even the philosophy and fears—have hardly responded to rehabilitative penology or humane decency. Indeed, it is still an attitude of 'lock them up and throw away the key', save for some casual 'open Jail' experiments and radical phrases in academic literature. We omit the Chambal oasis where changes are being tried out. And this is a startling anti-climax when we remember that our Freedom Struggle had found nearly all post-Independence leaders

A in wrathful incarceration and most Indian Ministers, now and before, had been no strangers to prison torments. The time has come for reform of the sentencing process with flexibility, humanity, restoration and periodic review informing the system and involving the court in the healing directions and corrections affecting the sentence whom judicial power has cast into the 'cage'. For the nonce, however, we, as judges, have to work within the law as it now stands. B And we cannot impose what is not sanctioned or is not accepted by the State. So we have couched what would have been binding mandates in terms of hopeful half-imperatives. Subject to the observations regarding in-prison and parole treatment of the appellant, we dismiss the appeal.

GOSWAMI, J.—I agree that there is no merit in this appeal which C is dismissed.

My learned Brother has dealt with both the lethargy in law-making and indifference and indolence in implementing laws in and attractive and trenchant manner.

So far as the post-sentencing aspects are concerned, my learned D Brother has gone into depth on matters which he has studied extensively. These will appertain to law reforms as well as prison reforms which the legislature and the implementing executive can profitably undertake. I hope and trust that my learned Brother's earnest and anxious observations in this judgment will not be a cry in the wilderness.

M.R. *Appeal dismissed.*