

JOSEPH PETER

v.

STATE OF GOA, DAMAN AND DIU

May 4, 1977

[V. R. KRISHNA IYER AND JASWANT SINGH, JJ.]

Criminal Procedure Code, 1973 (Act II of 1974), Section 354(3)—Discretionary power to choose between capital sentence and life term is a limited one—Leave should be refused when it is difficult to fault the court which has exercised such a power under Art. 136 of the Constitution.

Criminal Procedure Code, 1898, Section 377—Scope of.

Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963—Regulation 8(1) does not bar the referred jurisdiction of the Judicial Commissioner's Court.

Sentence—Extenuating circumstances—Circumstance that the accused is a young man or that the sentence of death has been haunting him for long alone cannot entitle him for judicial clemency.

The petitioner was convicted for the offence of murder under s. 302, I.P.C. and sentenced to death by the Trial Court. The Judicial Commissioner, Goa confirmed the death sentence in the referred trial under s. 374 of the 1898 Code of Criminal Procedure.

Dismissing the special leave petition to appeal, the Court.

HELD: (1) Discretion to choose between the capital sentence and life term under s. 354(3) of the 1973 Code of Criminal Procedure is limited. If the offence has been perpetrated with attendant aggravating circumstances, if the perpetrator discloses an extremely depraved state of mind and diabolical trickery in committing the homicide, accompanied by brutal dealing with the cadaver, infliction of death penalty cannot be avoided. Special leave under Art. 136 of the Constitution cannot be granted when it is difficult to fault the court on any ground, statutory or precedential. [772 G-H, 773 A]

Ediga Annamma, AIR 1974 SC 799, referred to.

(2) Section 377 of 1898 Code of Criminal Procedure applies only to situations where the court at the time of the confirmation of the death sentence consists of two or more Judges. Section 4(1)(i) of the Code of Criminal Procedure, in relation to a Union Territory, brings within the definition of "High Court", the highest court of criminal appeal for that area, namely, the Judicial Commissioner's Court. If, at the time the case for confirmation of death sentence is being heard, the Judicial Commissioner's Court consists of more than one Judge, at least two Judges must attest the confirmation. So long as one Judicial Commissioner alone functions in the Court, section 377 was not attracted. In the present case there is nothing illegal in a single (i.e. the only) Judicial Commissioner deciding the reference. [773 D-F]

(3) Referral jurisdiction under s. 377 is akin to appeal and revision. Regulation 8(1) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation 1963 does not disentitle the Judicial Commissioner from exercising power u/s. 377, Cr.P.C. In the instant case, the Judicial Commissioner's confirmation of death sentence is not without jurisdiction. [774 C-D]

(4) Judicial clemency cannot attenuate the sentence of death on the sole circumstance that the accused was a young man and the sentence of death been haunting him for long without other supplement factors or in the face of surrounding beastly circumstances of the crime. Possibly, Presidential power wider but judicial power is embanked. [774 E-F]

A CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 216/1977.

(From the Judgment and Order dated 28-9-1973 of the Judicial Commissioner, Court, Goa Daman and Diu in CrI. Appeal No. 17/72).

S. J. S. Fernandez, amicus curiae, for the petitioner.

B The Order of the Court was delivered by

C KRISHNA IYER, J.—A death sentence, with all its dreadful scenario of swinging desperately out of the last breath of mortal life, is an excruciating hour for the judges called upon to lend signature to this macabre stroke of the executioner's rope. Even so, judges must enforce the laws, whatever they be, and decide according to the best of their lights, but the laws, are not always just and the lights are not always luminous. Nor, again, are judicial methods always adequate to secure justice. We are bound by the Penal Code and the Criminal Procedure Code, by the very oath of our office.

D Section 354(3) of the new Code gives the convicting judge, on a murder charge, a discretion to choose between capital sentence and life term. It is true that in the present Code, the unmistakable shift in legislative emphasis is on life imprisonment for murder *as the rule* and capital sentence *an exception*, to be resorted to for reasons to be stated (*Edige Annamma*, 1974 SC 799, AIR). Even so, the discretion is limited and courts can never afford to forget Benjamin Cardozo's wise guidance :

E "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains.'"

(Cardozo : *The Nature of the Judicial Process* : Wale University Press (1921)).

G We have heard counsel on the merits and perused the paper book with some care and see no ground to disturb the conviction. The question of 'sentence' projects sharply before us and what we have stated above turns our focus on circumstances justifying the graver sentence. The learned Sessions Judge has given valid reasons as to why he is imposing the death sentence. The guidelines laid down by this Court, in its precedents which bind us, tell us that if the offence has been perpetrated with attendant aggravating circumstances, if the perpetrator discloses an extremely depraved state of mind and diabolical trickery in committing the homicide, accompanied by brutal dealing with the cadaver, the court can hardly help in the present state of the law, avoiding infliction of the death penalty. When discretion has been exercised by the trial Court and it is difficult to fault that

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court on any ground, statutory or precedential, an appellate review and even referral action become too narrow to demolish the discretionary exercise of power by the inferior court. So viewed, it is clear that the learned Judicial Commissioner has acted rightly in affirming the death sentence. We are unable to grant leave on this score either.

Counsel for the petitioner has urged that the affirmation by the Judicial Commissioner's court of Goa, Diu and Daman, of the Death sentence is illegal. According to him s. 377 of the old code (which govern the instant case), is a missile which will bit down the confirmation by the Judicial Commissioner. The said section reads :

"377. In every case so submitted the confirmation of the sentence, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them."

This section means, as we understand it, that when the High Court concerned consists of two or more judges, the confirmation or other sentence shall be signed by at least two of them. This provision obviously applies *only* to situations where the court, at the time of the confirmation of the death sentence, consists of two or more judges. It is true that s. 4(1)(i) in relation to a Union Territory brings within the definition of the 'High Court' the highest court of criminal appeal for that area viz., the Judicial Commissioner's court. It therefore follows that if, at the time the case for confirmation of the death sentence is being heard, the Judicial Commissioner's court consists of more than one judge, at least two judges must attest the confirmation. In the present case it is common ground that when the case was heard and judgment pronounced there was only one Judicial Commissioner, although the sanctioned strength was two. So long as one Judicial Commissioner alone functioned in the court, s. 377 was not attracted. The necessary inference is that in the present case there is nothing illegal in a Single (i.e. the only) Judicial Commissioner deciding the reference.

We are aware that the insistence of the Code on two judges hearing the matter of such gravity as a death sentence involves is because of the law's grave concern that human life shall not be judicially deprived unless at least two minds at almost the highest level are applied. Even so, exceptional situations may arise where two judges are not available in a High Court and, in that narrow contingency, the Code permits what has now happened. We cannot fault the judgment on this ground either.

Counsel for the petitioner contends that the Criminal Procedure Code is a general statute but the Goa, Daman and Diu (Judicial Commissioners Court) Regulation, 1963 is a special law which prevails against the general. On that footing he argues that under Regulation 8(1) the Court of the Judicial Commissioner shall have only such jurisdiction as is exercisable in respect of Goa, Daman and Diu by the Tribunal de Relacao. According to him, the said Tribunal did not have the powers of confirmation of death sentence, and,

- A** therefore, the judicial Commissioner cannot exercise such power.
- B** He also argues that under the said provision the Judicial Commissioner is the highest Court of Appeal and Revision but not of Reference and for that reason cannot exercise the powers under section 377 of the old Criminal Procedure Code. We see no force in these twin submissions. A Code is complete and that marks the distinction between a Code and an ordinary enactment. The Criminal Procedure Code, by that canon, is self-contained and complete. It defines a High Court which takes in a Judicial Commissioner's Court. (Section 4(1)(i)). We need not and indeed may not travel beyond the Code into the territory of the Regulation. Even otherwise, there is nothing in Regulation 8(1) which helps the petitioner. It provides that the Judicial Commissioner shall be the highest criminal Court, 'Appeal and Revision' used in that provision are words of the widest import and cover all proceedings which are not original proceedings but are by way of judicial review for a higher level. Referral jurisdiction, under section 377, is skin to appeal and revision and we think that Regulation 8(1) does not disentitle the Judicial Commissioner from exercising power under section 377 of the Code : nor are we inclined to accept the submission that on the speculative assumption that the Tribunal de Relacao did not have the power to *confirm* death sentences, and, therefore, the Judicial Commissioner, acting as the High Court under the Code, cannot enjoy such power. Regulation 8(1) does not limit the jurisdiction of the Judicial Commissioner in the sense counsel wants us to accept. We therefore hold that the Judicial Commissioner's confirmation of the death sentence is not without jurisdiction.
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- D**
- E** Undeterred by the fact that the murder is gruesome counsel has pleaded that at least on the question of sentence leave should be granted because his client is a young man and the sentence of death has been haunting him agonisingly for around six years. May be that such a long spell of torment may be one circumstance in giving the lesser sentence. Even so, we have to be guided by the rulings of this Court which have not gone to the extent of holding that based on this circumstance alone, without other supplementing factors or in the face of surrounding beastly circumstances of the crime, judicial clemency can attenuate the sentence. Possibly, Presidential power is wider but judicial power is embanked.
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We refuse special leave and dismiss the petition.

Petition dismissed.