

(2015) 03 AHC CK 0176

In the Allahabad High Court

Case No : Criminal M. Application No. 7588 of 2015

Hari Dutta Tiwari

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 258, 309, 311, 482
Penal Code, 1860 (IPC) — Section 147, 218, 304, 323, 330

Citation : (2015) 2 ACR 1890

Hon'ble Judges : Manoj Misra, J

Bench : Single Bench

Advocate : Anil Tiwari and Preetpal Singh Rathore, for the Appellant

Final Decision : Dismissed

Judgement

Manoj Misra, J—Heard Sri Anil Tiwari for the applicant; learned A.G.A. for the State and perused the record. The facts as they appear on the record are that the applicant is a retired police officer. On August 22, 1984, while the applicant was posted as Constable in district Jalaun, a person named Budh Singh was shown to have been arrested on spot for an offence of robbery, which gave rise to Case Crime No. 283 of 1984 at P.S. Konch, district Jalaun. On August 25, 1984, Budh Singh died in custody. It was alleged by his family members that Budh Singh was arrested from his house; thereafter framed in a robbery case; and tortured by police officials, which resulted in his death. A preliminary enquiry resulted in a first information report, lodged by the Inspector Crime Branch on 27.11.1987, against 7 police officers including the applicant of implicating the deceased Budh Singh in a false robbery case and thereafter subjecting him to, custodial torture which resulted in his death. This F.I.R. was registered as Case Crime No. 567 of 1987 at P.S. Konch, district Jalaun. Thereafter the matter was investigated by the Crime Branch, which revealed the involvement of the accused including the applicant in the offence, as a result sanction for prosecution was obtained from the Governor, vide order dated 12.1.1994, and charge-sheet was

laid in court on 20.9.1995, which took cognizance of the offences on 16.11.1995. Thereafter, efforts were made to secure the presence of the accused who, at that point in time, were members of the police force.

2. Instant application has been filed seeking quashing of the proceeding arising out of Case Crime No. 567 of 1987 (supra), which at present is pending as Case No. 2425 of 2014 in the court of C.J.M., Jalaun at Orai under Sections 147, 342, 323, 304, 218 and 330, I.P.C.

3. Sri Anil Tiwari, who has appeared on behalf of the applicant, has admitted at the Bar that non-bailable warrant against the applicant for securing his presence, according to the order sheet, was issued in the year 1995 and since then repeated orders have been passed directing issuance of non-bailable warrants to him. He, however, submits that none came to the knowledge of the applicant who retired from service in the year 2008. It is submitted that only now the applicant came to know of the proceedings as a result he has rushed to this Court seeking quashing of the proceedings as well as the coercive processes taken against him.

4. The submission of Sri Anil Tiwari is to the effect that Article 21 of the Constitution of India guarantees speedy trial of an accused which means that there should not be inordinate delay in: (a) lodging of the F.I.R.; (b) conduct of investigation; and (c) conclusion of the trial which includes securing presence of the accused. It has been submitted that in the instant case the delay has occurred at every stage. The F.I.R. was lodged in the year 1987 in respect of the death which took place in the year 1984 whereas the charge-sheet was laid in the year 1995. Not only that, no effort was taken to secure the presence of the accused till 2015. Therefore, at every stage there has been a delay which has seriously prejudiced the defence of the accused and as such the proceeding of the case, which at present is pending as Case No. 2425 of 2014 in the court of C.J.M., Jalaun at Orai arising out of Case Crime No. 564 of 1987, P.S. Konch, district Jalaun deserve to be quashed. He has placed reliance on the observations of the Apex Court in the case of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, AIR 1979 SC 1360 : (1979) CrilJ 1036 : (1980) 1 SCC 91 : (1980) 1 SCC 81 : (1980) SCC(Cri) 23 : (1979) 3 SCR 169, as well as on certain observations made in Machander Vs. State of Hyderabad, AIR 1955 SC 792 : (1955) CrilJ 1644 : (1955) 2 SCR 524, as also few other cases where right to speedy trial has been recognized as part of the fundamental right guaranteed under Article 21 of the Constitution of India.

5. Before proceeding to examine the weight of the submissions of the learned counsel for applicant as to whether the proceedings of the court below can be quashed on ground of denial of right to speedy justice, which is said to be implicit in Article 21 of the Constitution of India, it would be useful to first examine the law in this regard. A Constitutional Bench of five Judges of the Apex Court, after taking a conspectus of all the previous existing law on the subject, in the case of Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., AIR

1992 SC 1701 : (1992) CriLJ 2717 : (1991) 6 JT 431 : (1991) 2 SCALE 1273 : (1992) 1 SCC 225 : (1991) 3 SCR 325 Supp , held as follows:

"86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or nonavailability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Nonavailability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is -- who is responsible for the delay ? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good

faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on -- what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell. J. in *Barker* "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in *U.S. v. Ewell* in the following words:

"...the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances."

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the "demand" rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in *U.S.A.*, the relevance of demand rule has been substantially watered down in *Barker* and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors -- "balancing test" or "balancing process" -- and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order -- including an order to

conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded -- as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of U.S.A. too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

6. Later, the concept came to be examined by a larger Bench of the Apex Court consisting of seven Judges in the case of P. Ramachandra Rao Vs. State of Karnataka, AIR 2002 SC 1856 : (2002) CriLJ 2547 : (2002) 2 Crimes 200 : (2002) 4 JT 92 : (2001) 4 SCALE 226 : (2002) 4 SCC 578 : (2002) 3 SCR 68 : (2002) AIRSCW 1841 : (2002) 3 Supreme 260 , where, while considering the question of quashment of proceedings on ground of delay, it was observed as follows:

"29. For all the foregoing reasons, we are of the opinion that in Common Cause case (I) [as modified in Common Cause (II)] and Raj Deo Sharma (I) and (II) the court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:

(1) The dictum in A.R. Antulay case is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(3) The guidelines laid down in A.R. Antulay case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), Raj Deo Sharma case (I) and (II). At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482, Cr.P.C. and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary -- quantitatively and qualitatively -- by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act."

7. In the case of Ranjan Dwivedi Vs. C.B.I., Through the Director General, AIR 2012 SC 3217 : (2012) CriLJ 4206 : (2012) 5 CTC 83 : (2012) 7 JT 557 : (2012) 4 RCR(Criminal) 880 : (2012) 7 SCALE 382 : (2012) 8 SCC 495 : (2012) AIRSCW 4591 : (2012) 5 Supreme 449 , the Apex Court while refusing to quash the proceedings of a murder trial, which remained pending at the stage of arguments for 37 years, observed:

21. The reasons for the delay is one of the factors which the courts would normally assess in determining as to whether a particular accused has been deprived of his or her right to speedy trial, including the party to whom the delay is attributable. Delay, which is occasioned by action or inaction of the prosecution is one of the main factors which will be taken note of by the courts while interjecting a criminal trial. A deliberate attempt to delay the trial, in order to hamper the accused, is weighed heavily against the prosecution. However, unintentional and unavoidable delays or administrative factors over which the prosecution has no control, such as, overcrowded court dockets, absence of the

Presiding Officers, strike by the lawyers, delay by the superior forum in notifying the Designated Judge (in the present case only), the matter pending before the other forums, including the High Courts and the Supreme Court and adjournment of the criminal trial at the instance of the accused, may be a good cause for the failure to complete the trial within a reasonable time. This is only illustrative and not exhaustive. Such delay or delays cannot be violative of the accused's right to a speedy trial and needs to be excluded while deciding whether there is unreasonable and unexplained delay. The good cause exception to the speedy trial requirement focuses on only one factor i.e., the reason for the delay and the attending circumstances bear on the inquiry only to the extent to the sufficiency of the reason itself. Keeping this settled position in view, we have perused the note prepared by Shri Raval, learned A.S.G. Though, the note produced is not certified with copies of the order-sheets maintained by the trial court, since they are not disputed by the other side, we have taken the information furnished therein as authentic. The note reveals that the prosecution, apart from seeking 4-5 adjournments, right from 1991 till 2012, is not responsible for delay in any manner whatsoever. Therefore, in our opinion the delay in the trial of the petitioners from 1991 to 2012 is solely attributable to the petitioners and the other accused persons."

8. In the case of *Niranjan Hemchandra Sashittal and Another Vs. State of Maharashtra*, (2013) 3 ABR 802 : (2013) 4 AD 13 : AIR 2013 SC 1682 : (2013) CriLJ 2143 : (2013) 6 JT 632 : (2013) 2 RCR(Criminal) 690 : (2013) 3 SCALE 265 : (2013) 4 SCC 642 : (2013) 2 SCC(L&S) 187 : (2013) AIRSCW 1966 : (2013) 2 Supreme 385 , while dealing with the question of quashment of proceeding on ground of delay, the Apex Court observed as follows:

"24. It is to be kept in mind that on the one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time-limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective."

9. From the law noticed herein above what is clear is that mere delay is no ground to quash the proceedings. There is also no fixed period for conclusion of the trial. What is to be seen is as to whom the delay is attributable to as also whether by the delay any serious prejudice has been caused to the accused. There is no hard and fast rule that mere delay would prejudice the defence of the accused. In some cases it may come to his advantage. The court while considering the question of quashment of proceeding has to examine the facts of each case on the touchstone of the principles laid down by the Apex Court in various pronouncements in this regard and has also to consider the impact of the

crime as also whether quashment in a given case on mere ground of delay would shake the confidence of people in the judicial system.

10. Coming to the facts of the instant case, indisputably the accused were all police officials. Obviously, they must be having influence at the district level, therefore, the investigation stood transferred to the Crime Branch. It is noteworthy that the first information report came to be lodged after nearly three years and charge-sheet took nearly eight years thereafter to be filed after obtaining sanction from the Governor. The offence alleged is of framing a person in a false case; thereafter of torturing him in custody; ultimately, resulting in his death. Obviously, the crime has deep social impact. Since the year 1996 or so non-bailable warrants are pending to be executed to secure the presence of the applicant. Admittedly, the applicant remained in service till the year 2008 and during his service tenure sanction for his prosecution was obtained from the Governor. Under the circumstances, it cannot be accepted that the applicant would not be aware that he was being investigated for a case of custodial torture and that a charge-sheet has been filed against him after sanction of the Governor which has resulted in proceedings before the court. If the trial did not proceed for nearly 20 years it was because of absence of the accused from the proceedings, therefore, no benefit of the delay would enure to the applicant. Moreover, grant of such benefit would completely shatter the faith in our legal as well as judicial system. Further, the delay, in the facts of the case, would rather come to his advantage rather than cause any serious prejudice. The applicant must therefore, forthwith surrender and face trial rather than evade the same.

11. The application is dismissed. However, dismissal of this application will not preclude the applicant from moving an application seeking discharge, in accordance with law, after surrendering before the court concerned. Let a copy of this order be sent to the concerned court below for information.