

(1961) 08 AHC CK 0026

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 1896 of 1961

Parkasho

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 07-08-1961

Acts Referred:

Constitution of India, 1950 — Article 161, 162, 226, 246, 72
Criminal Procedure Code, 1898 (CrPC) — Section 402, 402A
Penal Code, 1860 (IPC) — Section 302

Citation : AIR 1962 All 151 : (1962) 32 AWR 225

Hon'ble Judges : S.N. Dwivedi, J

Bench : Single Bench

Advocate : Gopal Behari, for the Appellant; R.K. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Dwivedi, J.—The petitioner's husband Banwari was murdered by the second and third respondents. They were tried u/s 302 read with Section 34 of the I. P. C; by the Sessions Judge, Meerut. By his judgment dated 5th November 1960 he sentenced them to death. They preferred an appeal against their conviction and sentence to this Court. Their appeal was dismissed on February 2, 1961 and the sentence of death was confirmed by the Court. During the course of arguments on appeal it appears that their counsel also tried to impress upon the court the advisability of commuting the sentence of death to a sentence of life imprisonment. The court refused to do so, because it found no extenuating feature. They then presented a petition to the Governor for commuting their sentence of death to imprisonment for life. The Governor, by his order dated April 22, 1961 commuted the sentence of death to imprisonment for life. This petition is directed against the said order of the Governor.

2. The relief claimed in the petition is that the Court should issue a writ in the nature of Mandamus commanding the State of U. P. through its Chief Secretary to execute the order of the High Court regarding the sentence of death and treat

the order of the Governor dated April 22, 1961 as a nullity.

3. At the outset I would like to observe that the petitioner does not appear to me to possess requisite standing to move the Court. A person may invoke the aid of the Court under Article 228 of the Constitution for the enforcement of his or her fundamental rights or "for any other purpose¹" The expression within quotation marks would suggest that the aid of the Court may also be invoked by a person for the protection of his or her ordinary legal rights, interests and privileges or for the prevention of legal wrongs or injuries to him or her. The impugned order does not appear to me to violate or threaten to violate any right, interest or privilege of the petitioner, it does not also cause or threaten to cause any wrong or injury to her. She cannot accordingly invoke the aid of the Court under Article 226. No doubt the aforesaid respondents killed her husband; she was also a prosecution witness to the murder case. But these two circumstances do not lend her requisite interest to apply under Article 226 for the quashing of the impugned order.

4. Further, I also entertain grave doubts whether the Court ought to issue at all a writ order or direction for indirectly devitalising an order which saves a man from the gallows. It is difficult to believe that those who enacted Article 226, had this object in mind. The petitioner would derive no legal benefit from the quashing of the impugned order; her anger alone may be satiated. But a writ, order or direction may not issue to satisfy sentiments. The court would do that at the cost of its judicial character.

5. The validity of the impugned order would depend on Arts. 72, 73, 161 and 162 of the Constitution and Sees. 402 and 402-A Cri P. C. Article 72 of the Constitution, in so far as it is material to the case, provides :

"72 (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person, convicted of any offence-

(c) In all cases where the sentence is a sentence of death.

(3) Nothing in Sub-clause (c) of Clause (1) shall affect the power to suspend, remit or commute a Sentence of death exercisable by the Governor under any law for the time being in force."

Article 73 of the Constitution, in so far as it is material reads :

"73. Subject to the provisions of this Constitution the executive power of the Union shall extend".

(a) to the matters with respect to which Parliament has power to make laws :

"Provided that the executive power referred to in Sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws."

"(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or function as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution."

Article 161 reads as follows :

"161. The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

Article 162 provides :

""162. Subject to the provisions of this Constitution the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon, the Union or authorities thereof.""

The material portion of Section 402 Cri. P. C. may now be set out.

"402 (1) The appropriate Government may without the consent of the person sentenced commute any one of the following sentences for any other mentioned after it. Death, imprisonment for life

(3) In this section the expression "appropriate Government" shall mean:

(a) In cases where the sentence is for an Offence against any law relating to a matter to which the executive power of the Union extends, the Central Government, and]

(b) in any other case the State Government". Section 402-A provides :

"402-A. The powers conferred by Sections 401 and 402 upon the State Government may in the case of sentence of death, also be exercised by the Central Government."

6. The Adaptation of Laws Order, 1950 has substituted for the words "Provincial Government"" the words "appropriate Government" in Sub-section (1) of Section 402 and has inserted Sub-section (3) in that section. The said Order also substituted for "Provincial Government" the words "State Government" and for the words "Governor General" the words "Central Government" in Section 402-A. Thus before the commencement of the Constitution the power of Commuting a sentence of death was exercisable by the Provincial Government as well as by the Governor General. These are all the provisions that have a bearing on the

question before me.

7. Sub-clause (c) of Clause (1) of Article 72 of the Constitution expressly confers the power of commuting the sentence of death upon the President. That provision however is subject to the provisions of Clause (3) of that Article Clause (3) provides that notwithstanding Sub-clause (c) of Clause (1) the Governor of a State shall continue to exercise the power of commuting the sentence of death if such power is conferred upon him by any law. It follows from Article 72 that, if there is no law which confers upon the Governor, the power of commuting a sentence" of death, it is the President who can commute a sentence of death. There is no other statutory provision except Section 402 Cri. P. C. upon which the Governor of a State may rely for the conference of a power to commute a sentence of death on him.

8. I, therefore, turn to the language of Section 402 now. Sub-section (1) of Section 402, which has already been quoted by me, confers the power of commuting a sentence of death upon the "appropriate Government". Sub-section (3) of that section defines the expression "the Appropriate Government". In cases where the sentence of death is passed in respect of an offence against any law relating to a matter to which the "executive power of the Union extends, the "appropriate Government" would be the Central Government, In those cases a sentence of death may not be commuted by the State Government. The question which immediately arises is whether the sentence of death for an offence under Schedule 302 I. P. C. is against any law relating to a matter to which the executive power of the Union extends. If the question is answered in the affirmative, the Central Government alone would be competent to commute the sentence of death imposed on the second and third respondents. If the answer is in the negative, then undoubtedly the State Government would have the power to commute the sentence of death imposed on them now, the expression, "any law relating to a matter to which the executive power of the Union extends" is not defined in the Cri. P. C.

The expression, I think, has been borrowed from Clause (1) of Article 73 of the Constitution. Sub-clause (a) of Clause (1) of that Article provides that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Clause (2) of Article 246 of the Constitution provides that Parliament and the Legislature of any State shall both have power to make laws with respect to any of the matters enumerated in list III of Sec, VII, which is also called the Concurrent list. Thus If view of Sub-clause (a) of Clause (1) of Article 73 the executive power of the Union shall extend to the matters enumerated" in the. Concurrent list. One of the matters referred to in item No. 1 of the Concurrent list is "criminal law, including all matters included in the I. P. C. at the commencement of this Constitution"". The executive power of the Union shall therefore extend to the offence made penal by Section 302 I. P. C.

If one confines oneself to Sub-clause (a) of Clause (1) of Article 73, it would then appear that the president and not the Governor could commute the sentence of

death imposed on the second and third respondents in the present case, because they were sentenced to death for an offence u/s 302, But one must also consider the proviso to Article 73 The burden of that proviso is that the executive power of the Union does not save as expressly provided in the Constitution or in any law made by the Parliament extend to matters with respect to which the Legislature of a State has also the power to make laws. To the same effect is Article 162. According to Clause (2) of Article 246 the Parliament and the Legislature of a State both have power to make laws in respect of the matters specified in the Concurrent list. The Legislature of Uttar Pradesh is therefore entitled to make a law in respect of the offence u/s 302. Neither there is any express provision in the Constitution nor has any law of Parliament been shown to me which may be said to be inconsistent with the proviso, Sub-clause (c) of Clause (1) of Article 72 of the Constitution may have been an express provision to the contrary in the absence of Clause (3). A combined reading of the provisions set out above would show that the State Government continues to enjoy the power of commuting a sentence of death. The expression "State Government¹ means the Governor under the Indian General Clauses Act, : Accordingly u/s 402 Cri. P. C. the Governor can commute a sentence of death. This power is kept intact by Clause (3) of Article 72. I am therefore " of the view that the impugned order is not in valid.

9. In view of the foregoing discussion, I dismiss the petition.