

(1990) 08 MAD CK 0042

In the Madras High Court

Case No : Criminal Miscellaneous Petns. No's. 533 and 3313 of 1987

Ramamoorthy alias Vannia Adikalar

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-08-1990

Acts Referred:

Constitution of India, 1950 — Article 13, 14, 141, 144, 19
Criminal Procedure Code, 1973 (CrPC) — Section 173
Penal Code, 1860 (IPC) — Section 309

Citation : (1992) CriLJ 2074

Hon'ble Judges : T.S. Arunachalam, J

Bench : Single Bench

Advocate : V. Selvaraj for M/s.R.N. Amarnath and Julian, for the Appellant;
Hamid Sulthan, Govt. Advocate (Crl. Side), for the Respondent

Judgement

1. Both these petitions are disposed of together since a common question has been raised.

2. Crl. M.P. No. 533 of 1987 :- The petitioner is the sole accused in C.C. No. 260 of 1986 pending on the file of the Judicial Magistrate

(erstwhile Judicial II Class Magistrate), Ambur. The respondent, who is the Sub-Inspector of Police, Law and Order, Ambur, after investigation in

Crime No. 706 of 1986, filed the final report before the trial Magistrate, alleging that the petitioner had committed an offence punishable under S.

309, I.P.C. The prosecution case is that at about 3 p.m. on 8-12-1986, the petitioner commenced a fast-unto-death before the Ambur Town

Police, demanding that the Inspector of Police, Ambur Town, and the District Collector, should be suspended and one Subramani of Kamma

Krishnapalli village, was had been detained under the Tamil Nadu Act 14 of 1982, must be set at liberty. The Sub-Inspector of Police arrested the

petitioner at 5.30 p.m. on 10-12-1986, after Dr. Sekar of the Ambur Government Hospital examined him. The petitioner was given treatment in

the hospital, which he did not refuse and ultimately the respondent has chosen to prosecute the petitioner, for attempting to commit suicide. The

final report is dated 19-12-1986 in respect of the incident stated to have occurred between 8-12-1986 and 10-12-1986. It is also the prosecution

case that a placard was kept at the place of fasting and pamphlets were also distributed.

3. CrI. M.P. No. 3313 of 1987 :- The petitioners are the accused in C.C. No. 2 of 1987, pending on the file of the Judicial Magistrate (erstwhile

Judicial II Class Magistrate), Ambur. The charge against them is under S. 309, I.P.C., as in the other case. The facts are also similar, except that

there was neither medical examination of the petitioners nor treatment offered to them in the Government Hospital, Ambur. The facts show that

soon after the petitioner in CrI. M.P. No. 533 of 1987 was arrested on the evening of 10-12-1986, his followers after raising slogans in his favour

vanished from the scene. Some time later, the petitioners are stated to have assembled over again making the same demands and wanting to go on

hunger-strike till death. The petitioners were also arrested at or about 7.30 a.m. on 9-12-1986 after they were photographed, and they were then

remanded.

4. The facts stated in both petitions will show, that the object was common, though the occurrences were different.

5. Mr. V. Selvaraj, learned counsel appearing on behalf of the petitioners in each one of these petitions contended that the petitioners had no

intention to die and they had resorted to fasting to highlight their grievances and force the Government to release Subramani, who had been illegally

detained under the Tamil Nadu Act 14 of 1982, and further demanding the suspension of the District Collector and the Inspector of Police, Ambur

Town. He strenuously contended, that the mens rea required under S. 309, I.P.C. has not been made out on the entire records forwarded under

S. 173, Cr.P.C. of Court, and, on that sole ground, the pending prosecutions should not be allowed to survive. It was his next contention that S.

309, I.P.C. is ultra vires and unconstitutional and the Bombay High Court had so held in Maruti Shripati Dubal v. State of Maharashtra, 1987 CrI

LJ 743. If S. 309, I.P.C. will have to held, to be non-existent in the statute book, in view of the above decision, these prosecutions must automatically cease to exist.

6. I have heard Mr. Hamid Sultan, learned Government Advocate appearing on behalf of the respondent on both these contentions.

7. It is better to initially dispose of the second contention which relates to the vires of S. 309, I.P.C. The Bombay High Court in Maruti Shripati

Dubal v. State of Maharashtra, 1987 Cri LJ 734 held that S. 309 of the Indian Penal Code was ultra vires the Constitution, being violative of Art.

21 thereof. It was stated therein as under :

The fundamental rights enumerated in Art. 19 are only extensions of the right to life and have no meaning without it. Art. 21 spells out not only a

protection against an arbitrary deprivation of life and personal liberty but also positive rights to enable an individual to live life with human dignity.

The fundamental rights have their positive as well as negative aspects. If this is so, logically it must follow that right to live as recognised by Art. 21

will include also a right not to live or not to be forced to live. To put it positively it would include a right to die, or to terminate one's life.

There is nothing unnatural about the desire to die and hence with the right to die. Whatever the circumstances which induce a person to end or

terminate his or her life, the act of termination of life is the act of that individual. It is no less his than his act of living. The confusion between the

circumstances which impel or urge a person to end his life and the termination of life often leads one to the mistake conclusion that the desire to end

one's life itself is not natural. The unnatural cause of death must also be distinguished from the natural desire to die. The means adopted for ending

one's life may be unnatural varying from starvation. But, the desire which leads one to resort to the means is not unnatural. To take a concrete

instance it may be that were it not for torture or cruel treatment in a given case that person might not have ended his or her life. But the urge which

the individual felt to end life on account of the treatment was only natural.

The normal urge of a human being is to live and to continue to enjoy the fruits of life till nature intervenes to end it. Suicide or an attempt to commit

suicide is not a feature of a normal life. It is an incident of abnormality or of an extraordinary situation or of an uncommon trait of personality.

Abnormality and uncommonality are not unnatural merely because they are exceptional. There are various circumstances in which suicide is committed or attempted. The reaction of the community to all the situations is not uniform and varies from condemnation to acclamation depending upon the situation.

Suicide or attempt to commit it as such has never been an object of abhorrence or condemnation which would be so if life by itself was considered reverend. It is the cause of its termination or the condition in which it is terminated which has always and everywhere determined the societal attitude towards it.

S. 309, Penal Code, is vulnerable on ground of violation of Art. 14 of the Constitution.

The language of S. 309 is sweeping in its nature The want of a plausible definition and even of guidelines to distinguish the felonious from the non-felonious act itself therefore makes the provisions of S. 309 arbitrary and violative of Art. 14. Arbitrariness and equality are enemies of each other.

The equality guaranteed by Art. 14 stands further violated by the provisions of S. 309 because it treats all attempts to commit suicide by the same measure without regard to the circumstances in which the attempts are made.

There is further no situation or no experience to which suicide is the only possible reaction. Different persons react differently to different situations and experiences, depending upon their personality traits. That is why a suicidal act cannot be explained by the situation alone and all persons in the same situation and facing the same experiences cannot be painted by the same brush.

Suicide involves no damage to person or property of others. If destruction of one's property or its deliverance to others for a cause or no cause is not an offence, there is no reason why sacrifice of one's body for a cause or without a cause or for the mere deliverance of it should be regarded as an offence. Much less an attempt at doing so. One's life, one's body with all its limbs are certainly one's property and he is the sole master of it.

He should have the freedom to dispose it of as and when he desires. Even at present the relevant statutes permit donation by individual of certain parts of his body under certain conditions, thereby recognising the right of the

individual to deal with his body as he chooses.

8. A contrary view has been taken, on the constitutional validity of S. 309, I.P.C. by a Divisional Bench of the Andhra Pradesh High Court in

Chenna Jagadeeswar v. State of Andhra Pradesh (1988) Cri 357 : 1988 Cri LJ 549 wherein it was held (at pp. 557-58 of Cri LJ) :

... in a country like India, where the individual subjected to tremendous pressure, it is wise to err in the side of caution. To confer a right to destroy

one-self and to take it away from the purview of the Courts to enquire into the act would be one step down in the scene of human distress and

motivation. It may lead to several incongruities and it is not desirable to permit them. Hence S. 309, I.P.C. is valid and does not offend Arts. 19 an

21 of the Constitution of India.

However, Mr. Selvaraj would contend that once a High Court in the country had declared S. 309, I.P.C. as arbitrary and ultra vires, the effect

would erase the existence of S. 309, I.P.C. from the statute book for the whole of the country and cannot be confined within the jurisdiction of the

Bombay High Court alone. If that argument were to be accepted, one would be in a dilemma, for the Bombay High Court and the Andhra Pradesh

High Court have expressed divergent views. It appears to me that only law laid down by the Supreme Court would be binding throughout the

country and it would not be proper, reasonable or justified to hold that the provision declared by one of the High Courts in the country as ultra

vires of the Constitution must embrace the whole country, without it being tested by any other High Court. My view is sufficiently strengthened by

the observations of the Full Bench of the Delhi High Court in P.L. Mehra, etc. Vs. D.R. Khanna etc., . The learned Judges took note of the

observations of the Apex Court in Behram Khurshed Pesikaka Vs. The State of Bombay, , cited before me, by learned counsel appearing for the

petitioners. In that case, while commenting on a portion of the view of Prof. Willoughby, Mahajan, C.J. observed that, in view of Arts. 13 and 141

of the Constitution, there was no scope in India for the application of the American doctrine enunciated by Prof. Willoughby, and that it is true that

as distinguished from a High Court decision, which is effective only between the parties and as a precedent to be followed in the same High Court,

a Supreme Court decision is binding on all Courts in India, and is therefore not

only as a precedent but also as a general law of all India

application. Nevertheless, such law is Judge-made law. It is not legislation and therefore it does not directly repeal or amend the statute which is

declared void by it. The Full Bench went on to add as under :

On the contrary, the decision of a High Court is primarily one between the parties. Secondly it is a precedent which is binding on the Courts

subordinate to the said High Court. It is not a binding precedent outside the territorial limits of the said High Court. Further, such a decision can be

reversed by a larger Bench of the same High Court or by the Supreme Court. The very basis of the authority of a precedent is the principle of stare

decisis. This principle can be invoked only when the precedent has a finality and an universal application. In both these respects the decision of a

High Court is found wanting. Such a decision cannot therefore result in making the statute declared void by it to be unenforceable everywhere in

India.

In *Behram Khurshed Pesikaka Vs. The State of Bombay*, it was also observed (Para 53).

Article 141 if the Constitution declares that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. In

view of this clear enactment there is no scope in India for the application of the American doctrine enunciated by Willoughby.

The Full Bench of the Delhi High Court also observed in yet another portion of the Judgment as follows *P.L. Mehra, etc. Vs. D.R. Khanna etc.*, :

In respect of a High Court's decision, therefore, the usual rules about the decision being treated merely as a precedent to be followed in other

cases within the jurisdiction of the said High Court and the statute continuing to be law in the country must prevail. It is true that Arts. 141 and 144

of the Constitution make the law declared by the Supreme Court binding on all Courts in India and required all authorities civil and judicial in India

to act in aid of the Supreme Court. The law laid down by the Supreme Court, therefore becomes the law of the land and the same cannot be said

about the decision of a High Court which has only a territorial application. It, however, seems to me that in essence, the declaration of voidness of

a statute made by a High Court, unless it is reversed by the Supreme Court, has the same effect although the operation of the declaration may be

confined to the territorial limits of the High Court's jurisdiction. Within those territorial limits the statute has to be regarded as "still-born",

"dead" and "non-existent" and unless it is re-enacted, it will be wholly inoperative and of no legal effect.

However, learned counsel would pointedly refer to the following passage in Paragraph 53 of Behram Khurshid's case and contend that once a law

has been struck down as unconstitutional by a Court, no notice can be taken of that law by any Court and in every case, an accused person need

not start proving that the law was unconstitutional. The passage referred to reads as under :

In this country once a law has been struck down as unconstitutional law by a Court, no notice can be taken of that law by any Court, and in every

case an accused person need not start proving that the law is unconstitutional. The Court is not empowered to look at that part of the law which

has been declared as void, and therefore there is no onus resting on the accused person to prove that the law that has already been declared

unconstitutional is unconstitutional in that particular case as well. The Court has to take notice only of what the law of the land is, and convict the

accused only if he contravenes the law of the land.

I am unable to agree with this submission, for the observation of the apex Court in Paragraph 53 has to be taken as a whole. In several portions of

the said Paragraph it has been stated that Art. 141 of the Constitution declared that the law declared by the Supreme Court shall be binding on all

Courts within the territory of India. It was under those circumstances, it was observed that there was no scope for the application of the American

doctrine enunciated by Willoughby. A few words in isolation, out of context, cannot be relied upon to enure in favour of the petitioners when the

constitutional provisions as well as the observation of the Supreme Court taken as a whole, clearly portray the position contra. In view of the

aforestated reasoning, the second contention of the learned counsel for petitioners, is negatived.

9. The first contention which is based more on facts has to be now scrutinised. The petitioner in Crl. M.P. No. 533/87 had commenced his fast-

unto-death, opposite to Ambur town Police Station. The records forwarded under S. 173, Cr.P.C. to the trial Magistrate show that the petitioner

had certain demands, which necessitated his commencing the fast. The demands were that the District Collector and the Inspector of Police, Ambur town, had to be suspended and that Subramani of Kamma Krishapally had to be released from preventive detention. The fast of the petitioner commenced at 3 p.m. on 8-12-1986 and virtually ended at 5.30 p.m. on 10-12-1986 when he was arrested. The very averment made by the prosecution shows, that the fast was not really intended to last till the death of the petitioner, but would have terminated in the event of his demands having been met, by the authority, whomsoever it might be. In the event of non-compliance with the demands made, the attitude of the petitioner must indicate, the necessity or otherwise of prosecuting him for the alleged commission of an offence under S. 309, I.P.C. Soon after his arrest, the petitioner was taken before Dr. Sekar, the Medical officer attached to the Government Hospital, Ambur. The doctor found that the general condition of the petitioner was not satisfactory and therefore he was admitted as an in-patient at 7.30 p.m. and was discharged at 9.30 a.m. on 14-12-86. Without any demur, the petitioner underwent treatment in the hospital and, the time of his discharge, his health-condition was found to be in a very good state. The attitude of the petitioner in accepting medical facilities at the hospital without any protest and, after discharge, having forgotten his earlier vow to fast-unto-death, will certainly indicate that the petitioner did not have the mens rea to destroy himself. To establish the offences under S. 309, I.P.C., the prosecution must show, that the act of the accused amounted to an attempt and that the attempt was complete by doing an act towards the commission of suicide. There can be no doubt that, if a person refraining from taking bodily sustenance for the purpose of destroying his own life, being conscious of the probable consequences and having at that time sufficient mind to will be destruction of life, ingredients of S. 309, I.P.C. will be attracted. On the other hand, as in this case, if the proposed fast-unto-death had been commenced with certain demands and even before they were conceded, the petitioner chooses to get himself treated without protest, it will only indicate that there was neither sufficient mind nor will to destroy himself. If that be so, his being conscious of the probable consequences does not at all arise. Suicide has not been defined in the Penal Code and the Andhra Pradesh High Court in Chenna Jagadeeswar's case (1988 Cri LJ 549)

has extracted the comprehensive definition of suicide" by Emile Durkheim, an eminent sociologist of the 19th century, which reads as follows (at p.

556 of Cri. L.J.) :

The term suicide is applied to all cases of deaths resulting directly or indirectly from a positive or negative act of the victim himself, which he

knows will produce this result. An attempt is an act thus defined but falling short of actual death.

In our country, fasting is undertaken for several causes. It cannot be disputed that the peculiar difficulty about suicide by starvation is that it is a

long drawn out process, could be interrupted or given up at any stage. Unless there is some overt declaration by the accused of his opinion to fast-

unto-death, coupled with such conduct, to positively show that he intended to persevere to the bitter end, the provision of S. 309 I.P.C. will not

come into play. Even if there be such intention in the beginning, one may have always to make an allowance for the possibility of the change in mind

and breaking the fast before it becomes dangerous. In this case, it is fairly clear, that the petitioner abstained from taking food for approximately

three days with the object of bringing pressure to bear upon the authorities, so as to force them to remedy his grievances, and his life was never

actually in danger upto the time he broke his fast and further his subsequent conduct would categorically proclaim that he had never intended to

carry on fasting upto the point of death.

10. The Allahabad High Court in Ram Sunder Dubey Vs. State, had taken the view, I have expressed above. It looks more appropriate to hold,

that the fast-unto-death undertaken by the petitioner was more aimed at publicity with no real desire to destroy himself.

11. In CrI. M.P. No. 3313 of 1987, the case against the petitioners is weaker still, than the case projected against the petitioner in CrI. M.P. No.

533 of 1987. After the arrest of the petitioner in CrI. M.P. No. 533 of 1987, it is the prosecution case, that a group which was along with the

petitioner therein, left the scene and thereafter the petitioners in CrI. M.P. 3313 of 1987 commenced the fast-unto-death, making the very same

demands made by the petitioner in CrI. M.P. No. 533 of 1987. These petitioners were arrested even on the next morning 9-12-1986 at 7-30 a.m.

and thereafter, after being photographed, they were remanded. We do not even

have the medical evidence pointing out the state of their health.

After they were released on bail, they forgot all about their initial fast-unto-death and the purpose for which they professed to fast, and did nothing

more in that direction to continue the hunger-strike. As detailed in the earlier case the mens rea of self-destruction is totally absent. In cases of this

nature, where the real object is not to kill oneself, but aimed more at achieving certain objects, which may or may not be achieved, it will be better,

that prosecutions are not initiated, because to my mind they would only lead to sheer waste of public time and money. While so observing, I have

in my mind the observations of the Supreme Court in State of Karnataka Vs. L. Muniswamy and Others, .

12. The entire records forwarded to Court under S. 173, Cr.P.C., in both the prosecutions do not, even if they were taken to be true, as a whole,

attract the ingredients necessary to constitute an offence under S. 309, I.P.C. Even if one skilfully attempts to arrange those factual bits in a

presentable form, there is no material on record, on which any Tribunal could reasonably convict the petitioners for the offence of attempt to

commit suicide. I am satisfied, that the materials on which the prosecution proposes to rely upon, are awefully inadequate to bring home the guilt of

the petitioners. In that view, the proceedings in both the cases will have to be quashed.

13. In the result, both the petitions are allowed and the proceedings in C.C. Nos. 260/86 and 2/87 on the file of the Judicial Magistrate (erstwhile

Judicial II Class Magistrate), Ambur, are quashed.

14. Petitions allowed.