

(1994) 12 CAL CK 0003
In the Calcutta High Court
Case No : C.O. No. 19024 of 1993

Swapan Kumar Chakravorti	Vs	APPELLANT
State of West Bengal and Others		RESPONDENT

Date of Decision : 12-12-1994

Acts Referred:

Banking Regulation Act, 1949 — Section 35AD
Constitution of India, 1950 — Article 19(1), 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Indian Medical Council Act, 1956 — Section 25(1)
Penal Code, 1860 (IPC) — Section 304A, 338, 341, 419, 420

Citation : (1995) CriLJ 3090

Hon'ble Judges : Satya Brata Sinha, J

Bench : Single Bench

Advocate : Tarun Banerjee, Arun Kumar Maiti and Kaberi Sengupta Maiti, for the Appellant; Prafulla Kumar Ghosh, for the Respondent

Judgement

Satya Brata Sinha, J.—The petitioner in this application has, inter alia, prayed for the following reliefs:

(a) A writ in the nature of Mandamus may be issued commanding the Respondents or Respondent/Respondents concerned to quash and/or set aside the purported Criminal Proceeding being G.R. No. 315/84 (T.R. No. 210/87) u/s 419 of IPC pending in the Court of the learned S.D.J.M. at Barasat, North 24-Parganas and grant full and/or final registration in favour of the petitioner as a Medical Practitioner on the basis of his application for final registration which is being withheld by the West Bengal Medical Council and/or forbear from taking any step or further step pursuant to the purported criminal proceeding would cause prejudice to the petitioner in any manner whatsoever in violation of Article 21 of the Constitution of India in any manner whatsoever till the disposal of the writ application;

(b) A writ in the nature of certiorari may be issued directing the concerned Respondent/Respondents to produce before this Hon'ble Court all records

relating to the purported Criminal Proceeding so that conscionable justice may be done by quashing and/or setting aside the purported Criminal Proceeding pending against the petitioner as above after holding and/or declaring the purported proceeding as illegal arbitrary, mala fide, without jurisdiction and grossly violative of Article 21 of the Constitution of India.

2. The fact of the matter lies in a very short compass.

3. The petitioner is said to have passed the M.B.B.S. Examination from Rajsahi University, now in Bangladesh whereat he also underwent Internship training. The petitioner allegedly obtained Indian citizenship on 20th September, 1977. On 7th January, 1981 he applied for Provisional Registration before the West Bengal Medical Council in terms of the provisions of Section 25(1) of the Indian Medical Council Act, 1956. The Medical Council of India directed him to take practical training for one year in India whereafter he received an appointment letter from the Director of Health dated 14th August, 1981 asking him to do the Internship (Practical Training) for one year at Bongaon Dr. J.R. Dhar Sub-Divisional Hospital, 24-Parganas (North).

4. It is stated that the petitioner completed the said training whereafter a Provisional Registration Certificate was issued to him on 9th November, 1981 which was valid up to 17-8-1982. He thereafter applied for permanent Registration on 1-9-1982 pursuant whereof the Medical Council of India accorded permission for final Registration on 6-3- 1983. On 4-3-1984 a First Information Report was lodged against him purported to be under Sections 419/420/467/471 of the Indian Penal Code which was registered as Habra Police Station case No. 8 of 1984. On 15-8-1985 Charge Sheet was submitted against the petitioner and on 30-8-1985 Learned Sub-Divisional Judicial Magistrate, Barasat, 24-Paraganas (N) took cognizance of the offence u/s 420/511 of the Indian Penal Code ad against the petitioner. On 11-8-1988 learned Sub-Divisional Judicial Magistrate, Barasat, 24-Parganas (N) framed charges against the petitioner u/s 419 of the Indian Penal Code. Trial of the case started on 22-1-1991. According to the petitioner up to 28-5-1993 three prosecution witnesses out of total number of 12 prosecution witnesses had been examined. This writ application was filed on 28-9-1993 and the respondents despite direction has not filed any affidavit-in-opposition.

5. Mr. Tarun Banerjee, the learned counsel appearing on behalf of the petitioner, inter alia, submitted that the delay in holding the trial is violative of the petitioner's right of life and liberty as enshrined under Article 21 of the Constitution of India. It was further submitted that the charges framed as against the petitioner are vague.

6. The learned counsel contended that even the complainant was not cited as witness in the charge-sheet as he could not be examined by the Police. It was further submitted that because of long pendency of the criminal case he could not practice as a qualified Medical Practitioner for a long time and thus his right

to carry on medical profession as enshrined under Article 19(1)(g) of the Constitution of India has also been violated.

7. The learned counsel in support of his aforementioned contention relied upon a large number of decisions which are as follows:-

1. Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, .
2. Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, .
3. State of Maharashtra Vs. Champalal Punjaji Shah, .
4. Vasanta Vs. State of Maharashtra, .
5. State of Bihar Vs. Uma Shankar Ketriwal and Others, .
6. S. Guin and Others Vs. Grindlays Bank Ltd., .
7. The State Vs. Maksudan Singh and Others, .
8. Madheshwardhari Singh and Another Vs. State of Bihar, .
9. Rakesh Saxena Vs. State, .
10. Srinivas Gopal Vs. Union Territory of Arunachal Pradesh (Now State), .
11. Machander Vs. State of Hyderabad, .
12. S. Veerabadran Chettiar Vs. E.V. Ramaswami Naicker and Others, .
13. Chajoo Ram Vs. Radhey Shyam and Another, .
14. Strunk v. United States, reported in (1973) 37 Law Ed. 2d 56.
15. Hemendra Chandra Chakraborty v. State of West Bengal, reported in (1989) 2 CLT 93.
16. Mihir Kumar Ghosh Vs. State of West Bengal and Others,
17. Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., .

8. It is implicit in the broad sweep and contents of Article 21 as interpreted by the Hon"ble Supreme Court in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , that the constitution confers a fundamental right on every person not to be deprived of his life or liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that Article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair and just". Such deprivation would be violative of his fundamental right and secure his release. Now obviously the procedure prescribed by law for depriving a person of his liberty cannot be "reasonable, fair and just" unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure a reasonably quick trial cannot be regarded

as "reasonable, fair and just" and it would fall foul of Article 21. There can therefore be no doubt that speedy trial of a criminal case is mandated by the Constitution. Speedy trial is meant reasonably expeditious trial as is an integrated and essential part of the fundamental right to life and liberty enshrined in Article 21.

9. In *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, , with regard to delay in the contest of under trials, the Apex Court categorically observed : (Para 5).

"Even a delay of one year in the commencement of the trial is bad enough, howmuch worse could it be when the delay is as long as 3 or 5 or even 10 years. Speedy trial is of the essence of Criminal Justice and there can be no doubt that delay in trial by itself constitutes denial of justice. It is speedy trial which is one of the constitutionally guaranteed rights. The sixth Amendment to the constitution provides that-

In all Criminal Prosecutions, the accused shall enjoy the right to a speedy and public trial."

So also Article 3 of the European Convention of Human Rights provides that:

"Every one arrested or detained shall be entitled to trial within a reasonable time or to release pending trial".

10. In the case of *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, , it was again reiterated by the Supreme Court as under: (Para 10)

"Speedy trial is as held by us in our earlier judgement dated 26th February, 1979 an essential ingredient of "reasonable, fair and just" procedure guaranted by Article 21 and it is the Constitutional obligation of the State to device such a procedure as would ensure speedy trial of the accused".

11. The aforesaid view was reiterated by Chinnappa Reddy, J., speaking for the Court in *State of Maharashtra Vs. Champalal Punjaji Shah*, . Yet again in *Vasanta Vs. State of Maharashtra*, , it was observed as follows :- (Para 20)

"The fiat of Article 21, as explained is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies a right to a speedy trial. It implies humane conditions of detention, preventive or punitive, "procedure established by law" does not and with the pronouncement of sentence, it includes the carrying out of sentence. That is as far as we have gone so far". 12. It was observed by the Supreme Court in *Machander Vs. State of Hyderabad*, ."

"While it is incumbent on us to see that the guilty do not escape it is even more necessary to that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to these concerned with the detections of crime and entrusted with the

administration of justice, limits must be placed on the length to which they may go".

13. The Supreme Court in *State of Bihar Vs. Uma Shankar Ketriwal and Others*, , reiterated :

"It may well be that the respondents themselves were responsible in a large measure for the slow pace of the case inasmuch as quite a few orders made by the trial Magistrate were challenged in Higher Courts, but then there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage".

14. In *S. Guin and Others Vs. Grindlays Bank Ltd.*, , the Supreme Court Stated that the facts thereof may call for a somewhat pointed notice. The accused persons therein were charged u/s 341 of the IPC, read with Section 35AD of the Banking Regulation Act, 1949 for an offence allegedly committed by them on the 31st October, 1977. There was no delay in investigation and trial and the Magistrate by its judgement dated 27th June, 1978 (i.e., after merely eight months) acquitted the accused persons. An appeal against the acquittal was taken before this Court which was apparently admitted but could not come up for final hearing till six years. On the 19th December, 1984 the Court set aside the acquittal and remanded the case for retrial afresh. On appeal by the accused appellants learned Judges set aside the High Court judgement and restored the acquittal with the following unequivocal and categorical observations :- (Para 3)

"We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High Court should have directed the dropping of the proceeding in exercise of its inherent power u/s 482 Criminal Procedure Code, even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process."

It was further observed :- (Para 4)

"We are of the view that following the above principle, the High Court should have dismissed the appeal before it even if it disagreed with the view taken by the trial Court with regard to the gist of the offence punishable u/s 341, of I.P.C, having regard to the inordinate delay nearly six years that has ensued after the judgement of acquittal the nature and magnitude of the offences alleged to have been committed by the appellants and the difficulties that may have to be encountered in securing the presence of witnesses in a case of this nature nearly seven years after the incident".

15. In *Rakesh Saxena Vs. State*, , the Supreme Court quashed the proceedings on the ground that any further continuance of the prosecution after lapse of more than six years in case of the appellant who was merely a trader at the lowest rung of the hierarchy in the Foreign Exchange Division of the Bank is

uncalled for, particularly in view of the complicated nature of the offence charged.

16. Similarly in *Srinivas Gopal Vs. Union Territory of Arunachal Pradesh (Now State)*, , the Supreme Court quashed the proceedings against the appellant on the ground of delay in investigations and commencement of trial. In this case investigation commenced in November, 1977, cognizance was taken by the Court in March, 1986. These facts were held sufficient to quash the proceedings particularly when the offence charged as a minor one namely, Section 304A read with 338 of I.P.C.

17. In *S. Veerabadran Chettiar Vs. E.V. Ramaswami Naicker and Others*, , the Supreme Court refused to send back proceedings on the ground that already a period of five years has elapsed and it would not be just and proper in the circumstances of the case to continue the proceedings after such a lapse of time.

18. In *Chajoo Ram Vs. Radhey Shyam and Another*, , the Supreme Court refused to direct retrial after a period of ten years having regard to the facts and circumstances of the case.

19. In *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, , the Supreme Court observed :- (Para 41)

"It is now clear that even apart from Article 21 Courts in this country have been cognizant of undue delay in Criminal matters wherever there was inordinate delay any farther proceedings were deemed to be oppressive and unwarranted they were put to an end by making appropriate order".

In *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, , it was held that an accused's right to a prompt enquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial it was observed that the desires or convenience of the accused or other individuals are of little relevance and make no difference to the prosecutor's obligation to ensure a prompt trial. The main question considered in this case was whether the violation of the said guarantee entails dismissal of the charges.

20. It was held that dismissal of charges is the only possible remedy where a speedy trial has been denied.

21. In *Hemendra Chandra Chakraborty v. State of West Bengal*, reported in (1989) 2 Cal LT93, the learned Judge of this Court his order dated April, 13, 1989 allowed the said writ petition and quashed the First Information Report against the petition and directed the concerned lower Court to dispose of the case within a limited period.

22. In *Mihir Kumar Ghosh Vs. State of West Bengal and Others*, , a learned Single Judge of this Court allowed the said writ petition and quashed the Criminal proceedings and released the petitioner from all the charges on the ground of inordinate delay of framing of charges and concluding the trial beyond the period of seven years and more. The learned Judge also directed the employer of the

writ petitioner to release his superannuation benefit and pension, which was also withheld due to pendency of the Criminal proceedings against the petitioner.

23. There cannot be any doubt in view of the aforementioned decisions of the Apex Courts as also this Court that speedy trial is a fundamental right of a citizen. In case of this nature it was incumbent on the state to get the trial expedite.

24. In Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., , the Supreme Court upon taking into consideration its earlier decisions categorically held that High Court has the power to pass appropriate order to prevent abuse of pendency of any Court or otherwise to secure the ends of justice. In the said decision itself the Supreme Court considered a full bench decision of Patna High Court in Madheshwardhari Singh and Another Vs. State of Bihar, , wherein another earlier full bench of the same Court in The State Vs. Maksudan Singh and Others, , which has also been relied upon by the learned counsel for the petitioner and held that no outer limit can be fixed for conclusion of the trial although the decision of the full bench of the Patna High Court aforementioned was upheld on facts as it was found that the petitioner was not guilty of obstructive tactics and delay was entirely of the prosecution's doing which was prejudicial to the accused. The Supreme Court however, appears to have not agreed with the principle enunciated in the aforementioned full bench decisions of the Patna High Court that a criminal proceedings could be quashed only because a trial could not be completed within ten years. In the aforementioned decision it was held that the principles laid down are not exhaustive. It was stated :- (Para 54 of AIR).

"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 societal 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 retrial. This 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 preconviction 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 tactics". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability 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 proceedings 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 work-load of the Courts 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 ideal has been stated by C, 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 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 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 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 for 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 ineffectuates 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."

25. In *Mihir Kumar Ghosh Vs. State of West Bengal and Others*, , the Supreme Court reiterated these principles laid down in its earlier decisions and quashed a

criminal proceedings.

26. Yet recently in Santosh De Vs. Archna Guha and others, , the Supreme Court quashed proceedings pending against the accused persons for 17-18 years taking inter alia into consideration the fact that the delay in trial was not attributed to the acts of the accused and no witness has been examined by the prosecution.

27. As indicated hereinbefore, the petitioner in this application had questioned the continuance of criminal proceedings on two grounds:

(a) right of speedy trial and

(b) vagueness in the charge.

So far as the second ground is concerned, in my opinion, the same cannot be considered by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

28. So far as the ground for quashing the criminal case on the charges of the delaying trial is concerned, the same appears to have some substance, However, it appears that contrary to principles enunciated by the Supreme Court, this Court in its order dated 28th December, 1993 directed that if a prayer for adjournment is made on the next date of hearing, the concerned learned Magistrate would adjourn the same till 15th September, 1993. Yet again by an order dated 30th November, 1993 it was directed that in the event an application for adjournment is made before the concerned Magistrate, the learned Magistrate will adjourn the same till 31st January, 1994.

29. The respondents have not filed any affidavit-in-opposition. The petitioner has also not filed supplementary affidavit stating as to what transpired from January, 1984, till the date of hearing of this application. The petitioner has not produced the copy of the order sheet for the purpose of showing that he had not taken any obstructive attitude in the proceedings nor did he show that the proceedings could not be completed on prosecution's doings.

30. In this view of the matter, in my opinion, it will be in the interest of justice to direct the learned Magistrate to conclude the trial within a period of six weeks from the date of receipt of a copy of this order. If the prosecution witness do not turn up within the aforementioned period, the learned Sub-divisional Judicial Magistrate would close the prosecution case and pass a judgement on the basis of materials which have already been brought on records.

31. This order is being passed keeping in view of the fact that according to the petitioner's own showing at least three witnesses have been examined. Neither any material has been placed before this Court nor it would be advisable to Judge merit of the prosecution case on the basis of testimonies of the aforementioned three prosecution witnesses.

32. In the event, the learned Sub-Divisional Judicial Magistrate finds that the

petitioner has unnecessarily been harassed although he is not guilty of the charges levelled against on him, he may consider the disability of granting suitable compensation in his favour. Such awarding of compensation, if any, would, however, be in addition to the petitioner's right to take proper action as against the complainant.

33. It may, however, be noted in this writ application the complainant has not been impleaded as party.

34. So far as the second relief prayed for in the writ application is concerned, it may be stated that the Medical Council of India has not been impleaded as party in the writ application. The petitioner has only impleaded the Secretary, Medical Council of India, New Delhi and the Registrar, of the West Bengal Medical Council.

35. Medical Council of India is a juristic person and thus the petitioner ought to have impleaded it as a party and not its Secretary.

36. Moreover, no notice has also been directed to be issued by this. Court as against he said respondents. In absence of the said respondents, therefore the relief prayed for by the petitioner against the Medical Council of India cannot also be granted.

37. This application is, therefore, disposed of with the aforementioned directions.

38. As the State has not filed any affidavit-in-opposition, in my opinion, the petitioner is entitled to costs which is quantified at 50 G.Ms.

39. Learned counsel for the petitioner is permitted to take gist of the order and communicate the same to the Court below.