PETITIONER:
JAVED AHMED ABDUL HAMID PAWALA

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT09/11/1984

BENCH:
REDDY, O. CHINNAPPA (J)
BENCH:
REDDY, O. CHINNAPPA (J)
VENKATARAMIAH, E.S. (J)

CITATION:
1985 AIR 231 1985 SCR (2) 8
1985 SCC (1) 275 1984 SCALE (2)697
CITATOR INFO :
1985 SC1293 (*)
1986 SC 806 (*)
1988 SC1531 (4)
RF 1989 SC 142 (1)
RF 1989 SC1335 (1,3,28,30,31,33,34)
RF 1989 SC1933 (27)

ACT:
Constitution of India-Article 21-Scope of-Protection of Art. 21 can be invoked by a person awaiting execution of sentence of death for commuting death sentence into imprisonment for life if there is delay exceeding two years in the execution of sentence of death.
Practice & Procedure-A Division Bench of three Judges cannot purport to overrule decision of a Division Bench of two judges.

HEADNOTE:
The petitioner was convicted and sentenced to death by the Sessions Judge on 6. 2. 1982 . The High Court confirmed the sentence of death on 29130. 4.1982. An appeal preferred by the petitioner to this Court under Art. 136 of the Constitution was dismissed on 20. 4. 1983. The petition for review was dismissed on 12, 8. 1983. A petition for clemency was also rejected by the President of India. The petitioner filed the present writ petition under Art. 32 of the Constitution praying that in view of his tender age, his reformation in jail and the long lapse of time since the passing of the sentence of death on him the execution of the sentence of death may be stopped and the sentence may be commuted to one of imprisonment for life. On being asked by this Court, the Superintendent of the jail where the petitioner had been kept reported that so far nothing adverse to the petitioner had came to the notice of the authority.
Allowing the petition,
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HELD; In T. V. Vatheeswaran v. State of Tamil Nadu, a Division Bench of this Court consisting of one of us and R.B. Misra, J. held that making all reasonable allowance for the time necessary for appeal and consideration of reprieve, delay exceeding two years in the execution of a sentence of

death should be considered sufficient to entitle the person under sentence of death to invoke Art. 21 of the Constitution and demand the quashing of the sentence of death. Shortly thereafter in Sher Singh v. Stat of Punjab, another Division Bench of three learned Judges of this Court presided over by Chandrachud, C.J while expressing almost complete agreement with most of what had been said in Vatheeswaran's case dissented from the opinion expressed therein that a delay of two years and more was sufficient to entitle a person under sentence of death to invoke Art 21. Of the Constitution. The reason was, they said "The fixation of time limit of two years does not seem to us to accord with the

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common experience of the time normally consumed by the litigative process and the proceedings before the executive". They also said that besides delay there were also other factors to be taken into account while considering the question whether the sentence of death should be vacated. Referred Trials and Confirmations Cases are dealt with speedily by High Courts and are never kept pending longer than two or three months. It is only when they reach this Court that the delay occurs. But surely, our inability to devise a procedure to deal expeditiously with such matters of life and death can be no justification for silencing what the learned Chief Justice has himself so eloquently described as 'the voice of justice and fairplay' which demands that 'so long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. [17A-F]

T. V. Vatheeswaran v. Sate of Tamil Nadu, [1983] 2 S. C.C. 68, Furman v. State of Georgia, 408 US 238, Noel Riley v. Attorney-General, 1982 Crl. Law Review 679 and Sher Singh v. Slate of Punjab, AIR 1983 SC 465, referred to.

Whether a Division Bench of three Judges can purport to overrule the judgment of a Division Bench of two Judges merely because three is larger than two. The Court sits in Divisions of two and three Judges for the sake of convenience and it may be in-appropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of two Judges. Vide Young v. Bristol Aeroplane Co. Ltd. It may be otherwise where a Full Bench or a Constitution Bench does so. [17G-H; 18A]

Young v. Bristol Aeroplane Co. Ltd., 1944 (2) All ER. 293, referred to.

In the instant case, an over all view of all the circumstances appears to us to entitle the petitioner to invoke the protection of Art. 21 of the Constitution. We accordingly quash the sentence of death and substitute in its place the sentence of imprisonment for life. [l8B]

JUDGMENT:

ORIGINAL JURlSDICTION: Writ Petition (Criminal) No. 972 of 1984.

(Under article 32 of the Constitution of India)

Mrs. K. Hingorani and Mrs Rekha Pandey for the Petitioner.

M. N. Shroff for the Respondent.

The Judgment of the Court was delivered by

CHINNAPPA REDDY, J. To be or not to be", is the question which Javed Ahmed Abdul Hamid Pawala has posed us. In connection with certain cruel and multiple murders the

petitioner was convicted and sentenced to death by the Learned Sessions H
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Judge of Thane, on 6. 2. 1982. The High Court of Maharashtra confirmed the sentence of death on 29/3()-4-1982. An appeal preferred by the petitioner to this Court under Art 136 of the Constitution was dismissed by us on 20. 4. 1983. The petition for review was dismissed on 12. 8. 1983. A petition for clemency was also rejected by the President of India The Petitioner has filed the present writ petition under Art. 32 of the Constitution praying that in view of his tender age, his reformation in jail and the long lapse of time since the passing of the sentence of death on him, the execution of the sentence of death may he stopped and the sentence may be commuted to one of imprisonment for life. In his petition he has frankly confessed to the dastardly crimes committed by him. He has stated that he now releases the enormity of what he has done and wants to atone and make good the injury inflicted upon society by him by striving to serve humanity if given a chance to do so. Moved by the apparent ring of sincerity in the sentiments expressed by the petitioner in his petition, one of us (E. S. Venkataramiah, J.) admitted the petition and later it has been directed by the Court that the petition should be heard by a Bench consisting of the two of us. On 14. 9. 1984 we called for a report from the Superintendent, Yeravada Central Prison, Pune to report about the conduct and behavior of the prisoner during the period of his incarceration. The report of the Superintendent Central Jail is to the effect that so far nothing adverse to the petitioner has came to the notice of the authority. The question therefore is what is to be done in the circumstances ? The petitioner is an young man aged about 22 years. He appears to be genuinely repentant and he now desires to atone for the grievous wrong that has been done by him. The repentance and the desire appear to be sincere as far as we are able to judge. The Jail authority has no adverse comment to make against his conduct. The sentence of death has now been hanging over his head for two years and nine months.

In T.V. Vatheeswaran v. State of Tamil Nadu(l), a Division Bench of this court consisting of one of us and R.B. Misra, J. considered at length the question whether delay in the education of the sentence of death was sufficient to entitle the person under the sentence of death to invoke Art. 21 of the Constitution. In
(1) [1983] 2 S.C.C. 68.
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opining that a delay exceeding two years would so entitle the prisoner, we first observed :-

> "First, let us get rid of the cob-webs of prejudice. Sure, the murders were wicked and diabolic. The appellant and his friend showed no mercy to their victims. Why should any mercy be shown to them ? But, gently, we must remind ourselves it is not Shylock's pound of flesh that we seek, nor a chilling of the human spirit. It is justice to the killer too and not justice untempered by mercy that we dispense. Of course, we cannot refuse to pass the sentence of death where the circumstances cry for it. But, the question is whether in a case where after the sentence of death is given, the accused person is made to undergo inhuman and degrading punishment or where the execution of the sentence is endlessly delayed and the accused is made to suffer the most excruciating agony and anguish, is it not open to a court of appeal or a court exercising

writ jurisdiction, in an appropriate proceeding to take note of the circumstance when it is brought to its notice and give relief where necessary ?

After referring to Ediga Anamma, Lalla Singh, Bhagwan Bux Singh, Sadhu Singh and Sahai, we proceeded to quota Justice Brennan's observation in Furman v.State of Georgia(l), where he had said:

"The prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." F

We then referred to the minority opinion of Lord Scarman and Lord Brightman in Noel Riley v. Attorney-General(2)7 where they had said:-

"It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that

(1) 408 US 238.
(2) [1982] Crl. Law Review 679.

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prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in Anderson case, it is cruel and has dehumanising effects. Sentence of death is one thing; sentence of death followed by lengthy imprisonment prior to execution is another.

It is of course true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In a truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay in the circumstances of these five cases. We need not rehearse the facts, which are not in dispute. We do not doubt that the appellants have proved that they have been subjected to a cruel and dehumanising experience

Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is, of course, for the applicant or constitutional protection to show that the delay was inordinate, arose from no act of his, and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading Such a case has been established in our view, by these appellants."

We added,

"While we entirely agree with Lord Scarman and Lord Brightman about the dehumanising effect of pro longed delay after the sentence of death, we enter a little caveat, but only that we may go further. We think that the cause of the delay is immaterial when the sentence

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is death. Be the cause for the delay, the time necessary A for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay."

Thereafter we proceeded to consider the implications of Art. 21 in the light of Menaka Gandhi, Sunil, Batra, Bachan Singh, Bhuvan Mohan Patnaik, Pandurang Sangzgiri, Champalal Plmjaji Shah, Hussainara Khatoon and M.H. Hoskot.We then said:-

"So, what do we have now ? Articles 14,19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out Fundamental Rights. A person under sentence of death may also claim Fundamental Rights. 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 end with the pronouncement of sentence, it includes the carrying out of sentence. That is as far as we have gone so far. It seems to us but a short step, but a step in the right direction, to hold that prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death. In the United State of America where the right to a speedy trial is a Constitutionally guaranteed right, the denial of a speedy trial has been held to entitle an accused person to the dismissal of the indictment or the vacation of the sentence (vide Strunk v. United States [1973] 37 L Ed. 2d S6). Analogy of American law is not permissible, but interpreting our Constitution sui generis, as we are bound to do, we find no impediment in holding that the dehumanising factor of prolonged delay in the execution of a sentence of death has the Constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the Constitutional guarantee that no

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person shall be deprived of his life or personal liberty except - according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death."

We proceeded to consider what delay could be considered prolonged enough to attract the Constitutional protection of Art. 21, We thought that making all responsible allowance for the time necessary for appeal and consideration of reprieve, delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Art. 21 of the Constitution and demand the quashing of the sentence of death.

Very shortly after the Court had pronounced its judgment, in Vatheeswaran's case, in Sher Singll v. State of Punjab1) another Divison Bench of three learned Judges of this Court presided over by Chandrachud, C.J. while expressing almost complete agreement with most of what had been said in Vatheeswaran's case dissented from the opinion expressed by therein that a delay of two years and more was

sufficient to entitle a person under sentence of death to invoke Art. 21 of the Constitution. The learned Judges first observed:-

"But we must hasten to add that this Court has not taken the narrow view that the jurisdiction to interfere with a death sentence can be exercised only in an appeal against the judgment of conviction and sentence. The question which arises in such appeals is whether the extreme penalty provided by law is called for in the circumstances of the case. The question which arises in proceedings such as P those before us is whether, even if the death sentence was the only appropriate sentence to impose in the case and was therefore imposed, it will be harsh and unjust to execute that sentence by reason of supervening events. In very recent times, the sentence of death has been commuted to life imprisonment by this Court in quite a few cases for the reason, inter alia, that the prisoner was under the specter of the sentence of death for an unduly LONG time after the final confirmation of that sentence, consequent upon the dismissal of the prisoner's Special Leave Petition or Appeal by this Court Tradi-

(1) AIR 1983 SC 46S.

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tionally, subsequent events are taken into account in the area of civil law. There is no reason why they should not receive due consideration in other jurisdictions, particularly when their relevance on the implementation or execution of judicial verdicts is undeniable. Undoubtedly, principles analogous to resjudicata govern all judicial proceedings but when new SITUATIONS emerge, particularly factual, after a verdict has assumed finality in the course of the hierarchical process, advertence to those situations is not barred on the ground that a final decision has been rendered already. That final decision is not a decision on new facts. Courts are never powerless to do justice, that is say, to ensure that the processes of law do not result in undue misery, suffering or hardship That is why, even after the final seal of approval is placed upon a sentence of death, this Court has exercised its power to direct, ex debito justitiae, that though the sentence was justified when passed, its execution, in the circumstances of the case, is not justified by reason of the unduly long time which has elapsed since the confirmation of that sentence by this Court. Some of us dealing with this case have been parties to decisions directing in appropriate cases, that the death sentence shall not be executed by reason of supervening circumstances."

They then proceeded to agree with our agreement with the view expressed by Lord Scarman and Lord Brightman. They said:-

"Like our learned Brethren, we too consider that the . view expressed in this behalf by Lord Scarman and Lord Brightman in the Privy Council decision of Neel Riley 1982 Crl. Law Review 679 is. with respect, correct. The majority in that case did not pronounce upon this matter The minority expressed the opinion that the jurisprudence of the civilized world has recognized and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. Sentence of death is one thing; sentence of death followed by lengthy

imprisonment prior to execution is another. The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional

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and physical integrity and health of the individual can render A the decision to execute the sentence of death an inhuman and degrading punishment in the circumstances of a given case."

After referring to Robert Johnson's 'Condemned to die, life under sentence of death', they observed:

"A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this Court for examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Art. 21 of the Constitution and to that extent, we express our broad and respectful agreement with our learned Brethren in their visualisation of the meaning of that article. The horizons of Art. 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Art. 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable. It is well established that a prisoner cannot be tortured or subjected to unfair or inhuman treatment (See Prabhnkar Pandurang Sanzgiri (AIR 1966 SC 424), Bhuvau Mohan Patniak (AIR 1974 SC 2092) and Sunil Batra (AIR 1978 SC,j,167S). It is a logical extension of the selfsame principle that the death sentence, even if justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair. Art. 21 stands like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fairplay. That voice can never be silenced on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence,"

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After saying so much, the learned Judges found it impossible A to agree, with that part of the judgment in T.V. Vatheesawaran v. State of Tamil Nadu (supra), where it had been said that delay exceeding two years in executing a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Att. 21 and demand the quashing of the sentence of death. The reason was, they said "The fixation of time limit of two years does not seem to us to accord with the common experience of the time normally consumed by the litigative process and the proceedings before the executive." They also said that besides delay there were also other factors to be taken into account while considering the question whether the sentence of death should be vacated. The observations of the learned Judges purporting to dissent from the view taken in T'atheeswaral1's case were made, curiously enough, while admitting ,SherSingh's petition on other grounds. It was

perhaps thought desirable and necessary to express firmly their views on one of the questions raised which they were not accepting while admitting the petition on other questions lest further damage be done to the cause of justice by following the wrong rule thought to have been laid down in Vatheeswaran's case and unworthy people saved from the gallows. We do not wish to dwell any further on this aspect of the matter except to point out that as far as we know Referred Trials and Confirmation Cases are 1 dealt with speedily by High Courts and are never kept pending longer than two or three months. It is only when they reach this Court that the delay occurs. But surely, our inability to devise a procedure to deal expeditiously with such matters of life and death can be no justification for silencing what the learned Chief Justice has himself so eloquently described as 'the voice of justice and fairplay' which demands that 'so long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution' a meaning which will prevent human suffering and degradation. 'Tlle case also raises the further question whether a Division Bench of three Judges can purport to over rule the JUDGMENT of a Division Bench of two judges merely because three is larger than two. The Court sits in Divisions of two and three judges for the sake of convenience and it may be in-appropriate for a Division Bench of three judges to purport to overrule the decision of a Division Bench of two judges. Vide Young v. Bristol Aeroplane Co. Ltd.(l) It may be otherwise where a full Bench or a Constitution Bench does so.

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We do not however desire to embark upon this question in this case. In the present case we are satisfied that an over all view of all the circumstances appears to us to entitle the petitioner to invoke the protection of Art. 21 of the Constitution. We accordingly quash the sentence of death and substitute in its place the sentence of imprisonment for life.

H.S.K. Petition allowed.

(5) 1944 (2) ALL ER. 293

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