

A VIKRAM SINGH @ VICKY & ANR.
v.
UNION OF INDIA & ORS.
(Criminal Appeal No. 824 of 2013)

B JULY 2, 2013

[T.S. THAKUR AND SUDHANSU JYOTI
MUKHOPADHAYA, JJ.]

C *Penal Code, 1860 – s.364A – Constitutional validity of*
– *Challenged by appellants-convicts on the ground that*
inasmuch as the same prescribes death sentence for a case
of kidnapping for ransom, the same is so harsh as to make it
unreasonable and unfair hence violative of Article 21 of the
D *Constitution – Matter referred to larger Bench in view of the*
peculiar fact situation in which the instant case arose and the
grounds on which provisions of s.364A were assailed –
Constitution of India, 1950 – Article 21.

E The appellants were sentenced to death by hanging
both under Section 302 and 364A of IPC by the trial Court,
which was upheld by the High Court and finally affirmed
by the Supreme Court.

F Seeking review of their conviction on the ground that
Section 364A IPC is itself unconstitutional being violative
of Articles 14 and 21 of the Constitution, the appellants
filed writ petition before the High Court praying for
striking down Section 364A of IPC and for an order
restraining the execution of the death warrant against
G them. Re-opening of the case of the appellants and
commutation of the death sentence to imprisonment for
life were also prayed for in the said petition. The High
Court dismissed the writ petition which was challenged
in the instant appeals.

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The constitutional validity of Section 364A of IPC was challenged on the ground that inasmuch as the same prescribes death sentence for a case of kidnapping for ransom, the same is so harsh as to make it unreasonable and unfair hence violative of Article 21 of the Constitution of India.

Referring the matter to larger Bench, the Court

HELD: 1. Constitutional validity of any Parliamentary or State legislation is judged on the twin tests of legislative competence of the legislature that enacts the law or on the ground that the legislative enactment violates a fundamental right guaranteed to the citizen. There is no other ground on which the constitutional validity of an enactment may be determined by a Court of law competent to do so. [Para 11] [1098-C-D]

2. In the instant case, the appellants were convicted both under Sections 302 and 364A of the IPC and sentenced to death for each one of the two offences. When asked whether any juristic exercise aimed at determining the constitutional validity of Section 364A will be of any assistance to the appellants who may despite an acquittal under Section 364A remain condemned to death for the capital offence of murder under Section 302 IPC, it was argued on behalf of the appellants that if Section 364A IPC were to be declared *ultra vires* of the Constitution, the sentence awarded to the appellants under Section 302 may call for a fresh look, having regard to the fact that the Courts had while awarding death sentence to the appellants had taken them to be guilty under both the provisions, which would no longer hold good, if Section 364A were to be held *ultra vires*. There is no need to express any final opinion on this aspect at this stage. For the present, there is a last ditch attempt by the appellants to avoid the extreme penalty that the law provides for even the most heinous crime punishable

A under the Code. The plea may indeed be in complete
desperation but one can well understand such
desperation among those who are waiting at the gallows
for the hangman to put the noose around their neck.
Dismissal of this appeal is bound to take them a step
B closer to the end. That apart the questions raised may
require an authoritative answer, by a Bench of three
Judges having regard to the fact that the death sentence
awarded to the appellants has been affirmed by a Bench
of co-ordinate jurisdiction. In view of the peculiar fact
C situation in which the case arises and the grounds on
which the provisions of Section 364A are assailed, this
case ought to go before a larger Bench of three Judges
for hearing and disposal. [Para 12 and 13] [1098-F-H;
1099-A-B, C-F]

D CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 824 of 2013.

From the Judgment and Order dated 03.10.2012 of the
High Court of Punjab & Haryana at Chandigarh in CWP No.
E 18956 of 2012 (O&M).

Sidharth Luthra, ASG, Dinesh Kumar Garg, B.S. Billowria,
Abhishek Garg, Ranjana Narayan, T.A. Khan, Rajat Mathur,
Pranay Agrawala, B. Krishna Prasad, Kuldip Singh, Mohit
Mudgil, Abhishek Singh, Mohit D. Ram for the appearing
F parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. For a person found guilty of a capital offence and
G sentenced to death even by the highest Court of the land the
options for reprieve are very limited. Once the conviction of the
accused and the sentence awarded to him attains finality the
prospects of judicial intervention recede further. Undeterred by
these limitations the appellants who have been sentenced to
H death by hanging both under Section 302 and 364A of the

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Indian Penal Code have taken a chance with a petition seeking review of their conviction not because anything grossly erroneous is pointed out about the conclusions arrived at by the Courts that dealt with their cases but on the ground that Section 364A of the IPC which makes kidnapping for ransom an offence is itself unconstitutional being violative of Articles 14 and 21 of the Constitution. Writ Petition (Crl.) D No. 15177 of 2012 was first filed in this Court by the petitioner, Vikram Singh @ Vicky for a declaration that Section 364A inserted in the Indian Penal Code by Act 42 of 1993 w.e.f. 22nd May 1993 is *ultra vires* the Constitution to the extent the same prescribes death sentence for any one proved guilty. The petitioner prayed for a further writ quashing the death sentence awarded to him by the trial Court, upheld by the High Court and finally affirmed by this Court in Criminal Appeals No.1396-97 of 2008. A mandamus directing commutation of the sentence awarded to the petitioners to imprisonment for life was also prayed for.

3. The writ petition aforementioned was eventually withdrawn with liberty to the petitioners to file a writ petition before the jurisdictional High Court. The Petitioners accordingly filed CWP No.18956 of 2012 before the High Court of Punjab and Haryana at Chandigarh once again praying for striking down Section 364A of IPC and for an order restraining the execution of the death warrant against them. Re-opening of the case of the petitioners and commutation of the death sentence to imprisonment for life were also prayed for in the said petition. A Division Bench of the High Court of Punjab and Haryana has, upon consideration, dismissed the petition by its judgment and order dated 3rd October 2012 which is impugned in these appeals.

4. The High Court has taken the view that the question whether Section 364A of IPC was attracted and whether a person found guilty of an offence punishable under that provision could be sentenced to death without applying the test of 'rarest of rare cases' was not only available to the petitioners

A as an argument before this Court in the appeal filed by them but that such a plea had been raised but lost by them. The High Court while saying so relied upon the following passage from the judgment of this Court in the appeal filed by the appellants against their conviction:

B *“... A plain reading of the Objects and Reasons which led to the amendment shows the concern of Parliament in dealing with kidnapping for ransom a crime which called for a deterrent punishment, even in a case where the kidnapping had not resulted in the death of the victim.*

C *The statistics further reveal that kidnapping for ransom had become a lucrative and thriving industry all over the country which must be dealt with, in the harshest possible manner and an obligation rests on Courts as well. Courts to lend a helping hand in that direction. In the case before us, we find that not only was Abhi Verma kidnapped for ransom which act would by itself attract the death penalty but he was murdered in the process. It is relevant that even before the aforesaid amendments, this Court in Henry’s case (supra) observed that death sentence could be awarded even in a case of kidnapping and murder based on circumstantial evidence..”*

(emphasis supplied)

F 5. The High Court also held that the question of quantum of sentence awarded to the petitioners had also been examined by this Court in the following paragraph of the judgment delivered in the criminal appeal:

G *“24. Some of the judgments aforesaid refer to the ongoing debate as to the validity and propriety of the death sentence in a modern society. There are the moralists who say that as God has given life, he alone has the right to take it away and this privilege cannot be usurped by any human being. There are others who believe that the death sentence cannot be taken as a*

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retributive or deterrent factor as the statistics show that the possibility of a death sentence has never acted as a deterrent to serious crime. The theory which is widely accepted in India, however, is that as the death penalty is on the statute book it has to be awarded provided the circumstances justify it. The broad principle has been laid in Bachan Singh's case (supra) as the "rarest of the rare cases". Bachan Singh case has been followed by a series of judgments of this Court delineating and setting out as to the kind of matters that would fall within this category. In Machhi Singh & Ors. Vs. State of Punjab 1983 (3) SCC 470 this Court gave an indication as to what could constitute this category..."

6. The High Court on the above reasoning concluded that this Court had considered the nature of the offence and its gravity and come to the conclusion that the same deserved the maximum punishment prescribed for both the offences proved against them. The High Court held that the plea now sought to be raised by the petitioners in the writ petition to the effect that Section 364A of IPC was attracted only when the offence is committed against Government or a foreign country etc. or that no such offence was made out in case of the petitioners, had not found favour with this Court.

7. Having said that, the High court proceeded to examine the plea raised by the petitioners on its merit, referred to the historical background in which the provisions of Section 364A were added to the statute book and held that Section 364A of IPC even in the form in which it was initially introduced made kidnapping by any person in the circumstances indicated in the said provision an offence no matter at the time of initial insertion of Section 364A, India was not committed to the International Convention Against the Taking of Hostages, 1979 to which it became a party only on 7th September 1994. It was only then that Section 364A was amended to incorporate the expression "...any foreign State or international inter-governmental organisation or any other person..." to honour the commitment

A made in terms of the said Convention. The High Court accordingly repelled the argument that Section 364A was intended only to take care of situations where kidnapping was meant to coerce the Government or any international organisation to do or not to do a particular act including the demand for payment of ransom. The writ petition was dismissed on the ground that there was no substance in the contentions urged in support thereof even on merits. The present appeals by special leave assail the correctness of the view taken by the High Court.

C 8. Appearing for the appellants, Mr. D.K. Garg strenuously argued that the High Court had fallen in error in holding the provisions of Section 364A to be constitutionally valid and also that the question whether the petitioners could be found guilty under Section 364A and sentenced to death has been examined by this Court in the appeals filed by the appellants against their conviction and sentence. Elaborating the submissions, Mr. Garg argued that the provisions of Article 21 of the Constitution guaranteed to the petitioners a fundamental right to life and liberty and protected them against deprivation of those rights otherwise than in accordance with the procedure prescribed by law. He urged that in order to satisfy the requirement of Article 21 of the Constitution it was necessary not only that the deprivation was in accordance with a validly enacted law but also that such law was just and fair. Deprivation of life and liberty on the basis of a law that was either unjust or unfair would, according to Mr. Garg, offend the constitutional guarantee contained in Article 21. He contended that inasmuch as Section 364A of IPC made even a first offender liable to be punished with death, it was much too harsh to be considered fair and reasonable.

H 9. It was further argued that the provisions of Section 364A are *ultra vires* also because a simple kidnapping for ransom in which the victim is released without any harm to him/her with or without payment of the ransom demanded for his/her release,

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is also on a plain reading of Section 364A, punishable with death without there being any guidelines in Section 364A for the Courts to follow while determining the quantum of punishment to be awarded in a given case.

10. Mr. Siddharth Luthra, learned ASG, appearing for the respondents *per contra* argued that Section 364A of IPC was a validly enacted piece of legislation. In the absence of any challenge to the legislative competence of the Parliament to enact the said provision, Section 364A of the Code could not be assailed for want of legislative competence. As regards the question of fairness of the law, the argument that Section 364A was unfair and hence violative of Article 21 of the Constitution, it was contended that it was within the legislative competence of the Parliament to provide remedies and prescribe punishment for different offences depending upon the nature and gravity of such offences and the societal expectation for weeding out ills that afflict or jeopardise the lives of the citizens and the security and safety of the vulnerable sections of the society especially children who are prone to kidnapping for ransom and being brutally done to death if their parents are unable to pay the ransom amount. Mr. Luthra referred to 42nd Law Commission Report, The Criminal Law (Amendment) Bill 1992 introduced in the Rajya Sabha as also the Statement of Objects and Reasons of the Bill for introduction of Section 364A and contended that kidnapping innocent persons for ransom had become rampant and called for strong legislative measures to root out the malady by providing heavy penalties for those indulging in such nefarious and barbaric acts. He also referred to the International Convention and the Report of the Committee of Home Affairs in support of his submission that Section 364A was amended in the year 1995 to fulfil India's commitment towards the international convention signed by it in the year 1994 by providing for severe penalty for those engaged in acts of violence and terrorism against the State, any foreign country or any international organisation. The provisions of Section 364A were, therefore, not only intended to deal with simple

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A cases of kidnapping for ransom but also cases in which
 terrorists and other extremist organisations resort to kidnapping
 for ransom or to such other acts only to coerce the Government
 to do or not to do something. Judged in the historical
 perspective in which the Law Commission had recommended
 B enactment of the law, and the salutary purpose which it is aimed
 at achieving the provisions of Section 364A were neither unfair
 nor unreasonable, argued Mr. Luthra.

C 11. Constitutional validity of any Parliamentary or State
 legislation is judged on the twin tests of legislative competence
 of the legislature that enacts the law or on the ground that the
 legislative enactment violates a fundamental right guaranteed
 to the citizen. There is no other ground on which the
 constitutional validity of an enactment may be determined by a
 Court of law competent to do so. Mr. Luthra rightly argued that
 D the challenge to the provisions of Section 364A of the IPC is
 not founded on the plea that the Parliament was not competent
 to enact such a law. Mr. Garg also fairly conceded that the
 petitioners have not challenged the provisions on the ground
 that the Parliament was not competent to enact the same. His
 E challenge to the constitutional validity rests entirely on the
 ground that in as much as the same prescribes death sentence
 for a case of kidnapping for ransom the same is so harsh as
 to make it unreasonable and unfair hence violative of Article
 21 of the Constitution of India.

F 12. The petitioners have been, as noticed earlier, convicted
 both under Sections 302 and 364A of the IPC and sentenced
 to death for each one of the two offences. We, therefore, asked
 Mr. Garg whether any juristic exercise aimed at determining the
 constitutional validity of Section 364A will be of any assistance
 G to the petitioners who may despite an acquittal under Section
 364A remain condemned to death for the capital offence of
 murder under Section 302 IPC. Mr. Garg, however, argued that
 if Section 364A, of the Indian Penal Code were to be declared
 H *ultra vires* of the Constitution, the sentence awarded to the

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petitioners under Section 302 may call for a fresh look, having regard to the fact that the Courts had while awarding death sentence to the petitioners had taken them to be guilty under both the provisions, which would no longer hold good, if Section 364A were to be held *ultra vires*.

13. We do not wish to express any final opinion on this aspect at this stage. The question whether a pronouncement as to the vires of Section 364A will have any impact on the sentence awarded to the petitioners would arise only if Section 364A is held to be constitutionally invalid. It is only then that the Court may go into the question of the impact of such a pronouncement. For the present, what we have before us is a last ditch attempt by the petitioners to avoid the extreme penalty that the law provides for even the most heinous crime punishable under the code. The plea may indeed be in complete desperation but one can well understand such desperation among those who are waiting at the gallows for the hangman to put the noose around their neck. Dismissal of this appeal is bound to take them a step closer to the end. That apart the questions raised may require an authoritative answer, by a Bench of three Judges having regard to the fact that the death sentence awarded to the petitioners has been affirmed by a Bench of co-ordinate jurisdiction. The peculiar fact situation in which the case arises and the grounds on which the provisions of Section 364A are assailed persuade us to the view that this case ought to go before a larger Bench of three Judges for hearing and disposal.

14. We, accordingly, refer this matter to a Bench of three Judges for hearing and disposal. The appellants shall, furnish additional set of papers within four weeks, failing which the Registry shall take steps to have additional copies prepared for the Court. Since it is a death sentence case, we permit learned counsel for the parties to mention the matter before the larger Bench for an early hearing.

B.B.B.

Matter referred to Larger Bench.