BABU AND 3 OTHERS

v.

STATE OF UTTAR PRADESH

January 19, 1965

[K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH, J. R. MUDHOLKAR AND S. M. SIKRI JJ.]

Division Bench—Difference between two judges referred to a third Judge—Third Judge how far free to come to his own conclusion—Code of Criminal Procedure, (Act 5 of 1898), s. 429.

Certificate of fitness—High Court when should grant certificate in criminal cases—Constitution of India Art. 134(1)(c).

The appellants were convicted by the Sessions Judge under s. 302 read with s. 34 of the Indian Penal Code. Two of them were sentenced to death and two to imprisonment for life. Their appeal before the High Court was heard by a Division Bench of two judges, one of whom was for allowing it, the other for dismissing it. The third Judge to whom it was referred dismissed the appeal. The appellants applied for a certificate of fitness to appeal to the Supreme Court. The certificate was granted mainly on the ground that the third Judge who heard the appeal had omitted to discuss at length the question of the genuineness of the first information report.

In the Supreme Court objection was taken on behalf of the State that the certificate of fitness granted by the High Court was incompetent in view of the previous dicisions of this Court in *Haripada Dey* v. *State of West Bengal & Anr.* [1956] S.C.R. 639, *Nar Singh & Anr.* v. *State of Uttar Pradesh*, [1955] 1 S.C.R. 238, *Sunder Singh* v. *State of Uttar Pradesh*, A.I.R. (1956) S.C. 411 and *Khushalrai* v. *State of Bombay*, [1958] S.C.R. 552. The appellants urged that these cases be reconsidered. A plea for the reduction of the death sentences was also made.

HELD: (i) Section 429 of the Criminal Procedure Code contemplates that it is for the third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. It was sufficient for the third Judge to have said on the question of the First Information Report that he did not consider it necessary to decide the point but if it was necessary he was in agreement with the Judge on the Division Bench who was for dismissing the appeal. There was therefore a proper decision by the third Judge and the certificate could not be based on the omission to discuss the doubts about the First Information Report. [771 F-H]

(ii) The Constitution does not contemplate a criminal jurisdiction for this court except in these cases covered by clauses (a) and (b) of Art. 134 which provide for appeals as of right. The High Court before it certifies the case must be satisfied that it involves some substantial question of law or principle. Only a case involving something more than mere appreciation of evidence is contemplated by the Constitution for the grant of a certificate. What that may be will depend on the circumstances of the case but the High Court should be slow to certify cases. The High Court should not overlook that there is a further remedy by way of special leave which may be invoked in cases where

the certificate is refused. The present certificate did not comply with the requirements of Art. 134(1)(c) as explained above. [780 C-F; 781 A] A

Case law considered.

(iii) That whenever two Judges in appeal differ on the question of sentence, death sentence should not be imposed without compelling reasons cannot be raised to the pedestal of a rule, for that would leave the sentence to the determination of one Judge to the exclusion of the other. Each case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of law should not be imposed. [781 E-F] B

Kalawati and Another v. *State of Himachal Pradesh,* [1953] S.C.R. 546 and *Pandurang, Tukia and Bhillia* v. *State of Hyderabad,* [1955] 1 S.C.R. 1083, referred to.

C

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 179 of 1964.

Appeal from the judgment and order dated August 21, 1963, of the Allahabad High Court in Criminal Appeals Nos. 2271 and 2272 of 1962.

Nur-ud-din Ahmad and *J. P. Goyal,* for the appellants. D

O. P. Rana, for the respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by certificate against the judgment of the High Court of Allahabad dated May 24, 1963 by which the conviction of and sentences passed on the four E appellants under s. 302 read with s. 34 of the Indian Penal Code were confirmed. Of the appellants, Babu Singh and Aram Singh have been sentenced to death and Gajram Singh and Ram Singh to imprisonment for life. The charge against them was that they had murdered one Babu Singh pradhan at village Behjoi on October 11, 1961. The pradhan was attacked by the appel- F lants with spears, *gandasa* and *lathi.* The spears were with Aram Singh and Ram Singh, the *gandasa* with Babu Singh and the *lathi* with Gajram Singh. The motive for the attack was said to be some former quarrels between Babu Singh pradhan and father of Babu Singh, the appellant and the action of the pradhan after his election in supporting on behalf of the *Gaon Samaj* proceed- G ings for encroachment started against the fathers of the appellants sentenced to death.

On the day of occurrence Babu Singh pradhan had gone on cycle to Behjoi to negotiate for the purchase of a Persian wheel. He had his cycle repaired by one Amrik Singh who was examined H as a court witness. He was returning to his own village Alpur situated to the North-East of Behjoi at a distance of four miles

A when he was way-laid, felled from the cycle and fatally attacked by the appellants. The report of the incident was made by his brother Sangram Singh at Behjoi Police Station at 8.30 P.M. Sangram Singh claimed to have accompanied his brother to Behjoi and to be in his company at the time of the assault. He was the principal eye-witness in the case. He gave the time of the assault
B as 6 P.M. The First Information Report also mentioned the names of Man Sukh (P.W. 9), Ved Ram (P.W. 4) and Jia Lal (P.W. 11) as eye-witnesses. In the Report one Umrao was also named but he was not examined as it was alleged that he had been won over by the defence.

C The prosecution examined 16 witnesses in support of the case. Two witnesses were examined by the court and 4 witnesses were examined for the defence. The Sessions Judge, Moradabad accepted the evidence of enmity and also of the eye-witnesses and convicting the appellants under s. 302/34, Indian Penal Code sentenced them as above. Aram Singh who had struck Babu
D Singh pradhan on the head and transfixed it with his spear from temple to temple and caused other injuries on vital organs was sentenced to death as also Babu Singh who had almost decapitated Babu Singh pradhan with *gandasa*. The other two appellants were given the lesser punishment because they had played a minor part. All accused appealed to the High Court.

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The appeal was heard in the High Court by D. S. Mathur and Gyanendra Kumar, JJ. and Mathur, J. was for dismissing the appeal while Gyanendra Kumar, J. was for allowing it. The points of difference were (a) whether the First Information Report was made on October 11, 1961 at 8.30 P.M. or much later, (b) whe-
F ther the offence took place at 6 P.M. or later when there was no light to identify the assailants and (c) whether the eye-witnesses were at all present at the scene and/or were reliable. Mathur J. concurred with all the conclusions of the Sessions Judge; Gyanendra Kumar, J. differed because he disbelieved that Sangram Singh had accompanied his brother. His reasons were that he
G need not have accompanied the pradhan and the shop-keeper with whom the brothers were said to have dealt for the purchase of the Persian wheel was not examined and Amrik Singh who repaired the cycle of the pradhan did not mention Sangram Singh. He observed that if Sangram was present at the scene he too would have been slain and the statement that he was pedalling 14 or 15
H paces behind the pradhan was not believable because cyclists generally ride abreast. He pointed out that as only one cycle was found at the spot and not the other Sangram Singh had not

gone there on cycle. He deduced this from the fact that Sangram Singh admitted to have gone on foot to Behjoi to make his report and he rejected his explanation that he did so because the cycle had no light observing that Sangram Singh could have borrowed an electric torch or some other light. He disbelieved Ved Ram because he had earlier spoken of *lathi* blows and no injuries caused by a *lathi* were detected at the postmortem examination. One of the accused (Ram Singh) had passed a decree against Ved Ram as a *Sarpanch* and this was accepted to be the probable motive for his false testimony. Man Sukh was not believed because he was a previous "history sheeter". Jia Lal, who had stated that the occurrence took place at 7 P.M., and was consequently declared hostile by the prosecution, was believed by the learned Judge who came to the conclusion that no light was available at that hour for proper identification. The learned Judge was also convinced that there was a delay in the despatch of the copy of the First Information Report, special report and the case diary, and he was of the opinion that the First Information did not accompany the requisition for postmortem examination sent to the doctor. He was finally of the view that as no independent eye-witness was examined the benefit of the doubt must be given to the accused.

The two judgments were then laid before Takru, J. who agreed with Mathur, J. in accepting the prosecution case. As a result of his decision the appeals were dismissed. On the application for certificate of fitness the two learned Judges, who had originally heard the appeal, again differed : Mathur, J. was in favour of refusing the certificate while Gyanendra Kumar, J. was for granting it. The latter stated that the main point of difference earlier was over the authenticity of the First Information Report, its time and date and Takru, J. had merely stated at the end of his order that if it was necessary for him to decide the point he would have agreed with Mathur, J. and would have accepted the First Information Report as genuine. Gyanendra Kumar, J. felt considerably aggrieved, as it appears from his order, that this matter which was fully argued before Takru, J. was not discussed by him in detail. The papers were laid before Broome, J. who agreed with Gyanendra Kumar, J. on the point that Takru J. had not gone into the question of the authenticity of the First Information Report and the genuineness of the various documents which were filed by the prosecution in support of it. He was for granting a certificate.

When this appeal came on for hearing before a Divisional Bench the State raised the contention that the certificate granted by

A the High Court was incompetent in view of the settled view of this Court in *Haripada Dey* v. *The State of West Bengal and Anr.*(1) *Nar Singh and Anr.* v. *The State of Uttar Pradesh*(2) and *Sunder Singh* v. *State of Uttar Pradesh*(3). The appellants then objected that the point involved was one of interpretation of Art. 134(1)(c) of the Constitution and it could only have been decided by a Bench
B of five Judges and the decisions above-mentioned being of Divisional Benches were without jurisdiction. The case was accordingly laid before us for disposal. Before us the same objection to the competency of the appeal was raised and it was contended on the other side that the decisions of this Court limiting the powers of the High Court to grant certificate in criminal cases under Art.
C 134(1)(c) were not correct and it is these points which require decision from us.

There seems to be some misapprehension about the manner in which the third Judge is required by law to proceed when there is a difference of opinion between two learned Judges in the High
D Court in the decision of an appeal. The provisions of s. 429, Criminal Procedure Code perhaps escaped notice in the High Court. This section provides :

> "429. Procedure where Judges of Court of Appeal are equally divided.
>
> E When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

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The section contemplates that it is for third Judge to decide on what points he shall hear arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit. In our judgment, it was sufficient for Takru J to have said on the question of the First Information Report that he did not consider it
G necessary to decide the point but if it was necessary he was in agreement with all that Mathur J had said. There was, therefore, a proper decision by Takru J and the certificate could not be based upon the omission to discuss the First Information Report and the doubts about it.

H It was contended by the State that the certificate attempted to reopen questions of fact which must be held to be decided finally

(1) [1956] S.C.R. 639. (2) [1955] 1 S.C.R. 238.
(3) A. I. R. [1956] S.C. 411.

by the High Court in concurrence with the Sessions Judge and such a certificate was incompetent in view of the decisions of this Court earlier mentioned. Reference was also made to *Khushalrao* v. *State of Bombay*(1). The appellants in reply contended that the interpretation put upon Art. 134(1)(c) in the earlier cases of this Court was too narrow and required to be reconsidered.

Article 134 provides for appeals to the Supreme Court in criminal matters. Clause (1) of this Article, which alone is material, reads :

> "134. Appellate jurisdiction of Supreme Court in regard to criminal matters.
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> (1) An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—
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> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
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> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
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> (c) certifies that the case is a fit one for appeal to the Supreme Court :
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> Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of article 145 and to such conditions as the High Court may establish or require.
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> (2) . . . . . .

The first two sub-clauses deal with special situations and provide for an appeal as of right and they need not be considered. The third sub-clause permits an appeal in cases which the High Court certifies as fit for appeal. The sub-clause does not state the conditions necessary for such certification. No rules under Art. 145 regulating generally the practice and procedure of this Court for the grant of certificate by the High Court have been framed. The power which is granted is no doubt discretionary but in view of the word "certifies" it is clear that such power must be exercised with great circumspection and only in a case which is really fit for appeal. It is impossible by a formula to indicate the precise limits

(1) [1958] S.C.R. 552.

A of such discretion, but the question has arisen on a number of occasions in this Court and some of the leading views may be considered.

In *Haripada Dey* v. *The State of West Bengal and Anr.*(1), the appellant was convicted under s. 411, Indian Penal Code and B sentenced to two years' rigorous imprisonment for dishonestly receiving and retaining a motor car which he had reason to believe was stolen. His appeal was dismissed by J.P. Mitter and Sisir Kumar Sen, JJ. He applied for a certificate and according to the practice of the Calcutta High Court the petition was placed not before the Judges who heard the appeal but before another Bench C consisting of the Chief Justice and Lahiri J. The Chief Justice passed an elaborate order in the course of which he observed :

> "In my view a certificate of fitness ought to issue in this case, although the question involved is one of fact.
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> In my view it is impossible not to feel in this case that there has not been as full and fair a trial as ought to have been held. In the circumstances, it appears to me that the petitioner is entitled to have his case further consi-
> E dered and since such further consideration can only be given by the Supreme Court, I would grant the certificate prayed for."

As the chief Justice himself said the question involved was one of fact, this Court did not approve of the certificate and held that it
F was no certificate at all. It was pointed out that a certificate granted in Criminal Appeal No. 146 of 1956 (*Om Prakash* v. *State of U.P.*) was not accepted when no reasons were given and that the certificate in *Haripada Dey's*(1) case was also bad because the reasons were not sound. Bhagwati J, speaking on behalf of Imam and Govinda Menon JJ and himself, said :

G "Whatever may have been the misgivings of the learned Chief Justice in the matter of a full and fair trial not having been held we are of the opinion that he had no jurisdiction to grant a certificate under article 134(1)(c) in a case where admittedly in his opinion the question involved was one of fact—where in spite
H of a full and fair trial not having been vouchsafed to the appellant, the question was merely one of a further

(1) [1956] S.C.R. 639.

consideration of the case of the appellant on facts. The mere disability of the High Court to remedy this circumstance and vouchsafe a full and fair trial could not be any justification for granting a certificate under article 134(1)(c) and converting this Court into a Court of Appeal on facts. No High Court has the jurisdiction to pass on mere questions of fact for further consideration by this Court under the relevant articles of the Constitution."

The observations, if we may say so with respect, are too absolute to be a safe guide in the infinite variety of cases that come before the courts. There are cases and cases. It can only safely be said that under Art. 134(1)(c) this Court has not been made an ordinary Court of Criminal Appeal and the High Courts should not by their certificates attempt to create a jurisdiction which was not intended. The High Courts should, therefore, exercise their discretion sparingly and with care. The certificate should not be granted to afford another hearing on facts unless there is some error of a fundamental character such as occurred in *Nar Singh's*(1) case.

In *Nar Singh's* case(1) 24 persons were tried under ss. 302/149, 307/149 and 148, Indian Penal Code and eight were convicted by the Court of Session. On appeal to the High Court five more were acquitted and that left Nar Singh, Roshan Singh and one Nanhu Singh. Their convictions were upheld by the High Court and their sentences were maintained. What had happened in the case of Nanhu Singh may now be stated from the judgment of this Court :

"By a curious misreading of the evidence this Nanhu Singh was mixed up with Bechan Singh. What the High Court really meant to do was to convict Bechan Singh and acquit Nanhu Singh. Instead of that they acquitted Bechan Singh and convicted Nanhu Singh. As soon as the learned High Court Judges realised their mistake they communicated with the State Government and an order was thereupon passed by that Government remitting the sentence mistakenly passed on Nanhu and directing that he be released."

All the accused applied for a certificate and in view of what had happened and as the conviction of Nanhu Singh on a murder

(1) [1965] S.C.R. 238.

A charge was still subsisting a common certificate was granted to all of them. The High Court thought that the word "case" in Art. 134(1)(c) meant the case as a whole. Nanhu Singh did not appeal and the appeal was filed by Nar Singh and Roshan Singh on the common certificate. This Court pointed out that the High Court was wrong in thinking that the word "case" in B the sub-clause meant a case as a whole and the certificate in relation to accused other than Nanhu Singh was bad. The certificate to Nanhu Singh was said to be proper. The Divisional Bench then considered the case under Art. 136(1) for special leave but found it unfit.

C In *Sunder Singh* v. *The State of U.P.*(1) it was laid down that unless a substantial question of law or principle was involved the case must not be certified as fit even though the question of fact may be difficult. *Khushal Rao's*(2) case again furnishes an example of an extraordinary situation. The High Court had based a conviction for murder on dying declarations which it D considered to be true but which required to be corroborated before they could be acted upon in view of the observations of this Court in *Ramnath Madho Prasad* v. *State of Madhya Pradesh*(3)—". . . . . it is the settled law that it is not safe to convict an accused person merely on the evidence furnished by a dying declaration without further corroboration". E The Court found corroboration in the fact that Khushalrao was absconding for a long time and was arrested from a room which had only one exit and that was locked on the outside. When the accused applied for certificate it was pointed out that there was some evidence which was not brought to F the notice of the High Court establishing that the accused was evading arrest in another case and the circumstance that he was hiding then became dubious. The High Court felt constrained to give the certificate because under the ruling of this Court the conviction was assailable. This Court pointed out that the certificate was bad because it was not granted by G the High Court on any "difficult question of law or procedure which it thought required to be settled by this Court but on a question which is essentially one of fact, namely, whether there was sufficient evidence of the guilt of the accused". The certificate was perhaps of the type represented by the certificate to Nanhu Singh which was held proper. The matter was H then considered in an elaborate judgment from the point of view

(1) A. I. R. [1956] S.C. 411. (2) [1958] S. C. R. 552.
(3) A. I. R. [1953] S.C. 420.

of Art. 136(1) and the view about dying declaration contained in the earlier case was modified. The evidence was examined afresh and the judgment of the High Court was affirmed. A

These cases illustrate different angles of the problem. There is no doubt whatever that sub-clause (c) does not confer an unlimited jurisdiction on the High Courts. The power gives a discretion but discretion must always be exercised on some judicial principles. A similar clause in Art. 133, which allows appeals in civil cases, has been consistently interpreted as including only those cases which involve a question of general public importance. That test need not necessarily be applied to a criminal case but it is clear that mere questions of fact should not be referred for decision. The Constitution does not contemplate a criminal jurisdiction for this Court except in those two cases covered by cls. (a) and (b) which provide for appeals as of right. The High Court before it certifies the case must be satisfied that it involves some substantial question of law or principle. In a criminal appeal the High Court can consider the case on law and fact and if the High Court entertains doubt about the guilt of the accused or the sufficiency of the evidence it can always give the benefit to the accused there and then. It is not necessary that the High Court should first convict him and then grant him a certificate so that this Court, if it thought fit, reverse the decision. It is thus obvious that only a case involving something more than mere appreciation of evidence is contemplated by the Constitution for the grant of a certificate. What that may be will depend on the circumstances of the case but the High Court should be slow to certify cases. The High Court should not overlook that there is a further remedy by way of special leave which may be invoked in cases where the certificate is refused. B C D E F

In this case the two learned Judges who first heard the appeal differed on appreciation of evidence. The Criminal Procedure Code contemplates the resolution of such a difference by the opinion of a third Judge. We have already drawn attention to the provisions of s. 429, Criminal Procedure Code relating to the hearing by the third Judge. It would appear to us that after the decision of the third Judge accepting the evidence against the appellants no question of fact survived. The learned Judge who heard the appeal on difference was also within his right in stating that the doubts which Gyanendra Kumar J. felt about the genuineness of the First Information Report etc. did not affect him and that he was in agreement with what Mathur J. had said on that part G H

A of the case. In our opinion, the certificate did not comply with the requirements of Art. 134(1)(c) as explained by us here. We have considered this case from the point of view of Art. 136(1) but we do not find it fit for the grant of special leave. The evidence in the case was rightly appraised by Mathur J. and the doubts which Gyanendra Kumar J. entertained were not justified.
B We do not, therefore, grant special leave.

It was contended that as long time has passed the sentence of death should be substituted by imprisonment for life and reliance was placed upon *Kalawati and Another* v. *The State of Himachal Pradesh*(1) where such action was taken. In our judgment, each
C case must be decided on its own facts and a sentence of imprisonment for life can only be substituted if the facts justify that the extreme penalty of the law should not be imposed. We do not consider this to be such a case..

It was next contended on the authority of *Pandurang, Tukia*
D *and Bhillia* v. *The State Hyderabad*(2) that as the two learned Judges have differed, the extreme penalty of the law should not be imposed. In the cited case the Judges had differed on the question of sentence itself and the third Judge before whom the matter was placed was in favour of the death penalty. Bose J, in reducing the sentence to imprisonment for life, observed : "But
E when appellate Judges, who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons". This cannot be raised to the pedestal of a rule for that would leave the sentence to the determination of one Judge to the exclusion of the other. In the present case both the Judges appear to have been in favour of the
F death sentence because although Gyanendra Kumar J. was in favour of acquittal he did not object to the confirmation of the death sentence when Takru J. had given his opinion. The offence here was brutal and normally the death penalty should follow. We, therefore, decline to reduce the sentence passed. The appeal fails and is dismissed.
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Appeal dismissed.

(1 [1953] S.C.R. 546.
(2) [1955] 1 S.C.R. 1083.