

SUPREME COURT OF AZAD JAMMU AND KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, C.J.
Muhammad Younas Tahir, J.

Cr. Misc. No.04 of 2023

(Filed on 25.01.2023)

Ghaffar Hussain s/o Qurban Hussain

.... PETITIONER

VERSUS

The State & others

.... RESPONDENTS

[Application for shifting of the petitioner
from death cell to the ordinary judicial
lockup]

FOR THE PETITIONER: Ch. Jahandad Khan,
Advocate.

FOR THE STATE: Ch. Shakeel Zaman,
Addl. Advocate General
along with Mr. Ahmed
Saad, Asstt. Advocate
General.

Date of hearing: 31.01.2023

ORDER

Raja Saeed Akram Khan, C.J.- The
petitioner, herein, was tried by the Additional
District Criminal Court, Mirpur and convicted in the

offence under section 302(a), APC by awarding him the death sentence as *Qisas*. The conviction recorded by the trial Court was maintained by the Shariat Appellate Bench of the High Court through judgment dated 27.12.2022. Against this judgment, an appeal is awaiting completion in the registry office. Meanwhile, this application for shifting of the condemned prisoner from death cell to the ordinary lockup has been placed before the Court.

2. The learned counsel for the petitioner argued with vehemence that against the conviction order passed by the Courts below an appeal is pending before this Court, however, the jail authorities have illegally shifted the petitioner to death cell. The appeal may consume a lot of time, moreover, there are strong chances that the sentence awarded to petitioner will be set at naught or altered. Added that the petitioner is not hardened, desperate or dangerous criminal, hence, there is no occasion for keeping him in the death cell.

3. The learned Additional Advocate General submitted that under section 30 of the Prisons Act, 1894, every prisoner under the sentence of death shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard. As the petitioner has been awarded death sentence, hence, he has rightly been confined in the death cell under the prevailing law.

4. We have heard the learned counsel for the parties and gone through the record. The law provides a comprehensive mechanism from trial of a criminal case to the execution of the sentence. After completion of the proceedings as prescribed by the Code of Criminal Procedure, 1898, the trial Court pronounces the judgment. In case the sentence of death is passed by the trial Court, it is submitted to the High Court for confirmation. The High Court may confirm the death sentence, annul or alter the same. If the death sentence is confirmed by the High Court, the convict may prefer an appeal to the Supreme Court. Even after

the judgment of the Supreme Court the convict retains the remedy of filing review petition or mercy petition before the Worthy President. After this stage, the sentence of death becomes executable and under section 381, Cr.P.C. the Court of Sessions is empowered to issue "death warrant" or "black warrant", to the Superintendent of the relevant prison who is supposed to return the warrant to the Court after certifying that the death sentence has been carried out. The controversy in hand relates to interpretation of section 30 of the Prisons Act, 1894, which states that:-

“30. Prisoners under sentence of death.— (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Deputy Superintendent and all articles shall be taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed, by day and by night, under the charge of a guard.”

It is clear from the plain reading of section (supra) that every prisoner under the sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of the Deputy Superintendent, and all articles, shall be

taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession and every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard. The referred section has to be read in juxtaposition with rules 329 to 332 of the Prisons Rules, 1978, which are reproduced as under:-

Rule 329: Warrant of commitment for sentence of death.- As soon as a prisoner is sentenced to death, the police officer who attends the trial, will inform the Superintendent of the prison of the fact. If the sentence is passed by the Sessions Judge, that officer will issue a warrant of commitment pending confirmation of the sentence by the High court. When the sentence has been confirmed by the High Court or is passed by the High Court, the Session Judge, or the High Court will transmit a warrant of execution as the case may be, to the Superintendent of the prison in which the condemned prisoner is confined.

Rule 330: Search and confinement.- Every prisoner under sentence of death shall be searched immediately on arrival in the prison by, or under the orders of, the Deputy Superintendent, and every article of clothing and other articles of whatever description shall be taken away from him. After having furnished him with prison clothing, bedding, aluminum utensils and light chappals, the Deputy superintendent shall remove him to a cell and forthwith make arrangements for his watch and ward.

Rule 331: Cell to be examined. Facilities be provided.- (i) The Deputy Superintendent or Assistant Superintendent in charge of condemned

prisoners shall examine every cell in which a condemned prisoner is to be confined. He shall satisfy himself that it is secure and does not contain any article which the prisoner could possibly use as a weapon of offence or as an instrument with which to commit suicide, or which in the opinion of the Superintendent, is in expedient to permit in such cell.

- (ii) All cells used for the confinement of condemned prisoners shall be provided with flush toilet seats and low-level water taps. Privacy should be ensured.
- (iii) Electric fan shall be provided in every such cell but precautions should be taken to ensure that the prisoner is unable to reach it.

Rule 332: *Special guard over condemned prisoners.*- Every condemned prisoner shall be confined in a cell apart from all other prisoners and shall be placed both by day and night under the charge of a special guards.”

Now, the question arises as to when a convict should be treated as a condemned prisoner or prisoner under sentence of death. The key words which call for humanistic interpretation are “under sentence of death”. The matter was considered by the Federal Shariat Court in the case reported as *Dr. Muhammad Aslam Khaki vs. The State & others* [PLD 2010 FSC 1] in the following manner:-

“131. The fact of the matter is that even though the Sessions Judge is competent to pass the sentence of Death at the end of the trial yet his order is subject to confirmation by the High Court. The process of confirmation or otherwise of the death sentence awarded by the Sessions Judge invariably takes a few years. Even if death sentence is confirmed the

condemned prisoner has a right to move the Supreme Court against decision of the High Court. The possibility of acquittal of the convicted prisoner at the High Court level or in appeal before the Supreme Court cannot be ruled out. Even after the appeal of the convict has been dismissed in the Apex Court the prisoner still retains the right of seeking pardon, reprieve, respite, remission, suspension or commutation of the sentence passed by any court, tribunal or other authority. It is only after the President has rejected the mercy petition of the convict that the sentence of capital punishment passed by the Sessions Judge becomes final and capable of execution. It has however been observed that in 1988 and now in the year 2008 the Federal Government think in terms of converting death penalties into life imprisonments. But this is besides the issue.

132. It, therefore, means that a condemned prisoner, who has a chance of acquittal in appeal or of the conversion of the capital punishment into life imprisonment, has in fact to wait for a period of about 10 years after the date of the pronouncement of the original judgment of the trial court. The trial itself takes a few years. A question therefore arises as to when should such a convict be treated as a condemned prisoner. This question is important because the agony through which he passes as a condemned prisoner must be reduced to minimum possible period. A period which is essential for all practical purposes.

133. After considering this issue from various angles in the light of Injunctions of Islam, we are of the considered view that a convict should not be declared a condemned prisoner from the date of pronouncement of the verdict of guilt by the trial court for the reason that unless the sentence of death is confirmed by the High Court the sentence awarded to the accused by the trial court is not capable of execution. The execution can legally follow only after confirmation by the High Court has taken place though the accused retains the right of appeal before the Supreme Court and the right to move a Mercy Petition before the President of Pakistan. That means

almost a decade before his fate is finally decided. The delay is not the fault of the prisoner. He should therefore be declared a condemned prisoner at the stage when the death sentence is legally executable. He would still be within his right to move the Apex Court or initiate a mercy petition under Article 45 of the Constitution. We may however add that mercy petitions should not be allowed to linger on for years and should be decided in a reasonable period, preferably within a month.

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Under the circumstances we consider that a prisoner should be treated as Condemned Prisoner only after his appeal in the High Court or the Federal Shariat Court has been dismissed and/or the sentence of death has been confirmed by the High Court or the Federal Shariat Court under section 376 of the Code of Criminal Procedure. Rules 329 through 364 in Chapter 14 of the Pakistan Prison Rules as well as section 30 of the Prisons Act, 1894 provide that as soon as a prisoner is sentenced to death he will be deposited in the death cell and subjected to special care as provided in Chapter 14. We have held that a prisoner under sentence of death shall be deemed to be a condemned prisoner only when the death sentence awarded by the trial court has been confirmed and it becomes executable i.e. when the death sentence has been confirmed under section 376 of the Code of Criminal Procedure and consequently portion of the legal provisions which authorize the prison authorities to treat a prisoner under sentence of death as a condemned prisoner before confirmation of his sentence i.e. it becomes executable, is declared to be violative of the principles of Islam.”

(underlining is ours)

It becomes abundantly clear that a prisoner becomes condemned prisoner only when the sentence of death awarded to him becomes

final, conclusive, indefeasible, which cannot be annulled or voided by any judicial or constitutional procedure. In other words, a prisoner will be said to be a condemned prisoner only when the sentence of death awarded to him becomes executable.

5. From the Indian jurisdiction, we have found a very relevant judgment titled *Union of Indian vs. Dharam Pal*¹. The relevant portion of the judgment is reproduced as under:-

“In the case of *Sunil Batra v. Delhi Admn.* [(1978) 4 SCC 494, (Constitution Bench)], the interpretation of the words “prisoners under sentence of death” fell for consideration before this Court. Krishna Iyer, J. concurring with the majority, in paragraphs 89 to 91 and 110 to 113 of the said judgment held thus:

“89. xxx... This [Section 30, Prisoners Act] falls in Chapter V relating to discipline of prisoners and has to be read in that context. Any separate confinement contemplated in Section 30 (2) has this disciplinary limitation as we will presently see. If we pull to pieces the whole provision it becomes clear that Section 30 can be applied only to a prisoner “under sentence of death”. Section 30(2) which speaks of “such” prisoners necessarily relates to prisoners under sentence of death. We have to discover when we can designate a prisoner as one under sentence of death.

90. The next attempt is to discern the meaning of confinement “in a cell apart from all other prisoners”. The purpose is to maintain discipline and discipline is to avoid disorder,

¹ [<https://indiankanoon.org/doc/95249467/>]

fight and other untoward incidents, if apprehended.

91. Confinement inside a prison does not necessarily import cellular isolation. Segregation of one person all alone in a single cell is solitary confinement. That is a separate punishment which the Court alone can impose. It would be a subversion of this statutory provision (Sections 73 and 74 IPC) to impart a meaning to Section 30(2) of the Prisons Act whereby a disciplinary variant of solitary confinement can be clamped down on a prisoner, although no court has awarded such a punishment, by a mere construction, which clothes an executive officer, who happens to be the governor of the jail, with harsh judicial powers to be exercised by punitive restrictions and unaccountable to anyone, the power being discretionary and disciplinary.

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110. The ingenious arguments to keep Batra in solitudinous cell must fail and he shall be given facilities and amenities of common prisoners even before he is ‘under sentence of death’.

111. Is he under sentence of death? Not yet.

112. Clearly, there is a sentence of death passed against Batra by the Sessions Court but it is provisional and the question is whether under Section 30(2) the petitioner can be confined in a cell all by himself under a 24 hour guard. The key words which call for humanistic interpretation are “under sentence of death” and “confined in a cell apart from all other prisoners.”

113. A convict is ‘under sentence of death’ when, and only when, the capital penalty inexorably operates by the automatic process of the law without any slip between the cup and the lip.

Rulings of this Court in Abdul Azeez v. Karnataka [(1977) 2 SCC 485 : 1977 SCC (Cri) 378 : (1977) 3 SCR 393] and D.K. Sharma v. M.P. State [(1976) 1 SCC 560 : 1976 SCC (Cri) 85 : (1976) 2 SCR 289] , though not directly on this point strongly suggest this reasoning to be sound.”

It is worthwhile to cite the relevant portion of the majority opinion through the words of Desai, J. in paragraphs 220 and 223 of the same judgment.

“220. xxx... Subsection (2) of Section 30 merely provides for confinement of a prisoner under sentence of death in a cell apart from other prisoners and he is to be placed by day and night under the charge of a guard. Such confinement can neither be cellular confinement nor separate confinement and in any event it cannot be solitary confinement. In our opinion, subsection (2) of Section 30 does not empower the jail authorities in the garb of confining a prisoner under sentence of death, in a cell apart from all other prisoners, to impose solitary confinement on him. Even jail discipline inhibits solitary confinement as a measure of jail punishment. It completely negatives any suggestion that because a prisoner is under sentence of death therefore, and by reason of that consideration alone, the jail authorities can impose upon him additional and separate punishment of solitary confinement. They have no power to add to the punishment imposed by the Court which additional punishment could have been imposed by the Court itself but has in fact been not so imposed. Upon a true construction, subsection (2) of Section 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death.

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223. The expression “prisoner under sentence of death” in the context of subsection (2) of Section 30 can only mean the prisoner

whose sentence of death has become final, conclusive and infeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority. ...xxx... Therefore, the prisoner can be said to be under the sentence of death only when the death sentence is beyond judicial scrutiny and would be operative without any intervention from any other authority. Till then the person who is awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of Section 30, subsection (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in subsection (2) of Section 30, reducing the period of such confinement to a short duration.”

The sum and substance of the judgment in Sunil Batra (supra), is that even if the Sessions Court has sentenced the convict to death, subject to the confirmation of the High Court, or even if the appeal is filed before the High Court and the Supreme Court against the imposition of death punishment and the same is pending, the convict cannot be said to be “under sentence of death” till the mercy petition filed before the Governor or the President is rejected. This Court in *Shatrughan Chauhan v. Union of India* [(2014) 3 SCC 1, (3 Judge Bench)] with approval of Sunil Batra (supra) has observed thus:

“90. It was, therefore, held in Sunil Batra case [*Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494: 1979 SCC (Cri) 155] that the solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 of the Prisons Act for prisoners “under sentence of death”. The crucial holding under Section 30(2) is that a person is not “under sentence of death”, even if the Sessions Court has sentenced him to death subject to confirmation by the High Court. He is not “under sentence of

death” even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, it was held that Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, has not been disposed of. Of course, once rejected by the Governor and the President, and on further application, there is no stay of execution by the authorities, the person is under sentence of death. During that interregnum, he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be “under sentence of death” means “to be under a finally executable death sentence”.

91. Even in *Triveniben* [*Triveniben v. State of Gujarat*, (1989) 1 SCC 678 : 1989 SCC (Cri) 248], this Court observed that keeping a prisoner in solitary confinement is contrary to the ruling in *Sunil Batra* [*Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155] and would amount to inflicting “additional and separate” punishment not authorised by law. It is completely unfortunate that despite enduring pronouncement on judicial side, the actual implementation of the provisions is far from reality. We take this occasion to urge to the Jail Authorities to comprehend and implement the actual intent of the verdict in *Sunil Batra* [*Sunil Batra v. Delhi Admn.*, (1978) 4 SCC 494 : 1979 SCC (Cri) 155].”

Thus, the actual intent of law is that to be “under sentence of death” means “to be under finally executable death sentence”. In other words, a prisoner can be said to be under the sentence of death only when the death sentence is beyond

judicial scrutiny and would be operative without any intervention from any other authority. Till then the prisoner who is awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of Section 30, subsection (2) of Prisons Act, 1894. It may also be stated here that shifting a prisoner to death cell amounts to "solitary confinement" which is a separate punishment and a Court alone can impose the same. In our opinion, subsection (2) of section 30 does not empower the jail authorities in the garb of confining a prisoner under sentence of death, in a cell apart from all other prisoners, to impose solitary confinement on him.

6. As we have reached the conclusion that a prisoner will be said to be a "condemned prisoner" or "prisoner under sentence of death" when, and only when, the capital punishment awarded to him becomes capable of execution and no judicial or administrative authority is further empowered to annul the same under statutory or constitutional dictates; therefore, we are constrained to direct in

the public interest and to save the prisoners from the unnecessary burden of litigation like one in hand, that the concerned jail authorities shall follow the interpretation made in the judgments referred to hereinabove. In future, only those prisoners will be admitted to death cell whose sentence becomes final, conclusive and indefeasible. A copy of this order shall be sent to Home Secretary and I.G. Prisons for compliance.

In the instant case, the sentence awarded to the convict-petitioner has not yet become final as appeal before this Court is pending which is likely to take some time for disposal, hence, the application is allowed with the direction to the jail authorities to shift the convict-petitioner from death cell to ordinary judicial lockup.

CHIEF JUSTICE

JUDGE

Mirpur,
31.01.2023