IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 804 OF 2019
[@ SPECIAL LEAVE PETITION (CRL.) NO. 498 of 2016]

Union of India and Ors. **... Appellantss**

versus

Dharam Pal **... Respondent**

O R D E R

Leave granted.

2. The instant criminal appeal is directed by the State against the decision of the High Court of Judicature of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 7436 of 2013 (O&M) whereby the High Court allowed the Writ Petition filed by the Respondent Dharam Pal, and commuted the death sentence awarded to him to life imprisonment. The Respondent was tried and convicted under Section 302/34 of the Indian

Penal Code (hereinafter, "IPC") for the commission of murder of five persons belonging to the same family.

3. The brief facts leading to the impugned Writ Petition are that, the Respondent Dharam Pal, in an earlier incident, was convicted under Section 376/452 of the IPC vide judgment dated 04.07.1992 passed by the Additional Sessions Judge, Sonepat, in Sessions Case 11 of 1991 and sentenced to undergo rigorous imprisonment for ten years. The Respondent was released on bail by the High Court while admitting his appeal, however on the intervening night of 09.06.1993 and 10.06.1993 at around 03:30 a.m., the Respondent accompanied by his brother Nirmal Singh committed the murder of five persons who were the family members of the prosecutrix for whose rape the Respondent was convicted.

4. The Respondent and his brother were tried and convicted under Section 302/34 of the IPC by the Sessions Court, Sonepat in Sessions Case No. 65 of 1993. Vide its judgment dated 05.05.1997, the said Court sentenced both the accused to be hanged until death. Death Reference was heard and the conviction and sentence was affirmed by the High Court by its

judgment dated 29.09.1998. The Respondent and his brother, further filed an appeal before this Court, which came to be partly allowed, commuting the death sentence of the Respondent's brother Nirmal Singh into life imprisonment, but upheld the death sentence of the Respondent taking into account his conviction in the rape case, and commission of murder of five family members of the prosecutrix of that case while on bail. Thus, this Court vide judgment and order dated 18.03.1999 confirmed his death sentence and directed that he be hanged until death.

5. The Respondent filed a mercy petition before the Governor of the State of Haryana under Article 161 of the Constitution of India, which came to be rejected after which, on 02.11.1999, the Respondent sought pardon from the President of India in exercise of powers under Article 72 of the Constitution. However, on 25.03.2013, the President rejected his application, after an inordinate and unexplained delay of 13 years and 5 months, and a date was fixed for his execution. It is pertinent to mention that in the meantime, the Respondent had filed an appeal against his conviction in Sessions Case No. 11 of 1991

under Section 376/452 of the IPC before the High Court, which came to be allowed acquitting him for the said offence vide order dated 19.11.2003.

6. It is under these circumstances that the Respondent filed the impugned Writ Petition before the High Court praying for his death sentence to be commuted to life imprisonment in light of the change in circumstances viz. his acquittal in the rape case, which was an important deciding factor by this Court in negating his appeal. He also challenged it on grounds of delay in deciding his mercy petition by the President, among other grounds.

7. The High Court while allowing his Writ Petition held that it is a case of violation of the fundamental rights of the Respondent, which makes him eligible for getting his death sentence commuted to life imprisonment, and orders were passed accordingly. The State has filed this appeal against the decision of the High Court.

8. In the Statement of Objections filed by the State of Haryana before the High Court, it is admitted that the Respondent has remained in solitary confinement for a period

of 18 years, and has undergone imprisonment for a total period of more than 25 years till date. It is also an admitted position that the order of acquittal of the Respondent in the Sessions Case No. 11 of 1991 was not put to the notice of the President while deciding the mercy petition, the failure of which is argued to be pivotal in deciding the mercy petition causing prejudice against the Respondent.

9. The learned counsel for the appellant argued that the impugned judgment is erroneous as the delay in disposing the mercy petition pending before the President was justified. He tried to explain the various stages and reasons for the delay in deciding the petition. He further brought to our attention the nature of the offence committed by the Respondent, i.e. the gruesome cold-blooded murder of five persons. He finally prayed the impugned judgment be set aside and orders for executing the Respondent be passed.

Per contra, the counsel for the Respondent supported the judgment of the High Court inasmuch as there is a real and apparent violation of the Respondent's fundamental rights due to the inordinate delay in deciding the mercy petition, 18 years

of solitary confinement before the rejection of the mercy petition and that the acquittal in the rape case was not put on record before the President at the time of deciding the mercy petition causing grave prejudice and injustice against the Respondent. He prayed that the appeal may be dismissed, and the Respondent be released from prison upon remission of sentence as he has already spent over 25 years in prison.

10. We have heard the parties at length and have perused the case records. It is our considered opinion that the High Court is entirely justified in allowing the Writ Petition filed by the Respondents. We find no error or illegalities with the order passed, and concur with its findings.

11. As mentioned supra, it is admitted that the Respondent has undergone incarceration for a total period of over 25 years, out of which 18 years were in solitary confinement. Throughout the period of deciding his mercy petition by the President, he was kept in solitary confinement in various jails. Solitary confinement prior to the disposal of the mercy petition is per se illegal and amounts to separate and additional punishment not

authorized by law. It is pertinent to quote Section 30 of the Prisoners Act, 1894 at this juncture.

> "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 Jailer and all articles shall be taken from him which the Jailer 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."

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 to113 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, 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.

x x x x x x

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... Sub-section (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, sub-section (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, sub-section (2) of Section 30 does not empower a prison authority

to impose solitary confinement upon a prisoner under sentence of death.

x x x x x

223. The expression "prisoner under sentence of death" in the context of sub-section (2) of Section 30 can only mean the prisoner whose sentence of death has become final, conclusive and indefeasible 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, sub-section (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in sub-section (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".
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> 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]."

12. Thus, solitary confinement prior to the rejection of mercy petition, which has taken place in spite of various decisions of this Court to the contrary, is unfortunate and palpably illegal. In the present case, the Respondent underwent such a long period of solitary confinement that too, prior to his mercy petition being rejected, thereby making it a formidable case for commuting his death sentence into life imprisonment, as rightly held by the High Court.

13. The next main ground of challenge is the unexplained and inordinate delay in disposing the Respondent's mercy petition by the President. Although the appellants tried to justify the delay citing various bona fide reasons, the same cannot be accepted as the prolonged delay

in execution of a sentence of death has a dehumanizing effect and this has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under Article 21 of the Constitution. The High Court placed apt reliance on the judgment of this Court in *Shatrughan Chauhan* (supra) for condemning the inordinate delay and thereby commuting the sentence of the Respondent.

Some important observations of *Shatrughan Chauhan* (supra) are reiterated herewith:

> "19. In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the People in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it…xxx.
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> 45. Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death…xxx.
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> x x x x x
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> 47. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the

authorities to dispose of the same expeditiously. Though no time-limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage viz. calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. This Court, in *Triveniben* [*Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678], further held that in doing so, if it is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.

48. Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations.

49. The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is inexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement

of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanising effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence…xxx.

x x x x x

244. It is well established that exercising of power under Articles 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitution Framers did not stipulate any outer time-limit for disposing of the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing of the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Articles 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every constitutional duty must be fulfilled with due care and diligence, otherwise judicial interference is the command of the Constitution for upholding its values.

245. Remember, retribution has no constitutional value in our largest democratic country. In India, even an accused has a de facto protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, we make it clear that when the judiciary interferes in such matters, it does not really interfere with the power exercised under Articles 72/161 but only to uphold the de facto protection provided by the Constitution to every convict including death convicts."

14. In our considered opinion, the High Court examined the inordinate delay in disposing the mercy petition in the right perspective to hold it illegal, and thereafter commuted the sentence to life imprisonment in light of the aforementioned principles of law laid down in *Shatrughan Chauhan* (supra). These aspects, coupled with the fact that the authorities did not place the records regarding the acquittal of the Respondent in the rape case before the President for consideration of the mercy petition has caused grave injustice and prejudice against the Respondent. On receipt of a mercy petition, the Department concerned has to call for all the records and materials connected with the conviction. When the matter is placed before the President, it is incumbent on the part of the concerned authority to place all the materials such as judgments of the courts, as well as any other relevant material connected with the conviction. In the present case, this Court while upholding the death sentence of the Respondent and commuting the sentence of his brother to life imprisonment had placed reliance on the fact that the Respondent was convicted in the rape case, and

the persons who he had killed were the family members of the prosecutrix of the rape case. The fact that he was subsequently acquitted for that case has great bearing on the quantum on sentence that ought to be awarded to the Respondent and the same should have been brought to the notice of the President while deciding his mercy petition. Failure to do so has caused irreparable prejudice against the Respondent.

15. Therefore, considering the facts and circumstances of this case, it is our considered opinion that the High Court has not erred in setting aside the sentence of death of the Respondent and commuting the same into life imprisonment. Considering the aforementioned reasons discussed by us such as the unconscionable delay of more than 13 years in deciding the mercy petition, the failure to produce the relevant documents regarding the Respondent before the President for deciding the mercy petition, and that the Respondent has undergone 18 years of illegal solitary confinement, we find no reason to interfere with the decision of the High Court. However, considering the fact that the

Respondent had violated the conditions of bail imposed on him by the High Court in criminal appeal, inasmuch as he had committed the murder of five persons while on bail, cannot be overlooked while quantifying the actual sentence. In our considered opinion, having regard to the totality of facts and circumstances, and for the reasons mentioned supra, it would be appropriate to direct the release of the Respondent after the completion of 35 years of actual imprisonment including the period already undergone by him.

16. Ordered accordingly. The appeal is disposed of in the aforementioned terms.

.....J.
(N.V. Ramana)

.....J.
(Mohan M. Shantanagoudar)

.....J.
(S. Abdul Nazeer)

New Delhi;
April 24, 2019.