

(2019) 07 P&H CK 0158

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 21274 Of 2016 (O&M)

Jasbir Singh @ Jassa And Another

APPELLANT

Vs

State Of Punjab And Others

RESPONDENT

Date of Decision : 26-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 45, 46, 53, 73, 74, 120B, 201, 30(2), 302, 364, 364A, 366
Code Of Criminal Procedure, 1973 — Section 366(2), 415
Prisons Act, 1894 — Section 29, 30, 30(2)
Constitution Of India, 1950 — Article 14, 19, 20, 20(2), 21, 32, 20(2), 72, 72A, 134(c), 136, 161, 226

Citation : (2019) 07 P&H CK 0158

Hon'ble Judges : Jitendra Chauhan, J

Bench : Single Bench

Advocate : Gursharan Kaur Mann, Yash S. Vijay, Navkiran Singh, Nandan Jindal, Harpreet Kaur, Sunint Kaur, Chetan Mittal, Varun Issar, Jasraj Singh

Final Decision : Dismissed

Judgement

Jitendra Chauhan, J

The petitioners, who have been awarded death sentence in FIR No.36 dated 14.02.2005, registered under Sections 302, 364, 201 and 120-B of the

Indian Penal Code, at P.S. City Hoshiarpur, inter alia, seek commutation of death sentence to life imprisonment.

It is contended that the petitioners were convicted in FIR No.36 ibid and awarded death sentence by the Court of learned Additional Sessions Judge,

Hoshiarpur, on 21.12.2006. Their appeal and death reference were decided by this Court on 13.05.2008 and further, their appeals before Hon'ble the

Supreme Court were dismissed on 25.01.2010. The mercy petition of the petitioners were presented by the jail authorities before His Excellency the

President of India on 11.10.2012. However, on 26.11.2012, the Joint Secretary (Judicial), Ministry of Home Affairs (Judicial Division), Govt. of India

forwarded the petition to the Secretary, Department of Home Affairs and Justice, Govt. of Punjab, with a direction that the mercy petition has to be

considered by the Governor of Punjab under Article 161 of the Constitution of India. Pursuant thereto, the jail authorities submitted fresh mercy

petition to the Governor of Punjab through proper channel on 08.12.2013 and the same was dismissed vide order dated 15.01.2015 (Annexure R-V/T)

i.e. after more than a year of its submission and more than two years after the application for mercy petition was made by the petitioners. The

communication of the rejection of the mercy petition before the Governor was received by the jail authorities through the office of Additional Director

General of Police (Prisons), Punjab on 22.01.2016, i.e. after more than a year of the rejection of the mercy petition by the Governor. Thereafter, the

petitioners preferred a mercy petition before His Excellency the President of India though the jail vide application dated 23.01.2016 and the said mercy

petition was sent to the President through the Principal Secretary on 25.01.2016. The said mercy petition filed before His Excellency the President

was rejected on 11.08.2016 (Annexure R-VI). Earlier, a death warrant was issued by learned Sessions Judge on 15.09.2012, before the filing of any

mercy petition by the petitioners, which was subsequently kept in abeyance by this Court on 03.10.2012 and thereafter, stayed by Hon'ble the

Supreme Court on 12.10.2012 in SLP (Crl.) No.8149 of 2012.

It is contended that the petitioners deserve the benefit of commutation of death sentence into life imprisonment on three grounds i.e. delay in disposal

of mercy petitions; solitary confinement; and long period of incarceration.

It is submitted that there has been an unreasonable and avoidable delay in execution of the death sentence making it a fit case for commutation of the

punishment to life imprisonment. The petitioners were arrested on 14.02.2005. On 20/21.12.2006, the petitioners were convicted by learned trial Court

convicted and sentenced to death penalty. On 30.05.2008, this Court confirmed the death penalty and dismissed the appeals of the petitioners. On

25.01.2010, their appeal was dismissed by Hon'ble the Supreme Court, whereas, the review petition was dismissed on 20.04.2011. Learned counsel

states that as per the procedure laid down by the Ministry of Home Affairs, Govt.

of India regarding petitions for mercy in death sentence cases, it is the duty of the Superintendent to submit the mercy petition within seven days of the dismissal of an appeal by Hon'ble the Supreme Court. However, no mercy petition was filed by the Superintendent after the dismissal of the appeal on 25.01.2010 or after the dismissal of review petition on 20.04.2011. To the contrary, on 15.09.2012, death warrants were issued by learned Sessions Judge, Hoshiarpur executable on 05.10.2012. Only thereafter, on 11.10.2012, first mercy petition was filed before the Hon'ble President of India under the directions issued by this Court, after unreasonable delay of more than one year and ten months on the part of the jail authorities. On 26.11.2012, a communication was received from the Union Ministry of Home Affairs to file mercy petition before His Excellency the Governor of the State. On 08.02.2013, fresh mercy petition was filed before the His Excellency the Governor, which was rejected on 15.01.2015 after about two years from the day of filing. On 22.01.2016, communication of rejection of mercy petition by the office of the His Excellency the Governor was communicated to the jail authorities which further informed the petitioners. Again, there was inordinate and unexplained delay of more than one year in informing the decision of the Hon'ble Governor. Thereafter, second mercy petition was filed before His Excellency the President of India on 25.01.2016, which was rejected on 07.08.2016. On 11.08.2016, the rejection of mercy petition by the President was communicated to the petitioners by the jail authorities. Ultimately, second death warrants were issued by learned Sessions Judge, Hoshiarpur on 27.09.2016 executable on 25.10.2016. Learned counsel further contends that the petitioners were kept in solitary confinement from 21.12.2006 till 2009 and since 30.09.2016 (till the filing of the present petition), they have again been kept in solitary confinement in death cells. It is submitted that as per Sub-section 2 of Section 30 of the Prisons Act, a prison authority is not empowered to impose solitary confinement upon a prison under the sentence of death until it becomes final, conclusive and infeasible. By doing so, it will amount to imposing punishment for the same offence more than once which would also be violative of Article 20(2) of the Constitution of India. It is also asserted that the petitioners have been living a miserable life due to the prolonged condition of solitary confinement, in separate death cells in

jail, away from their relatives and friends and not even being allowed any parole or bail since the day of their incarceration. The petitioners have not

been allowed to have a sight of other prisoners. It is contended that the petitioners were kept in solitary confinement from 21.12.2006 to 30.12.2009,

15.09.2012 to 30.10.2012 and 27.09.2016 to 30.10.2016. Learned counsel further submits that till 24.04.2019, the petitioners have already undergone

14 years, 02 months and 10 days of custody. After such a long period of incarceration, execution of death warrants would amount to punishing the

petitioners twice for the same offence. Lastly, it is contended that many other illegalities and irregularities have been committed by the respondents

during the pendency of the judicial/executive proceedings. It is submitted that no order was passed by Hon'ble the Supreme Court declaring a stay on

the mercy proceedings on 12.10.2012 or on any other date in the proceedings of SLP (Crl.) No.8149 of 2012. Further, on 05.09.2016, it was

communicated to learned Sessions Judge and the jail authorities that an application for re-opening of the review petition Nos.192-193 of 2011 had been

filed before Hon'ble the Supreme Court. Despite this fact, learned Sessions Judge, Hoshiarpur had issued death warrants on 27.09.2016 (Annexure P-

1). The consideration of irrelevant material or non-consideration of relevant material while deciding the mercy petitions is also a circumstance in

favour of the petitioners. Cite Sunil Batra Vs. Delhi Administration, 1978 AIR (SC) 167;5 Smt. Triveniben Vs. State of Gujarat, 1989(1) RCR (Crl.)

512; Madhu Mahta Vs. Union of India, 1990(1) RCR (Crl.) 25;3 Daya Singh Vs. Union of India, 1991(2) RCR (Crl.) 33;4 Shivaji Jaising Babar Vs.

State of Maharashtra, 1991(3) RCR (Crl.) 698; Mahendra Nath Das Vs. Union of India, 2013(2) RCR (Crl.) 93;3 Shatrughan Chauhan Vs. Union of

India and others, 2014(1) RCR (Crl.)741; Navneet Kaur Vs. State of NCT of Delhi and another, 2014(2) RCR (Crl.) 39;7 V. Sriharan @ Murugan

Vs. Union of India and others, 2014(1) RCR (Crl.) 990; Ajay Kumar Pal Vs. Union of India, 2015(1) RCR (Crl.) 281 (SC;)Dharam Pal Vs. State of

Haryana and others, 2015(3) RCR (Crl.) 130 P&H DB and State of Punjab Vs. Kala Ram @ Kala Singh, 2019(1) RCR (Crl.) 472 P&H DB.

To counter the assertions raised on behalf of the petitioners, learned State counsel submits that the petitioners-Vikram Singh @ Vicky and Jasvir Singh

@ Jassa along with co-accused Sonia wife of Jasvir Singh @ Jassa were convicted on 21.12.2006 for the offence of culpable homicide amounting to

murder, under Sections 302 and 364-A IPC and sentenced to death, subject to confirmation of the said sentence by this Court. The case was referred

by the then Sessions Judge, Hoshirpur vide letter dated 30.01.2007 under Section 366 Cr.P.C. before this Court in Murder Reference No.1 of 2007

and Criminal Appeal No.105-DB of 2007. Vide order dated 30.05.2008, this Court accepted the murder reference and confirmed the death sentence.

Thereafter, the convicts preferred Criminal Appeal Nos.1396-1397 of 2008 before Hon'ble the Supreme Court which were decided vide judgment

dated 25.01.2010 whereby, the death sentence awarded to Sonia wife of Jasvir Singh @ Jassa was commuted to life imprisonment, whereas, the

death sentence awarded to the present petitioners was upheld. Thereafter, a review petition bearing Crl. No.192-93 of 2011 titled as Vikram Singh &

others Vs. State of Punjab, was filed by the petitioners against judgment dated 25.01.2010 in criminal appeal Nos.1396-1397 of 2008. However, no

intimation of any kind was received by this office regarding the filing of review petition Nos.192-193 of 2011. Thereafter, both the petitioners filed

Writ Petition (Criminal) No.15177 of 2012 under Article 32 of the Constitution of India, before Hon'ble the Supreme Court on 01.05.2012, which was

dismissed as withdrawn with liberty to file appropriate petition before this Court vide order dated 02.05.2012 (Annexure R-1). It is further submitted

that death warrants dated 15.09.2012 were received in the office of respondent No.2 on 25.09.2012 for execution on 05.10.2012. The petitioners were

duly informed and their thumb impressions were taken. However, the petitioners submitted application dated 26.09.2012 stating that they would be

filing mercy petition through their counsel before His Excellency the President of India. Meanwhile, petitioner Jasvir Singh @ Jassa had filed CWP

No.5429 of 2010 titled as Jasvir Singh and another Vs. State of Punjab before this Court for enforcement of their perceived right to have conjugal life

and procreate within the jail premises. During the pendency of the writ petition, this Court vide interim order dated 11.10.2012 (Annexure R-III) issued

directions to jail authorities to accept the mercy petition from petitioner No.1 and forward the same to the addressee. However, the main petition for

conjugal rights was declined vide judgment dated 29.05.2014. Learned counsel thus contends that from the date of decision of the SLP (Crl.)

No.1396-1397 of 2008 on 25.01.2010, the petitioners did not avail remedy of mercy petition either before the Governor or before the President of India

up till 11.10.2012 and this delay of nearly two years and eight months is attributable to the petitioners alone. It is further submitted that in compliance of the interim directions passed by this Court on 11.10.2012, the mercy petition of both the petitioners was forwarded to His Excellency the President of India on 11.10.2012. In response thereto, the office of Joint Secretary (Judicial), Government of India vide letter dated 26.11.2012 (Annexure R-IV), sent back the mercy petition to the Secretary, Department of Home Affairs and Justice, Government of Punjab, with an advice to file the same before the Governor of the State in the first instance. At the same time, it was directed not to execute the death sentence of the petitioners till the decision of Mercy Petition under Articles 161 and 72 of the Constitution of India. Thereafter, the office of the Superintendent, Central Jail, Patiala vide letter dated 08.02.2013 submitted fresh mercy petition of the petitioner to His Excellency the Governor of Punjab under Article 161 of the Constitution of India. Thereafter, the petitioners filed CWP No.18956 of 2012, challenging the vires of Section 364-A IPC whereby, the offence of kidnapping for ransom has been made punishable with death or life imprisonment. The said petition was decided against the petitioners by a Division Bench of this Court vide judgment dated 03.10.2012. However, a direction was issued to the Superintendent, Central Jail, Patiala to keep the death warrants in abeyance and not to execute the same till 12.10.2012 to meanwhile, enable the petitioners to avail their remedy of Special Leave to Appeal. Thereafter, the petitioners filed SLP (Crl.) No.8149 of 2012 before Hon'ble the Supreme Court against the judgment passed by this Court in CWP-18956-2012. The same was taken and converted into criminal appeal No.824 of 2013. However, the apex Court vide interim order dated 12.10.2012, stayed the execution of death warrants of the petitioner. Finally, the appeal was dismissed vide judgment dated 21.08.2015. It is further submitted that the mercy petition of the petitioners was dismissed by His Excellency the Governor of Punjab vide order dated 15.01.2015 (Annexure R-V/T), whereas, the copy of said order was received by the respondents on 22.01.2016. On receipt of the said order, both the petitioners were informed on the same day i.e. 22.01.2016 and their thumb impressions were obtained. The petitioners vide an application dated 23.01.2016 to the Superintendent, Central Jail, Patiala, requested to file their mercy petition before His Excellency the President of India, under Article 72-A of the Constitution of India.

Vide letter dated 25.01.2016, the mercy petition of the petitioners was sent to His Excellency the President of India through proper channel and the same was rejected vide order dated 07.08.2016. The decision of His Excellency the President of India was intimated vide order dated 11.08.2016

(Annexure R-VI). Thereafter, letter dated 05.09.2016 issued by the Registrar, Supreme Court of India, informed this office that an application for re-opening of review petition Nos.192-193 of 2011 was filed on 27.08.2016 on behalf of the petitioners, however, no orders of stay of execution were

received till 16.09.2016. The warrants of Execution of sentence of death dated 27.09.2016 were received in the office of the Superintendent, Central

Jail, Patiala, from learned Sessions Judge, Hoshiarpur on 30.09.2016. On receipt of warrants for execution of sentence for death, the petitioners were

immediately informed of the same. It is thus, submitted that there is no inordinate delay on the part of the Executive in deciding the mercy petitions. It

is further submitted that the assertion raised on behalf of the petitioners being put-up in death cells under solitary confinement is against the record.

The petitioners were admitted in the jail upon their conviction on 21.12.2006. Since then, they were put-up in enclosure '32 Chakkis' along with 34

other inmates. They were not put-up in death cells or solitary confinement before their death warrants were received on 30.09.2016. Prior thereto, the

petitioner had been performing their daily routine and were also playing outdoor games along with other inmates within the enclosure '32 Chakkis'.

For the reasons best known to the petitioners, Union of India was not impleaded as respondent in the present petition. However, after hearing the

matter, the Court felt that the Union of India is a necessary party. Therefore, Union of India was impleaded as respondent vide order dated

28.08.2017. Despite the order passed, the petitioner did not file the amended memo of parties. However, Union of India caused representation and

contested the matter.

Learned Senior counsel appearing on behalf of the Union of India submits that the first mercy petition was filed on 11.10.2012, directly before the

President of India. However, the same was referred to the Governor of Punjab for the reason that the petitioners had the remedy of filing mercy

petition under Article 161 of the Constitution of India before the Governor and thereafter before His Excellency the President of India.

On 08.02.2013, a mercy petition was filed before the Hon'ble Governor which was finally rejected on 15.01.2015. The petitioners then filed mercy

petition before His Excellency the President of India who finally looking into the entire record, rejected the same on 07.08.2016. Thus, there is no

delay much less an inordinate delay in this case for the purpose of commutation of death sentence into life imprisonment.

Learned Counsel for the victim-intervener contends that the petitioners have not approached this Court with clean hands. The petitioners have not

disclosed the exact time-line of the multiple legal remedies availed by them at every step since their conviction vide judgment dated 21.12.2006. It is

submitted that after the dismissal of their review petitions by Hon'ble the Supreme Court on the ground of delay as well as on merits, the petitioners

challenged the constitutional validity of Section 364-A IPC before Hon'ble the Supreme Court, which was dismissed as withdrawn with liberty to

approach this Court vide order dated 02.05.2012. Thereafter, the petitioners challenged the constitutional vires of death sentence as a penalty for

Section 364-A IPC along with the consequential prayer to commute their death sentence into life imprisonment before this Court on 03.10.2012 by

filing CWP-18956-2012. The said petition was dismissed on 03.10.2012. Then the petitioners challenged judgment dated 03.10.2012 before Hon'ble the

Supreme Court and on 21.08.2015, a three-judge bench of Hon'ble the Supreme Court upheld the Constitutional vires of death sentence having been

prescribed for Section 364-A IPC and dismissed their appeal. Thus, the delay, if any, was at the instance of the petitioners. It is further submitted that

the rights of a convict must be considered in the light of the rights of the victim and his/her family. The victim has patiently and with resolute faith in

the judicial process, has counted on the justice delivery system. After 14 years of the initiation of criminal litigation in the present case, till date, the

sentence imposed by learned trial Court as upheld by Hon'ble the Supreme Court, has not been executed. CitesS mt. Triveniben Vs. State of Gujarat,

1989(1) SCC 678;

People's Union for Democratic Rights (PUDR) Vs. Union of India, 2015(3) RCR (Crl.) 7 (UPS);h atrughan Chauhan Vs. Union of India, 2014(1)

RCR (Crl.) 741 (SC;) Ajay Kumar Pal Vs. Union of India, 2015 (2) SCC 47 8and Sonu Sardar Vs. Union of India and another (Writ Petition Crl.

No.441 of 2015) (DELHI). Heard.

Hon'ble the Supreme Court in Triveniben's case (supra) which has been relied upon by learned counsel for all the parties, has laid down certain

guiding principles for the purposes of deciding whether a given case is fit for commutation of death penalty into a sentence of life imprisonment or not.

Their Lordships have observed thus:-

76. What should be done by the Court is the next point for consideration. It is necessary to emphasise that the jurisdiction of the Court at this stage is

extremely limited. If the Court wants to have a look at the grievance as to delay, it is needless to state, that there should not be any delay either in

listing or in disposal of the matter. The person who complains about the delay in the execution should not be put to further delay. The matter,

therefore, must be expeditiously and on top priority basis, disposed of. The Court while examining the matter, for the reasons already stated, cannot

take into account the time utilised in the judicial proceedings up to the final verdict. The Court also cannot take into consideration the time taken for

disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment

affirming the conviction and sentence. The Court may only consider whether there was undue long delay in disposing of mercy petition; whether the

State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay, may be a significant factor, but that by itself

cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself. The Court has

still to consider as observed in Sher Singh case (at 596):

The nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the

motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into

the verdict as to whether the sentence should be vacated for the reason that its execution is delayed.

(emphasis supplied)

Thus, while deciding the issue in hand, the Court has only to consider whether there was undue & long delay in disposing of mercy petition; whether

the State was guilty of dilatory conduct and whether the delay was for no reason

at all. Further, the inordinate delay, though significant, cannot be the solitary factor to discard the execution and most importantly, all the factors cannot be considered in isolation of the dastardly and diabolical circumstances of the crime.

Before proceeding further, it would be apposite to note down the chronology of events, as emanating from the record as also the submissions made on

behalf of learned counsel for the parties, as below:- 14.02.2005 FIR No.35/2005 was registered u/s 302/364-A/120-B and 201 IPC at P.S. City,

Hoshiarpur, Punjab on the allegation that Abhi Verma @ Harry, a boy aged 16 years, and a student of DAV School, Hoshiarpur, was kidnapped on

14.2.2005. Sh. Ravi Verma, father of the boy received a ransom call from the kidnapper demanding Rs.50.00 lakh. Sh. Verma informed the same to

the Police Station City at Hoshiarpur, Punjab, On the next day, the dead body of Abhi Verma was found lying in the fields of Daulatpur. Three

accused namely Vikram Singh, Jasvir Singh and Sonia (wife of Jasvir Singh) were arrested in this case.

21.12.2006 Learned trial Court vide its judgment in Sessions Trial No.24 of 3.9.2005 awarded death sentence to all the three accused for offences u/s

302/364-A/201 and 120-B of IPC 30.05.2008 High Court confirms the murder reference (MRC 1 of 2007) and dismisses the appeal (Crl. Appeal No

105-DB/2007) of the accused.

25.01.2010 The appeals the three accused (Crl. Appeal Nos. 1396-97 of 2008) before Hon'ble the Supreme Court were dismissed. However, Court

commuted the death sentence of convict-Sonia into life imprisonment, while confirming the death sentence awarded to convict-petitioners Jasvir Singh

and Vikram Singh.

20.04.2011 First Review Petition of the three convicts [Review Petition (Crl.) No. 192-193 of 2011] dismissed by Hon'ble the Supreme Court.

02.05.2012 The petitioners challenged constitutional validity of death sentence having been prescribed under Section 364-A IPC before Hon'ble the

Supreme Court vide Writ Petition (Crl.) No.66 of 2012. The same was withdrawn with liberty to approach this Court.

15.09.2012 Death Warrants issued for execution of 05.10.2012.

17.09.2012 The petitioners prefer CWP No. 18956 of 2012 challenging the constitutional vires of death sentence as a penalty for 364-A IPC before

this Court along with a consequential prayer to commute their death sentence into life imprisonment. This Court issued notice of motion on 24.9.2012.

03.10.2012 CWP No.18956 of 2012 was dismissed by this Court. However, while dismissing the same, the death warrants which were to be executed

on 05.10.2012 were stayed till 12.10.2012 in order to afford opportunity to the petitioners to file appeal before Hon'ble the Supreme Court.

11.10.2012 In pursuance to an order dated 10/11.10.2010 passed by this Court in CWP No.5429 of 2010 (whereby the convicts Jasvir Singh and Sonia

had sought enforcement of their perceived right to have conjugal life and procreate within the jail premises), the mercy petition was sent directly to the

President of India which was received in the Secretariat of the His Excellency the President on 18.10.2012.

The petitioners filed SLP (Crl.) No.8149 of 2012 before Hon'ble the Supreme Court against the judgment passed by this Court in CWP-18956-2012 on

03.10.2012. The same was taken and converted into criminal appeal No.824 of 2013.

12.10.2012 The apex Court vide interim order dated 12.10.2012, passed in SLP (Crl.) No.8149 of 2012, stayed the execution of death warrants of the petitioners.

26.11.2012 The Joint Secretary (Judicial), Ministry of Home Affairs, Government of India, communicated to the Secretary, Department of Home

Affairs, Government of Punjab, to place the mercy petition before the Governor under Article 161 of the Constitution of India.

08.02.2013 In compliance of the aforesaid letter, a fresh mercy petition on behalf of the petitioners was submitted before Hon'ble Governor.

02.09.2014 Hon'ble the Supreme Court vide judgment passed in Mohammed Arif's case [2014(4) RCR (Crl.) 103], directed to give an opportunity of

open hearing to the death row convicts in their review petitions before Hon'ble the Supreme Court.

30.09.2014 Letter from the Superintendent, Central Jail to the Joint Secretary (Judicial), Government of India, that the condemned prisoners have filed

criminal appeal No.824 of 2013 (arising out of SLP (Crl.) 8149 of 2012) and the same is pending adjudication.

03.11.2014 A speaking order was passed by the Principal Secretary, Department of Home Affairs, Government of Punjab, that the mercy petitions

were submitted before the Governor on 27.05.2014, however, certain observations have been made including the one with regard to a judgment

passed by Hon'ble the Supreme Court on 09.07.2014 in Union of India Vs. Sriharan @ Murugan and others, Writ Petition (Crl.) No.48 of 2014,

restraining the State Governments from exercising their powers of remission to life convicts.

24.11.2014 A letter is written to the Principal Secretary, Department of Home Affairs, Government of Punjab clarifying that the judgment passed in

Sriharan's case (supra) deal with life convicts and not the death row convicts and requested to consider the mercy petition of the petitioners under

Article 161 of the Constitution of India.

15.01.2015 Mercy petition rejected by His Excellency the Governor of Punjab.

21.08.2015 A three-judge Bench of Hon'ble the Supreme Court dismissed Criminal Appeal No.824 of 2013 [2015 (3) RCR (Crl.) 1030], upholding the constitutional validity of Section 364-A IPC.

22.01.2016 The rejection of the mercy petition by His Excellency the Governor was communicated to the petitioners.

23.01.2016 Mercy petition prepared and sent to His Excellency the 25.01.2016 President of India 07.08.2016 His Excellency the President rejects the mercy petition and 11.08.2016 the decision is communicated to the petitioners.

27.08.2016 For re-opening of the review petition No.192-193 of 2011, a letter was sent by Ms. Shilpa Singh, Advocate on behalf of the petitioners and an intimation to this effect was received from the Registrar of Hon'ble the Supreme Court as to whether any date for execution of the death sentence has been fixed or not.

05.09.2016 Pursuant to the message received from the registry of Hon'ble Supreme Court, the Registrar General of this Court wrote a letter dated

08.09.2016 to learned Sessions Judge, Hoshiarpur for strict compliance along with a copy to the Secretary, Ministry of Home Affairs, New Delhi, which was received in the Ministry on 23.09.2014.

06.09.2016 E-mail also sent to re-open the review hearing in the light of Mohammed Arif's case 27.09.2016 Death warrants issued for execution on 25.10.2016.

04.10.2016 Present petition filed before this Court under Article 226 of the

Constitution of India 22.10.2016 Amendment in writ petition vide CM No.13552 of 2016.

30.09.2016 Petitioners sent Fansi Yard after receiving death warrants since mercy petition stood rejected.

18.10.2016 Hon'ble Supreme Court stays the execution during the pendency of the 2nd review hearing (Crl. MP No.16673-16674 of 2016 and 16675-16676 of 2016 in review petition (Crl.) No.192-193 of 2011 in Crl. Appeal Nos.1396-1397 of 2008.

07.07.2017 The second review petition also dismissed vide judgment reported as 2017(3) RCR (Crl.) 648.

The first and foremost contention raised on behalf of the petitioners is with regard to delay in deciding the mercy petitions.

As regards the delay in deciding the mercy petition is concerned, there is no time limit prescribed for the Executive to decide the mercy petition

preferred by a condemned prisoner, nor there is any straight- jacket formula to determine the delay in such cases and each case has to be considered

in the lights of its own peculiar facts and circumstances.

However, Hon'ble the Supreme Court in its various judicial pronouncements, has laid down certain guiding factors for determining the crucial question

of 'delay' in such cases. In Triveniben's case (supra), their Lordships have laid down as under:-

â??15. It was contended that Article 21 contemplates not only a fair procedure but also expeditious procedure and in this context it was contended

that observations be made so that judicial process also is concluded as expeditiously as possible. Learned Attorney General has filed compilation of

rules of various High Courts and it is not disputed that practically in all the High Courts, a confirmation case where the sentence of death is awarded

by the Sessions Court and the case is pending in the High Court for confirmation time bound programme is provided in the rules and it could be said

that except on some rare occasion the High Court has disposed of a confirmation case between six months to one year and therefore it could not be

said that there is no procedure provided for expeditious disposal of these cases. At the Sessions level also the normal procedure of the Sessions trial is

that it is taken up day to day although after coming into force of the Code of Criminal Procedure in 1973 where the number of offences triable by the

Sessions Court have been increased but there is sometimes a slight departure from the normal rule which is the cause to some extent for some

slackness in the Sessions trial but attempt is always made and it is expected that Sessions case where offences alleged is one which is punishable with

death should be given top priority and normally it is given top priority and it is expected that the trials must continue day to day unless it is concluded.

Although it is well-known that sometimes it is at the instance of the advocates appearing for defence also that this normal rule is given a go-bye but

ordinarily it is expected that these cases must be tried expeditiously and disposed of.

16. Even in this Court although there does not appear to be a specific rule but normally these matters are given top priority. Although it was contended

that this reference before us--a Bench of five-Judges, was listed for hearing after a long interval of time. We do not know why this reference could

not, be listed except what is generally well-known the difficulty of providing a Bench of five Judges but ordinarily it is expected that even in this Court

the matters where the capital punishment is involved will be given top priority and shall be heard of and disposed of as expeditiously as possible but it

could not be doubted that so long as the matter is pending in any Court before final adjudication even the person who has been condemned or who has

been sentenced to death has a ray of hope. It therefore could not be contended that he suffers that mental torture which a person suffers when he

knows that he is to be hanged but waits for the Dooms-Day. The delay therefore which could be considered while considering the question of

commutation of sentence of death into one of life imprisonment could only be from the date the judgment by the apex court is pronounced i.e. when

the judicial process has come to an end.

17. After the matter is finally decided judicially, it is open to the person to approach the President or the Governor, nor, as the case may be, with a mercy

petition. Some-times person or at his instance or at the instance of some of his relatives, mercy petition and review petitions are filed repeatedly

causing undue delay in execution of the sentence. It was therefore contended that when such delay is caused at the instance of the person himself he

shall not be entitled to gain any benefit out of such delay. It is no doubt true that sometimes such petitions are filed but a legitimate remedy if available

in law, a person is entitled to seek it and it would therefore be proper that if there has been undue and prolonged delay that alone will be a matter

attracting the jurisdiction of this Court, to consider the question of the execution of the sentence. While considering the question of delay after the final

verdict is pronounced, the time spent on petitions for review-and repeated mercy petitions at the instance of the convicted person himself however

shall not be considered. The only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay

occurring at the instance of the Executive.

18. So far as the scope of the authority of the President and the Governor while exercising jurisdiction under Article 72 and Article 161 are concerned

the question is not at all relevant so far as the case in hand is concerned. But it must be observed that when such petitions under Article 72 or 161 are

received by the authorities concerned it is expected that these petitions shall be disposed of expeditiously.

19. to 21. XXX XXX XXX XXX XXX XXX

22. It was contended that the delay in execution of the sentence will entitle a prisoner to approach this Court as his right under Article 21 is being

infringed. It is well- settled now that a judgment of court can never be challenged under Article 14 or 21 and therefore the judgment of the court

awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in Naresh Shridhar

Mirajkar and Ors. v. State of Maharashtra and Anr., [1966] 3 SCR 744 and also in A.R. Antulay v.R.S. Nayak and another, [1988] 2 SCC 602 the

only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the

final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this

Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go

behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the

circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient

for coming to a conclusion that execution of the sentence of death will not be

just and proper. The nature of the offence circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict also cannot be considered for coming to the conclusion whether the sentence could be altered on that ground also.

In the instant case, the first mercy petition was filed on behalf of the petitioners on 11.10.2012, pursuant to the interim directions issued by this Court in CWP-5429 of 2010, whereby convicts Jasvir Singh and Sonia had sought enforcement of their perceived right to have conjugal life and procreate within the jail premises. The relevant portion of order dated 11.10.2012 reads thus:-

â??It is stated by the counsel that as per the specific instructions given to her, the first petitioner has drafted a mercy petition for submission to the President of India and the jail authorities may be directed to accept it for its onwards transmission to the competent authority.

If that is so the Superintendent, Central Jail, Patiala is directed to receive the mercy petition from the petitioner No.1 and forward the same to the address.

The needful shall be done today itself.â??

The mercy petition was received in His Excellency the President's Secretariat on 18.10.2012. Vide letter dated 26.11.2012 issued by the Joint

Secretary (Judicial), Ministry of Home Affairs, Govt. of India, informed the Secretary, Department of Home Affairs, Govt. of Punjab, to place the

mercy petition before the Governor in exercise of Article 161 of the Constitution of India which was the efficacious remedy available to the petitioners

in the first instance. In compliance thereof, first mercy petition was preferred before His Excellency the Governor on 08.02.2013 and it finally came to

be decided against the petitioners on 15.01.2015. Thus, the first mercy petition was decided by His Excellency the Governor within a period of one

year and ten months. The rejection of the mercy petition by His Excellency the Governor was communicated to the petitioners on 22.01.2016. On

23.01.2016, mercy petition under Article 72 of the Constitution of India was

prepared and sent to His Excellency the President of India on 25.01.2016.

The said petition was rejected on 07.08.2016 and communicated to the petitioners on 11.08.2016. Thus, the time taken for deciding the mercy petition

was barely six months. The period between 11.10.2012 i.e. the date when the first mercy petition was submitted before His Excellency the President

of India till the date of filing of first mercy petition before His Excellency the Governor on 08.02.2013, cannot be said to be a delay on the part of the

Executive as the whole exercise had been carried out to safeguard the interests of the petitioners alone. Further, the period from 15.01.2015, when the

first mercy petition was decided by His Excellency the Governor the date when the said rejection was communicated to the petitioners i.e. 22.01.2016,

also cannot be termed as 'delay in deciding the mercy petition' as described by the apex Court in Triveniben's case (supra). Another point raised

before this Court is whether the delay in filing the first mercy petition on 11.10.2012, after the rejection of review petition by Hon'ble the Supreme

Court on 20.04.2011, is attributable to the petitioners or to the State. An assertion has been raised on behalf of the petitioners that it was the duty of

the Superintendent to submit the mercy petition within seven days of the dismissal of an appeal before Hon'ble the Supreme Court. Reliance in this

regard has been placed on 'Procedure regarding petitions for mercy in death sentence cases', appended as Annexure A-1 to CM-8622-CWP-2019

filed by the petitioner No.1. The relevant portion thereof, reads thus:-

â??A. PETITIONS FOR MERCY.

I A convict under sentence of death shall be allowed, if he has not already submitted a petition for mercy, for the preparation and submission of a

petition for mercy, seven days after, and exclusive of, the date on which the Superintendent of Jail informs him of the dismissal by the Supreme Court

of his appeal or of his application for special leave to appeal to the Supreme Court.

Provided that in cases where no appeal to the Supreme Court has been preferred or no application for special leave to appeal to the Supreme Court

has been lodged, the said period of seven days shall be computed from the date next after the date on which the period allowed for an appeal to the

Supreme Court or for lodging an application for special leave to appeal to the Supreme Court expires.â??

Thus, the above provision by no stretch of imagination can be perceived to cast a duty on the Superintendent to file the mercy petition, rather, it is a

matter of individual choice, which the petitioners did not exercise till the issuance of interim directions by this Court on 11.10.2012 in CWP-5429-2010.

Similar view has been expressed by Hon'ble the Supreme Court in Triveniben's case (supra), which reads thus:-

“17. After the matter is finally decided judicially, it is open to the person to approach the President or the Governor, as the case may be, with a

mercy petition. Some-times person or at his instance or at the instance of some of his relatives, mercy petition and review petitions are filed repeatedly

causing undue delay in execution of the sentence. It was therefore contended that when such delay is caused at the instance of the person himself he

shall not be entitled to gain any benefit out of such delay. It is no doubt true that sometimes such petitions are filed but a legitimate remedy if available

in law, a person is entitled to seek it and it would therefore be proper that if there has been undue and prolonged delay that alone will be a matter

attracting the jurisdiction of this Court, to consider the question of the execution of the sentence. While considering the question of delay after the final

verdict is pronounced, the time spent on petitions for review-and repeated mercy petitions at the instance of the convicted person himself however

shall not be considered. The only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay

occurring at the instance of the Executive.

(emphasis supplied)

The opening lines of the paragraph make it abundantly clear that it is the discretion or choice of the death row convict to file a mercy petition.

From the above narration, it is manifestly established that there is no delay, much less inordinate delay, in deciding the mercy petitions.

The second argument raised on behalf of the petitioners is with regard to solitary confinement. It has been asserted that the petitioners were kept in a

'death cell' under illegal solitary confinement for a period of more than three years and two months making it a good case for commutation of the

death sentence. Hon'ble the Supreme Court in Sunil Batra's case (supra), has in detail discussed this aspect in the following terms:-

“109. Since arguments have been addressed, let us enquire what are the vital

components of solitary confinement? Absent statutory definition, the indication we have is in the Explanation to Paragraph 510 of the Jail Manual:

Solitary confinement means such confinement with or without labour as entirely secludes the prisoner both from sight of, and communication with, other prisoners.

110. The hard core of such confinement is (a) seclusion of the prisoner, (b) from sight of other prisoners, and (c) from communication with other

prisoners. To see a fellow being is a solace to the soul. Communication with one's own kind is a balm to the aching spirit. Denial of both, with

complete segregation superimposed, is the journey to insanity. To test whether a certain type of segregation is, in Indian terms, solitary confinement,

we have merely to verify whether interdict on sight and communication with other prisoners is imposed. It is no use providing view of or conversation

with jail visitors, jail officers or stray relations. The crux of the matter is communication with other prisoners in full view. Bad fellows in misery have

heartloads to unload and real conversation between them has a healing effect. Now that we have an Indian conceptualisation of solitary confinement

in the Prison Manual itself, lexical exercises, decisional erudition from other countries and legomachic niceties with reference to law dictionaries are

supererogatory. Even the backward psychiatry of the Jail Manual considers continuation of such confinement as ""likely to prove injurious to mind or

body"" or even prone to make the person ""permanently unfit to undergo such confinement"" (vide paragraph 512 (7) and (9) of the Jail Manual.)

111. In Words and Phrases (Permanent Edn.) solitary confinement as a punishment is regarded as ""the complete isolation of the prisoner from all

human society and his confinement in a cell of considerable size so arranged that he had no direct intercourse or sight of any human being and no

employment or instruction"". It is worthwhile comparing the allied but less harsh confinement called ""close confinement"" which means 'such custody,

and only such custody as will safely secure the production of the body of the prisoner on the day appointed for his execution.

112. A more practical identification of solitary confinement is what we find in Black's Law Dictionary: ""In a general sense, the separate confinement

of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailor; in a stricter sense, the complete isolation of

a prisoner from all human society and his confinement in cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction.

Complete isolation from all human society is solitary confinement in its stricter sense. The separate confinement of a person with occasional access of other persons is also solitary confinement.

113. to 216. XXX XXX XXX XXX XXX XXX

217. It may be conceded that solitary confinement has a degrading and dehumanising effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may breed insanity. Social isolation represents the most destructive abnormal environment. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it. It is abolished in U.K. but it is still retained in U.S.A.

218. If sub-s. (2) of s. 30 enables the prison authority to impose solitary confinement of a prisoner under sentence of death not as a consequence of violation of prison discipline but on the sole and solitary ground that the prisoner is a prisoner under sentence of death, the provision contained in sub-s.

(2) would offend article 20 in the first place as also articles 14 and 19. If by imposing solitary confinement there is total deprivation of comradeship

amongst co-prisoners, comingling and talking and being talked to, it would offend article 21. The learned Additional Solicitor General while not adopting

any dogmatic position, urged that it is not the contention of the respondents that sub-s. (2) empowers the authority to impose solitary confinement, but

it merely permits statutory segregation for safety of the prisoner in prisoners' own interest and instead of striking down the provision we should adopt

the course of so reading down the section as to denude it of its ugly inhuman features.

219. It must at once be made clear that sub-s. (2) of s. 30 does not empower the prison authority to impose solitary confinement, in the sense in which

that word is understood in para 510 of Jail Manual, upon a prisoner under sentence of death. Sections 73 and 74 of the Indian Penal Code leave no

room for doubt that solitary confinement is by itself a substantive punishment which can be imposed by a Court of law. It cannot be left to the whim

and caprice of prison authorities. The limit of solitary confinement that can be imposed under Court's order is strictly prescribed and that provides

internal evidence of its abnormal effect on the subject. Solitary confinement as substantive punishment cannot in any case exceed 14 days at a time

with intervals of not less duration than such periods and further, it cannot be imposed until the medical officer certifies on the history ticket that the

prisoner is fit to undergo it. Every prisoner while undergoing solitary confinement has to be visited daily by the medical officer, and when such

confinement is for a period of three months it cannot exceed seven days in any one month of the whole imprisonment awarded, with intervals between

the periods of solitary confinement of not less duration than such periods (see s. 74, IPC). The Court cannot award more than three months' solitary

confinement even if the total term of imprisonment exceeds one year (see s. 73, IPC). This is internal evidence, if any is necessary, showing the

gruesome character of solitary confinement. It is so revolting to the modern sociologist and law reformist that the Law Commission in its 42nd Report,

page 78, recommended that the punishment of solitary confinement is out of tune with modern thinking and should not find a place in the Penal Code

as a punishment to be ordered by any criminal court, even though it may be necessary as a measure of jail discipline Sub-s. (2) of s. 30 does not

purport to provide a punishment for a breach of Jail discipline. Prison offences are set out in s. 45. Section 46 confers power on the Superintendent to

question any person alleged to have committed a jail offence and punish him for such offence. The relevant sub clauses for the present purpose are

sub-clauses (8) and (10) which read as under:

46. The Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence by-

x x x x x x

(8) separate confinement for any period not exceeding three months;
Explanation-Separate confinement means such confinement with or without

labour as secludes a prisoner from communication with, but not from sight of, other prisoners, and allows him not less than one hour's exercise per

diem and to have his meals in association with one or more other prisoners;

x x x x x

(10) cellular confinement for any period not exceeding fourteen days:

Provided that such restriction of diet shall in no case be applied interval of not less duration than such period must elapse before the prisoner is again

sentenced to cellular or solitary confinement; Explanation-Cellular confinement means such confinement with or without labour as entirely secludes a prisoner from communication with, but not from sight of, other prisoners"".

220. The explanation to sub-clause (8) makes it clear that he is not wholly segregated from other prisoners in that he is not removed from the sight of other prisoners and he is entitled to have his meals in association with one or more other prisoners. Even such separate confinement cannot exceed three months. Cellular confinement secludes a prisoner from communication with other prisoners but not from the sight of other prisoners. However, para 847 of the Punjab Jail Manual and the provisions which follow, which prescribe detailed instructions as to how a condemned prisoner is to be kept, if literally enforced, would keep such prisoner totally out of bounds, i.e. beyond sight and sound. Neither separate confinement nor cellular confinement would be as tortuous or horrendous as confinement of a condemned prisoner. Sub-s. (2) of s. 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-s. (2) of s. 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-s. (2) of s. 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death.

221. If s. 30(2) does not empower the jail authority to keep a condemned prisoner in solitary confinement, the expression ""such prisoner shall be confined in a cell apart from all other prisoners' will have to be given some rational meaning to effectuate the purpose behind the provision so as not to

attract the vice of solitary confinement. We will presently point out the nature of detention in prison since the time capital sentence is awarded to an

accused and until it is executed, simultaneously delineating the steps while enforcing the impugned provision.

222. The next question is: who is a prisoner under sentence of death and how is he to be dealt with when confined in prison before execution of

sentence? If solitary confinement or cellular or separate confinement cannot be imposed for a period beyond three months in any case, would it be fair

to impose confinement in terms of s. 30(2) on a prisoner under sentence of death right from the time the Sessions Judge awards capital punishment till

the sentence is finally executed ? The sentence of death imposed by a Sessions Judge cannot be executed unless it is confirmed by the High Court

(see s. 366(1), Cr. P.C.). However, we are not left in any doubt that the prison authorities treat such a convict as being governed by s. 30(2) despite

the mandate of the warrant under which he is detained that the sentence shall not be executed till further orders are received from the Court. It is

undoubtedly obligatory upon the Sessions Judge while imposing the sentence of death on a person to commit him to jail custody under a warrant. Now,

after the convicted person is so committed to jail custody the Sessions Judge submits the case to the High Court as required by s. 366, Cr. P.C. The

High Court may either confirm the sentence or pass any other sentence warranted by law or may even acquit such a person. Thereafter, upon a

certificate granted by the High Court under Article 134(c) of the Constitution or by special leave under Article 136, an appeal can be preferred to the

Supreme Court. Section 415, Cr. P.C. provides for postponement of execution of sentence of death in case of appeal to Supreme Court either upon a

certificate by the High Court or as a matter of right under Supreme Court (Enlargement of criminal Appellate Jurisdiction) Act, 1971, or by 91 special

leave under Article 136. Further, under Articles 72 and 161 of the Constitution, the President and the Governor in the case of sentence of death has

power to grant pardon, reprieve or remittance or commutation of the sentence. No one is unaware of the long time lag in protracted litigation in our

system between the sentence of death as imposed by the Sessions Court and the final rejection of an application for mercy. Cases are not unknown

where merely on account of a long lapse of time the Courts have commuted the sentence of death to one of life imprisonment on the sole ground that

the prisoner was for a long time hovering under the tormenting effect of the shadow of death. Could it then be said that under sub-s. (2) of s. 30 such prisoner from the time the death sentence is awarded by the Sessions Judge has to be confined in a cell apart from other prisoners? The prisoner in such separate, confinement would be under a trauma for unusually long time, and that could never be the intention of the legislature while enacting the provision. Such special precautionary measures heaping untold misery on a condemned prisoner cannot spread over a long period giving him no respite to escape from the boredom by physical and mental contact with other prisoners. What then, must be the underlying meaning of the expression "a prisoner under sentence of death" in s. 30 so as to reduce and considerably minimise the period during which the prisoner suffers this extreme or additional torture ?

223. The expression "prisoner under sentence of death" in the context of sub-s (2) of s. 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. In a slightly different context in *State of Maharashtra v. Sindhi @ Raman (I)*, it was said that the trial of an accused person under sentence of death does not conclude with the termination of the proceedings in the Court of Sessions because of the reason that the sentence of death passed by the Sessions Court is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by a competent court. In the context of s. 303 of the Indian Penal Code it was said in *Shaik Abdul Azeez v. State of Karnataka*, (I) that an accused cannot be under sentence of imprisonment for life at the time of commission of the second murder unless he is actually undergoing such a sentence or there is legally extant a judicially final sentence which he is bound to serve without the requirement of a separate order to breathe life into the sentence which was otherwise dead on account of remission under s. 401, Cr. P.C. 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 s. 30, sub-s. (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in sub-s. (2) of s. 30, reducing the period of such confinement to a short duration.

224. What then is the nature of confinement if a prisoner who is awarded capital sentence by the Sessions Judge and no other punishment from the time of sentence till this sentence becomes automatically executable? Section 366(2) of the Cr. P.C. enables the Court to commit the convicted person who is awarded capital punishment to jail custody under a warrant. It is implicit in the warrant that the prisoner is neither awarded simple nor rigorous imprisonment. The purpose behind enacting sub-s. (2) of s. 366 is to make available the prisoner when the sentence is required to be executed. He is to be kept in jail custody. But this custody is something different from custody of a convict suffering simple or rigorous imprisonment. He is being kept in jail custody for making him available for execution of the sentence as and when that situation arises. After the sentence becomes executable he may be kept in a cell apart from other prisoners with a day and night watch. But even here, unless special circumstances exist, he must be within the sight and sound of other prisoners and be able to take food in their company.

225. If the prisoner under sentence of death is held in jail custody, punitive detention cannot be imposed upon him by jail authorities except for prison offences. When a prisoner is committed under a warrant for jail custody under s. 366(2) Cr.P.C. and if he is detained in solitary confinement which is a Punishment prescribed by s. (1) 73, IPC, it will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2). But as the prisoner is not to be kept in solitary confinement and the custody in which he is to be kept under s. 30(2) as interpreted by us would preclude detention in solitary confinement, there is no chance of imposing second punishment upon him and therefore, s. 30(2) is not violative of Article 20.â??

A perusal of the above would reveal that 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 condemned prisoner cannot be kept under solitary

confinement.

Now, the question arises as to whether the petitioners in the present case were at any stage kept under solitary confinement. Learned counsel for the

petitioners have referred to para Nos.1 and 2 of the reply dated 26.09.2017 filed by the State of Punjab to CM No.13575 of 2017, wherein, it has been

stated that "After 2009, they have not been kept isolated from other fellow inmates", to say that from 21.12.2006 till the end of the year 2009, the

petitioners were kept in solitary confinement.

However, in para No.5 of the reply dated 24.10.2016 filed in the main writ petition, the position has been explained as under:-

"5. That the contents of Para No.5 are denied being incorrect regarding the petitioners being put-up in death cells under solitary confinement. The

petitioners were admitted in this jail upon their conviction on 21.12.2006. Ever since, they were admitted this jail they were put-up in enclosure 32

Chakkis' along with 34 other inmates. They were not put-up in death cells or solitary confinement before their death warrants were received in this

office on 30.09.2016. Prior to 30.09.2016, they were performing their daily routine and were also playing outdoor games along with the other inmates

within the enclosure 32 Chakkis. Rest of the contents are admitted being matter of record."

Thus, the expression "After 2009, they have not been kept isolated from other fellow inmates", alone is not sufficient to hold that the petitioners

were under solitary confinement before 2009. At the most, it can be said to be statutory segregation and not solitary confinement by any stretch of

imagination. For better appreciation of the issue, it is appropriate to extract para No.1 of the preliminary submissions of reply dated 26.09.2017 which

reads thus:-

"1. That the petitioners were admitted in this in Patiala Jail after conviction on 21.12.2006 and they were confined in enclosure 32 Chakkis along

with other inmates. That before 2009, they were kept in the jail according to para no.468 (3) and para no.767 (1) of Punjab Jail Manual, 1996. As per

these para of Punjab Jail Manual, 1996 all the condemned petitioners were permitted to occupy the courtyard of his cell for half an hour each morning

and evening. Only one prisoner at a time was allowed to do. The prisoners were allowed such interviews and other communications with his relatives,

friends and legal advisers as incorporated in Para 468 (3) of Punjab Jail Manual. After 2009 they were performing their daily routine and were also

playing outdoor games along with the other inmates within the enclosure 32 Chakkis. However it is submitted that according to the Para no.598 and

758 of the Jail Manual, for the purpose of security and well-being of the condemned prisoners it is the responsibility of the State Govt. to look after the

health of the condemned prisoner. Daily search of his cell and his belonging is done to prevent condemned prisoners from inflicting any harm to his

own body and committing suicide. They were kept separate from other fellow prisoners for the purpose of security and well being.â??

Learned counsel for the petitioners have placed implicit reliance on the observations made by Hon'ble the Supreme Court in Triveniben's case (supra),

which read as under:-

â??It is therefore clear that the prisoner who is sentenced to death and is kept in jail custody under a warrant under Section 366(2) he is neither

serving rigorous imprisonment nor simple imprisonment. In substance he is in jail so that he is kept safe and protected with the purpose that he may be

available for execution of the sentence which has been awarded and in this view the aspect of solitary confinement has already been dealt with in the

above noted case but it must be said that the life of the condemned prisoner in jail awaiting execution of sentence must be such which is not like a

prisoner suffering the sentence but it is also essential that he must be kept safe as the purpose of the jail custody is to make him available for

execution after the sentence is finally confirmed.â??

(emphasis supplied)

In a latest judgment passed in Shatrughan Chauhan's case (supra), while dealing with the cases of solitary confinement, Hon'ble the Supreme Court

has given direction to comply with the dictum of law laid down in Sunil Batra's case (supra), but dismissed the cases merely on solitary confinement. It

has been observed thus:-

â??(iii) Solitary Confinement

80) Another supervening circumstance, which most of the petitioners appealed in their petitions is the ground of solitary confinement. The grievance of

some of the petitioners herein is that they were confined in solitary confinement from the date of imposition of death sentence by the Sessions Court

which is contrary to the provisions of the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, Prisons Act and Articles 14, 19 and 21 of

the Constitution and it is certainly a form of torture. However, the respective States, in their counter affidavits and in oral submissions, have outrightly

denied having kept any of the petitioners herein in solitary confinement in violation of existing laws. It was further submitted that they were kept

separately from the other prisoners for safety purposes. In other words, they were kept in statutory segregation and not per se in solitary confinement.

81) Similar line of arguments were advanced in *Sunil Batra vs. Delhi Administration and Ors. etc.* (1978) 4 SCC 494, wherein this Court held as

under:-

“87. The propositions of law canvassed in Batra's case turn on what is solitary confinement as a punishment and what is non-punitive custodial

isolation of a prisoner awaiting execution. And secondly, if what is inflicted is, in effect, 'solitary', does Section 30(2) of the Act authorise it, and, if it

does, is such a rigorous regimen constitutional. In one sense, these questions are pushed to the background, because Batra's submission is that he is

not 'under sentence of death' within the scope of Section 30 until the Supreme Court has affirmed and Presidential mercy has dried up by a final 'nay'.

Batra has been sentenced to death by the Sessions Court. The sentence has since been confirmed, but the appeal for Presidential commutation are

ordinarily precedent to the hangmen's lethal move, and remain to be gone through. His contention is that solitary confinement is a separate substantive

punishment of maddening severity prescribed by Section 73 of the Indian Penal Code which can be imposed only by the Court; and so tormenting is

this sentence that even the socially less sensitive Penal Code of 1860 has interposed, in its cruel tenderness, intervals, maxima and like softening

features in both Sections 73 and 74. Such being the penal situation, it is argued that the incarceratory insulation inflicted by the Prison Superintendent

on the petitioner is virtual solitary confinement unauthorised by the Penal Code and, therefore, illegal.

Admittedly, no solitary confinement has been awarded to Batra. So, if he is de facto so confined it is illegal. Nor does a sentence of death under

Section 53, I.P.C. carry with it a supplementary secret clause of solitary confinement. What warrant then exists for solitary confinement on Batra?

None. The answer offered is that he is not under solitary confinement. He is under 'statutory confinement' under the authority of Section 30(2) of the Prisons Act read with Section 366(2) Cr.P.C. It will be a stultification of judicial power if under guise of using Section 30(2) of the Prisons Act, the Superintendent inflicts what is substantially solitary confinement which is a species of punishment exclusively within the jurisdiction of the criminal court. We hold, without hesitation, that Sunil Batra shall not be solitarily confined. Can he be segregated from view and voice and visits and comingling, by resort to Section 30(2) of the Prisons Act and reach the same result ? To give the answer we must examine the essentials of solitary confinement to distinguish it from being 'confined in a cell apart from all other prisoners'.

88. If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy but a working technique of justice. The Penal Code and the Criminal Procedure Code regard punitive solitude too harsh and the Legislature cannot be intended to permit preventive solitary confinement, released even from the restrictions of Section 73 and 74 I.P.C., Section 29 of the Prisons Act and the restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, masked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Commonsense quarrels with such nonsense.

89. For a fuller comprehension of the legal provisions and their construction we may have to quote the relevant sections and thereafter make a laboratory dissection thereof to get an understanding of the components which make up the legislative sanction for semi-solitary detention of Shri Batra. Section 30 of the Prisons Act rules :

30. (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 charge of a guard.

This 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 (Section 73 and 74

I.P.C.) 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.

92. Indeed, in a jail, cells are ordinarily occupied by more than one inmate and community life inside dormitories and cells is common. Therefore, "to be

confined in a cell" does not compel us to the conclusion that the confinement should be in a solitary cell.

93. "Apart from all other prisoners" used in Section 30(2) is also a phrase of flexible import. 'Apart' has the sense of 'To one side, aside,... apart from

each other, separately in action or function' (Shorter Oxford English Dictionary). Segregation into an isolated cell is not warranted by the word. All

that it connotes is that in a cell where there are a plurality of inmates the death sentencees will have to be kept separated from the rest in the same

cell but not too close to the others. And this separation can be effectively achieved because the condemned prisoner will be placed under the charge

of a guard by day and by night. The guard will thus stand in between the several inmates and the condemned prisoner. Such a meaning preserves the

disciplinary purpose and avoids punitive harshness. Viewed functionally, the separation is authorised, not obligated. That is to say, if discipline needs it the authority shall be entitled to and the prisoner shall be liable to separate keeping within the same cell as explained above. "Shall" means, in this disciplinary context, "shall be liable to". If the condemned prisoner is docile and needs the attention of fellow prisoners nothing forbids the jailor from giving him that facility.

96. Solitary confinement has the severest sting and is awardable only by Court. To island a human being, to keep him incommunicado from his fellows

is the story of the Andamans under the British, of Napoleon in St. Helena ! The anguish of aloneness has already been dealt with by me and I hold

that Section 30(2) provides no alibi for any form of solitary or separated cellular tenancy for the death sentence, save to the extent indicated.

111. In my judgment Section 30(2) does not validate the State's treatment of Batra. To argue that it is not solitary confinement since visitors are

allowed, doctors and officials come and a guard stands by is not to take it out of the category.â??

82) It was, therefore, held 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'.

83) Even in *Triveniben* (supra), this Court observed that keeping a prisoner in

solitary confinement is contrary to the ruling in Sunil Batra (supra) and would amount to inflicting â??additional and separateâ? punishment not authorized 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 (supra).

84) As far as this batch of cases is concerned, we are not inclined to interfere on this ground.â??

(emphasis supplied)

No other material has been placed on the file to substantiate the plea of keeping the petitioners under solitary confinement for more than three long

years. It is informed that the cells were in two rows opposite to each other and the inmates could see and talk to each other. Thus, learned counsel for

the petitioners have failed to substantiate their assertions with regard to solitary confinement. They were only kept in death cells after receiving death

warrant in the office of the Superintendent on 30.09.2016. However, after the stay of death warrant by Hon'ble the apex Court on 24.10.2016, they

were allowed to live like other fellow inmates. Even otherwise, it has also come on record that both the condemned prisoners made a request vide

application dated 27.02.2014 (Annexure R-1/T) for staying alone in the Cell. Thus, the petitioners cannot derive any benefit from the dictum laid down

in Sunil Batra's case (supra) as facts of the present case are clearly distinguishable. The petitioners were not only allowed to meet visitors, doctors

and officials but they were also permitted to interact with other inmates and play outdoor games with them. Thus, it can be safely concluded that the

petitioners were never kept in solitary confinement.

Lastly, some procedural irregularities have been pleaded on behalf of the petitioners. It has been argued on behalf of the petitioner that death warrants

were issued twice, once in 2012 and then in 2016, despite the non-exhaustion of judicial and administrative remedies. It is to be noted that the appeals

of the petitioners being Crl. Appeal Nos.1396-97 of 2008 were dismissed by Hon'ble the Supreme Court on 25.01.2010. The review petitions of all the

three convicts bearing Review petition Nos.192-193 of 2011 were also dismissed on 20.04.2011 by Hon'ble the apex Court categorically observing that

there was an inordinate delay of 356 days in filing the review petition for which

no satisfactory explanation has been offered. The review petitions were dismissed on merits as well as on delay. After the dismissal of the review petitions, no judicial or administrative remedy was availed by the petitioners till 01.05.2012, when they challenged constitutional validity of death sentence having been prescribed for Section 364-A IPC before Hon'ble the apex Court by filing WP (Crl.) No.66 of 2012 (Dy. No.15177 of 2012). The said petition was adjourned to 02.05.2012, on which date, learned counsel for the petitioners made a request that his clients may be permitted to withdraw the writ petition with liberty to file appropriate petition before the jurisdictional High Court. The request was accepted. Thereafter, the petitioners did not avail any judicial or administrative remedy and on 15.09.2012, Death Warrants were issued for execution of sentence on 05.10.2012. It was only after the issuance of death warrants that the petitioners preferred CWP-18956-2012 before this Court on 17.09.2012 challenging the vires of Section 364-A IPC. The second death warrants dated 27.09.2016 were to be executed on 25.10.2016. Criminal Appeal No.824 of 2013 by Hon'ble the apex Court upholding the constitutional validity of death sentence prescribed under Section 364-A IPC was decided on 21.08.2015 and as such the stay on execution of death warrants issued earlier which was granted by Hon'ble the Supreme Court, also stood vacated. The mercy petition of the petitioners was rejected by His Excellency the President of India on 07.08.2016 and the orders to be passed were communicated to them on 11.08.2016. Only thereafter, death warrants were issued on 27.09.2016, admittedly, when no judicial or administrative proceedings initiated at the behest of the petitioners were pending adjudication. The writ petition bearing No.5429 of 2010 preferred in the year 2010 by petitioner-Jasvir Singh @ Jassa and his wife, co-convict, Sonia, for restitution of conjugal rights, though remained pending before this Court till its decision on 29.05.2014, but the same cannot be termed as a judicial remedy availed by the petitioner for the purposes of conviction in question being based on totally independent cause of action and unrelated to the criminal proceedings faced by the petitioners. Thus, the argument with regard to wrong issuance of death warrants in this case is misplaced. During the course of arguments, this Court has also gone through the 'Summary for the President' presented by the then Union Home Minister along

with mercy petition under Article 72 of the Constitution of India filed by the petitioners and does not find any relevant information having been omitted or any irrelevant being presented.

There is no dispute with regard to the fact that while deciding the question whether a death row convict is entitled to commutation of sentence to life

imprisonment, it will not be open to the Court to go behind or examine the final judicial verdict. However, as has been laid down in Triveniben's case

(supra), the dastardly and diabolical circumstances of the crime will play major role before reaching to a conclusion. In this case, deceased Abhi

Verma @ Harry, a minor of 16 years and a student of DAV School in Shimla Pahari Chowk, Hoshiarpur City, was kidnapped from outside the school

on 14.02.2005. On the same day, Ravi Verma, father of the deceased, a small jeweller, received a ransom call demanding Rs. 50.00 lac. The police

was informed and on the basis of secret information, a police party raided the kothi owned by Darshan Kaur (father's sister of petitioner Jasvir Singh)

and found both the petitioners sitting in the drawing room. On seeing the police, they tried to flee but were caught and arrested. Co-convict Sonia was

also apprehended from the rear courtyard of the kothi. On interrogation, petitioner Jasvir Singh @ Jessa disclosed that he along with petitioner Vikram

Singh had murdered Abhi Verma @ Harry. After wrapping the dead body in a bed-sheet the same had been removed to fields of village Daulatpur.

The convicts led the police party to the disclosed place and the dead-body of the deceased was recovered. It has been concurrently recorded by the

Courts that father of the deceased was known to petitioner No.1 and his family. The offence of kidnapping was committed by betraying the trust. All

the three accused committed offence of murder in a pre-planned manner by injecting Chloroform and Fortwin in heavy doses to the victim after tying

both his hands and legs and sealing his mouth with a tape to prevent the detection of offence; all the three remained closely associated with the pre-

planning till recovery of the dead body of the helpless child, whose life was put to an end on coming to know that the police has been contacted and

that the petitioners would not be able to obtain the ransom amount. It was not merely a case of murder but the accused were also held guilty under

Section 364-A IPC. As per record, there was no enmity between the petitioners and the family of the victim and cold-blooded murder was committed

only to extract a heavy ransom of Rs.50 lac.

A lot has been argued about the rights of the petitioners, however, there is not even a whisper as to how the cries of the victim have to be addressed

as it is the victim alone who sets the wheel of justice moving by giving information to the State. Even if there is some delay in executing the judgments

and orders of the competent Courts in such cases, that must not negate the consequences of the trial reached after recording the findings and after

weighing the material on record including the gravity of the crime and the consequences to follow in a vibrant justice delivery system. The Court feels

that it is under obligation not only to protect the rights of the petitioners alone but is under bounden duty to protect the rights of all, particularly the

victim. If the Court maintains silence on the issue, then no forum is left for the victim to voice his grievance and would facilitate the perpetrator of the

crime to chart out a route that defeats the purpose of trial. Such a course surely would culminate into defeat of the majesty of law.

In view of the above discussion, this Court does not find any merit in the instant petition and the same is, hereby, dismissed.