

Kehar Singh and Another Vs. the State and Others

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Court : Delhi

Decided On : Feb-21-1986

Reported in : 1987CriLJ291; 29(1986)DLT399; 1986(11)DRJ23

Judge : Malik Sharief Ud Din and; R.N. Aggarwal, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 73, 74 and 302; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 366, 368, 369 and 414

Appeal No. : Criminal Writ No. 26 of 1986

Appellant : Kehar Singh and Another

Respondent : The State and Others

Advocate for Def. : Mr. K. L. Arora

Advocate for Pet/Ap. : P.P. Grover,; K.L. Arora,; S.P. Minocha and;

Judgement :

Aggarwal, J.

1. This order be read in continuation of our order dt. January 30, 1986.
2. The petition was admitted on the limited question of facilities to which the petitioners are entitled in Jail.

3. The two petitioners along with Satwant Singh were found guilty of the charge under S. 120-B read with S. 302, Penal Code, and were sentenced to death. The petitioners are at present lodged in separate cells in ward No. 4.

4. The contention of the petitioners is that after the aforesaid conviction and sentence was passed upon them they have been lodged in separate cells and which are heavily guarded. They have alleged that three search-lights are focused on their cells in the result they are unable to have sleep. They have further alleged that they are not allowed to wear turbans and shoes. They have further complained that they are not allowed to go out of their cells to have a walk and further they are not allowed to communicate with each other and other inmates of the jail. Their further grievance is that they are not allowed bedding, books, newspapers and writing material.

5. The contention of the petitioners is that a reference under S. 366, Cr.P.C. for confirmation of the death sentence is a continuation of the trial and until the death sentence is confirmed they are to be treated as under-trials and they are entitled to class 'B' facilities which they were earlier enjoying. The prayer made in the petition is that they should be treated humanely in accordance with jail manual and they be treated as 'B' class under-trials and they should not be confined in solitary/condemned cells and they should not be segregated from the rest of the world.

6. The respondents in their reply have refuted the above allegations of the petitioners. Shri Rajesh Somaal, Superintendent, Central Jail, Tihar, in his affidavit dt. 7th February, 1986 has stated that the petitioners are being treated as convicts under the rules and they are being provided with all the facilities which are provided under the rules to convicts. He has further stated that the cells where the petitioners are lodged were constructed at the time when the jail came into existence. He has further averred that the search lights have been put by way of extra precaution in order to avoid any mishap. It is stated that the lights are not focused at the petitioners and in no way disturb or cause inconvenience during their sleep. The Jail Superintendent has further stated that the turban has been discontinued to avoid any mishaps and 'patka' has been provided instead. He has

further stated that the petitioners are brought out of their cells both in the morning and evening and they are allowed to have a walk in accordance with the rules and that during the period they are out they mix with each other. He has further stated that interviews permitted in accordance with the rules and that during the interview some distance is maintained with a view to minimise any mischief and this has been done keeping in mind the security of the petitioners. It is further stated that the petitioners are allowed to have newspapers and they also have been provided law books inside their cells and some stationery has also been provided for their use. The Jail Superintendent has further stated that the prison dress has been provided to the petitioners and they have been allowed to supplement their dress with their private woollens which the petitioners are in fact using.

7. The petitioners in their rejoinders filed through Smt. Jasbir Kaur wife of Kehar Singh and Gurmeet Singh (nephew of Balbir Singh) have reiterated that the petitioners are entitled to class 'B' facilities which were allowed to them during the trial but have been discontinued after their conviction and sentence. It has been stated that they are being treated as convicts and allowed class 'C' facilities. The petitioners in para 8 of the rejoinder have stated that after the order of this Court dt. 30th January, 1986 some of the facilities mentioned in the counter-affidavit of the Superintendent have been restored.

8. Shri Grover, learned counsel for the petitioners, contends that the reference under S. 366, Criminal P.C. for confirmation of the death sentence is a continuation of the trial and till the death sentence is confirmed by the High Court the petitioners have to be treated as under-trials and they are as under-trial entitled to class 'B' facilities. I am unable to agree in this contention. As required by law, on the conclusion of a trial a judgment has to be pronounced. On 22nd January, 1986 the Additional Sessions Judge who tried the case pronounced the judgment. He found the petitioners guilty of the offence charged with and sentenced them to death.

9. Section 366, Criminal P.C., which finds place in Chap. Xxviii under the heading 'Submission of death sentences for confirmation' provides that when the Court of Session passes a sentence of death, the proceedings shall be submitted to the

High Court and the sentence shall not be executed unless it is confirmed by the High Court. Sub-section (2) of the said section provides that the Court passing the sentence shall commit the convicted person to jail custody under a warrant.

10. It is clear from the above section that a death sentence passed by a Court of Session cannot be executed unless it is confirmed by the High Court. After the sentence of death is passed by the Court of Session the Court is required to commit the convicted persons to jail custody under a warrant. The warrant of commitment under the sentence of death is to be in form No. 40.

11. Section 368, Criminal P.C. provides that in any case submitted under S. 366, the High Court -

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or on amended charge, or

(c) may acquit the accused person : xxx xxx xxx'

12. Section 369, Criminal P.C. provides that the confirmation or new sentence has to be signed by two Judges where the Court consists of two or more Judges.

13. From a reading of the above provisions it is clear that if there is a reference for the confirmation of the death sentence the reference has to be heard by two Judges and they have to proceed as provided in S. 368, Cr.P.C. The convicts have a right to appeal against the conviction and sentence recorded by the Court of Session and that appeal is to be heard along with the reference.

14. Section 235 which finds place in Chap. xviii, Criminal P.C., provides that after hearing arguments and points of law (if any), the Judge shall give a judgment in the case and sub-section (2) provides that if the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of S. 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

15. From the order of sentence, it is clear that the Additional Sessions Judge on the conclusion of the trial had recorded a finding of conviction and sentenced the petitioners to death. The sentence of death is subject to confirmation by the High Court. It cannot, therefore, be said that the petitioners continue to be under-trials.

16. Before I discuss the next contention of Mr. Grover, I may refer to S. 30, Prisons Act, 1894, which reads as under :

'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 Jailor and all articles shall be taken from him which the Jailor 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'.

17. Chapter XXXI of the Jail Manual lays down, in detail the instructions that are to be followed after a prisoner is condemned to death. The above instructions, presumably were framed under S. 30, Prisons Act.

18. Shri Grover contended that a prisoner awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of S. 30, sub-section (2) till the sentence of death imposed on him becomes final and conclusive. The counsel for this contention of his relied upon the case of Sunil Batra v. Delhi Administration, : 1978 CriLJ1741 .

19. The facts of the cited case are that the Sessions Court of Delhi had held Sunil Batra guilty of robbery and murder and he was awarded the capital penalty in January, 1977. On the above sentence being imposed on him he was locked up in a single cell and he was also deprived of the 'B' class facilities which he was before conviction and sentence enjoying. An appeal was filed by Sunil Batra which was pending. Sunil Batra filed a writ petition under Art. 32 of the Constitution challenging the legality and virus of his solitary confinement. Two judgments were delivered in the case : one by Shri Justice V. R. Krishna Iyer and the second by

Shri Justice D. A. Desai for himself and on behalf of Chief Justice Shri Chandrachud, Shri Justice Murtaza Fazal Ali and Shri Justice P. N. Shinghal. Their Lordships of the Supreme Court held that S. 30(2), Prisons Act, is not vocative of Art. 20(2) of the Constitution. They also held that it was not vocative of Art. 21 of the Constitution and also of Arts. 14 and 19 of the Constitution. Their Lordships while discussing the scope and interpretation of S. 30(2) held as under :

'Section 73 and 74, 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 limits of solitary confinement that can be imposed under Court's order is strictly prescribed and that provides internal evidence of its abnormal effect of the subject.

Sub-section (2), S. 30, Prisons Act, 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. Sub-section (2), S. 30 does not empower the jail authorities in the grab of confining a prisoner under sentence of death, in a cell apart from all other prisoner, 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 S. 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death.

The expression 'prisoner under sentence of death' in the context of sub-section (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. 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-section (2). This interpretative process would, to a great extent relieve the torment and torture implicit in sub-section (2) of S. 30, reducing the period of such confinement to a short duration.

Section 366(2), Cr.P.C. read with Form 40 authorises only safe keeping which is the limited jurisdiction of jailor. Section 366(2) 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-section (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.

(Paras 223 and 224 of the judgment of Mr. Justice Desai at page 1730 of the report are important and may be read.)

20. It is clear from the above authority that a prisoner can be said to be under sentence of death only when the death sentence is beyond judicial scrutiny and is 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-section (2).

21. Mr. K. L. Arora, learned counsel for the respondents, in view of the cited authority fairly stated that for the purpose of S. 30(2) the petitioners at present cannot be considered under sentence of death. It would therefore, follow that S.

30, Prisons Act cannot be applied and the petitioner cannot under sub-section (2) of S. 30 be confined in a cell apart from all other prisoners. In this view, Chap. XXXI of the Jail Manual which pertains to prisoners condemned to death also becomes inapplicable.

22. Having held that the petitioners are neither under-trials nor can they be considered as prisoners condemned to death then the question arises under what class of prisoners they are to be treated. Mr. Arora contended that the petitioners would fall in the category of 'convicted' criminal prisoners and they would have to be dealt with under Chap. XVII of the Jail Manual.

23. I see force in this contention.

24. Chapter XVII deals with classification and separation of prisoners. The instructions contained in Chap. XVII have been framed to give effect to the provisions contained in Chap. V of the Prisons Act, 1894, which provides for the separation of various kinds of prisoners. Prisoners have been classified in the two classes civil prisoners and criminal prisoners. The criminal prisoners are further classified in two categories - convicted criminal prisoners and unconvicted criminal prisoners. The petitioners would fall in the category of 'convicted' criminal prisoners.

25. Para 576-A of the Jail Manual provides that the convicted prisoners shall be divided into three classes, namely, A, B and C classes. The claim of the petitioner is not for A class. Class B and Class C prisoners have been defined as follows :

'(2) Class 'B' will consist of prisoners who by social status, education or habit of the life have been accustomed to a superior mode of living. Habitual prisoners may be included in this class by order of the Inspector-General of Prisons.

(3) Class 'C' will consist of prisoners who are not classified in classes A and B.'

26. The admitted fact is that the petitioners are being treated as class 'C' prisoners. The further admitted fact is that the petitioners before their conviction were treated as class B under-trials. It is not understandable on what reasoning after conviction the petitioners ceased to be class 'B' prisoners and become class

'C' prisoners. They were probably placed in this category because of the instructions contained in Chap. XXXI of the Jail Manual. I have earlier observed that these instructions do not apply to the petitioners.

27. Mr. Arora contended that it is for the State Government to determine whether a convicted prisoner is to be placed in class 'A' or class 'B' and that since there is no order for placing the petitioners in class B they are being treated as class 'C' prisoners. Mr. Arora further contended that the petitioner Balbir Singh has filed an application for being placed in class 'B' and his application is under consideration and that the petitioner Kehar Singh could also move a similar application which would be considered by the competent authority.

28. I do not agree with this contention. The classification under classes 'A' and 'B' is on the basis of social status, education and other considerations noted in para 576-A. The petitioners before conviction were being treated as class 'B' under-trials. There could possibly be no change in their social status disentitling them from the higher class, after conviction.

29. I am of the view that the petitioners are entitled to be classified as class 'B' prisoners.

30. The next important question arises whether the petitioners can be kept in separate cells. Para 570 of the Jail Manual provides that subject to the requirements of para 567, convicted criminal prisoners may be confined either in association or individually in cells or partly in one way and partly in the other.

31. The rules framed for prisoners admitted to class 'B' also provide that the prisoners where such accommodation is available may be accommodated in cells or in association barracks specially set apart for them. It seems the petitioners can be kept in separate cells but this separation should not amount to solitary confinement. The jail authorities shall bear in mind the provisions contained in paras 570 to 575 of the Jail Manual.

32. I, however, wish to make it clear that the jail authorities are competent to take all steps and measures necessary for the security and safety of the petitioners but

in doing so they must remain within the four corners of the law laid down by the Supreme Court in the case of Sunil Batra : 1978 CriLJ1741 (supra).

33. My conclusions in 'nutshell' are :

(1) that the petitioners after their conviction and sentence are no longer under-trials;

(b) that till a final and executable sentence of death is passed the petitioners for the purpose of S. 30(2), Prisons Act, cannot be treated as prisoners condemned to death;

(3) that pending confirmation of death sentence the petitioners are to be treated as 'convicted' prisoners and they are to be dealt with under Chap. XVII of the Jail Manual :

(4) that the petitioners are entitled to class 'B' facilities;

(5) that the jail authorities are competent to take all steps and measures necessary to ensure the safety and security of the petitioners, but this has to be in conformity with the jail rules.

The petition is disposed of accordingly.

Malik Sharief-Ud-Din, J.

34. I have perused the order which my learned brother, R. N. Aggarwal, J. proposed to pass and I fully agree with the reasoning given in support of the order as also the order proposed to be passed. The controversy in this petition, in fact, falls within a very narrow compass.

35. The short point that deserves consideration is whether the petitioners who have been sentenced to undergo death sentence by the learned Addl. Sessions Judge are condemned prisoners as provided in Chap. XXXI of the Manual for the Superintendence And Management of Jails (hereinafter called the Manual). If the answer to this question is in negative then the court has to decide whether they

are under-trials or convicted prisoners. The entitlement of the petitioners after the pronouncement of death sentence by the Sessions Judge, in fact, depends on the answer to the aforesaid questions.

36. Admitted position is that the petitioners were enjoying 'B' class facilities as under-trial prisoners of which they have been suddenly stripped off by the jail authorities soon after the pronouncement of the death sentence, a sentence which is not executable in law unless it is confirmed by the High Court. The return filed by the respondents clearly goes to show that they are being treated as condemned prisoners as envisaged by Chap. XXXI of the Manual. Apparently, the jail authorities seem to be labouring under a mistaken notion of law and it appears that the observations of the Supreme Court in this regard as made in the case of Sunil Batra v. Delhi Administration, : 1978 CriLJ1741 , are not being followed. In that case, the Supreme Court has in unambiguous terms observed as under :-

'The death sentence will become executable only when the death sentence becomes final, conclusive and indefeasible which cannot be 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 duty to carry out must proceed to carry out without intervention from any outside authority.'

37. It was in that context that the Supreme Court in Sunil Batra's case (supra) : 1978 CriLJ1741 also has indicated as to how a prisoner against whom death sentence has not become executable should be dealt with by the jail functionaries. Mr. Arora's contention that in the case of Sunil Batra (supra) the Supreme Court was only interpreting the expression 'prisoner under sentence of death' appearing in sub-section (2), S. 30. Prisons Act, 1894, and not the provisions of Chap. XXXI of the Manual is misconceived. I fail to appreciate how the aforesaid expression can be differently interpreted for purposes of Jail Manual. However, this court does appreciate the gesture of Mr. Arora in stating that as long as the death sentence against the petitioners does not become executable and final they cannot be treated as prisoner condemned to death. This silver lining in the contention of Mr. Arora coupled with the law laid down by the Supreme Court in Sunil Batra's case clearly goes to show that the petitioners cannot be treated as prisoners

condemned to death. This position is also clearly brought out by Form No. 40 and Form No. 42 of the Second Schedule to the Code of Criminal Procedure. A plain reading of Form No. 40 would show that the petitioners are convicts sentenced to death which is not executable unless confirmed by the High Court and merely authorises the officer in charge of the Jail to receive them and keep them in safe custody till a further warrant, as provided by Form No. 42, is issued. A warrant in Form No. 42 under S. 414, Cr.P.C. can only be issued if the death sentence is confirmed by the High Court. In other words, Form No. 40 under S. 366, Cr.P.C. is only issued to the Officer in charge of Jail for confining the convict in safe custody till the convict is condemned to death. If that be so, then the provisions of Chap. XXXI of the Manual are not at all applicable to the petitioners.

38. This brings me to the next question as to whether the petitioners are under-trials. Mr. Grover argues that the confirmation proceedings and the hearing of appeal, if any, against a judgment is a continuation of trial and as such the petitioners should be treated as under-trials and given 'B' class facilities which they were enjoying before their conviction. To me it appears that the kind of facilities to which the petitioners are entitled in prison in turn depends on the determination of the fact as to the nature of their incarceration. Technically speaking, the confirmation proceedings pending in the High Court may amount to the continuation of trial. But in so far as the nature of incarceration of a person sentenced to death by a Session Court is concerned, the answer again is provided by S. 366, Criminal P.C. Sub-section (2) of S. 366 reads as under :-

'(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant.'

It would be noticed that stress is on the words 'convicted person to jail custody'. It is clear that such a convicted person has to be held in the safe custody of prison. Such a convict is not a person who has been sentenced to undergo imprisonment, simple or rigorous but is a person who had been sent to prison for being made available for execution, if and when, the death sentence becomes final, conclusive and infeasible. In that view of the matter. I am of the view that petitioners cannot be treated as under-trials and they are essentially prisoners convicted.

39. In this view the petitioners can only be classified as convicted prisoners. There is no reason why the jail authorities should not treat them as such. The crux of the matter, therefore, is that they are not to be treated as condemned prisoners. They are the prisoners who have been sentenced to death, which sentence is not executable till it is confirmed by this court. Sentence of death penalty is subject to confirmation by the High Court. It is open to the High Court either to confirm it or to pass any other appropriate order. In any case, since the sentence of death passed by the Sessions Court is not executable unless it is confirmed by the High Court, the sentence cannot be carried out. If the sentence of death passed by the Sessions Judge is inexecutable without confirmation by the High Court, could it be said that the petitioners are condemned prisoners. In my opinion this is not the correct position in law. I am, therefore, of the view that the petitioners are alright prisoners convicted but not the prisoners condemned to death.

40. Having said so, the next question as to what are their entitlements while in prison becomes easier to answer. I have already mentioned that Chap. XXXI of the Manual is not applicable to the petitioners. Under these circumstances the conclusion that the petitioners will be governed only by Chap. XVII of the Manual is inescapable. The jail functionaries have to treat them as convicted prisoners and to give them appropriate facilities under that Chapter. The petitioners during the period of trial admittedly were treated as 'B' class prisoners. This was, perhaps, for the reason that they were not offenders falling under the classification of 'C' category.

41. Another factor that must have probably weighed with the authorities, perhaps, was their social status, life style and qualifications. In my opinion, therefore, there is no reason as to why they should be stripped off the 'B' class prisoner facilities at least till they are declared as condemned prisoners in the eye of law.

42. Mr. Arora's contention that the power to classify into 'A' and 'B' categories vests in the Government under Para 576-A and that the prisoners must apply to the Government for the same, to my mind, does not appear to be relevant. The reason for saying so is that the petitioners during their trial before the Sessions Court were given 'B' class facilities. There is no change either in their status or in

the situation and I find it difficult to understand as to why they can be stripped off all those facilities till they are not declared as condemned prisoners. I am, therefore, of the view of that as convicted prisoners, there is no other option with the jail authorities but to restore those facilities to the petitioners. In conclusion, therefore, I fully agree with my learned brother, R. N. Aggarwal J. that the petitioners are neither under-trials nor are they prisoners condemned to death and that the petitioners are convicted prisoners and are entitled to 'B' class facilities as long as the sentence of death awarded to them does not become final and conclusive.

43. As to jail discipline and the safety of the prisoners, it is the entire responsibility of the jail authorities and they will have to take decisions from time to time in the circumstances of each case. I can only say that the jail discipline and safety of prisons is a matter of paramount importance and the jail authorities will have to be trusted in this regard as long as their actions are not motivated by extraneous considerations and are covered by the Prison Rules.

44. Order accordingly.