

Sharomani Akali Dal (Mann) and anr. Vs. State of J. and K. and ors.

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Court : Jammu and Kashmir

Decided On : Dec-24-1991

Reported in : 1993CriLJ927

Judge : B.A. Khan, J.

Acts : Jammu and Kashmir Code of Criminal Procedure (CrPC) , 1974 - Sections 276, 367, 374, 376, 381, 400 and 555; ;Central Code of Criminal Procedure (CrPC) - Section 354; ;[Constitution of India](#) - Articles 21 and 141; ;Jail Manual Rules; ;Jail Manual Regulations; ;Thumb of Rules

Appeal No. : O. Writ Petition Nos. 1051 and 1062 of 1991

Appellant : Sharomani Akali Dal (Mann) and anr.

Respondent : State of J. and K. and ors.

Advocate for Def. : R.C. Gandhi, Addl. Adv. General

Advocate for Pet/Ap. : B.L. Wadera,; M.A. Soni and; K.S. Johl, Advs.

Disposition : Petition dismissed

Judgement :

ORDER

B.A. Khan, J.

1. Who does not want to live and keep away from lethal noose, condemned prisoner, Raj Gopal Nayyar, is no exception, consistent with his long drawn struggle to stay alive, he along with Mr. S. Simaranjit Singh Mann. President of Sharomani Akali Dal (Maan), has filed these two writ petitions seeking commutation of death sentence to life imprisonment. The two petitions are being disposed of by a common order as identical questions of law and fact are involved.

2. Nayyar's fight for life has had a chequered history and hitherto he has avoided gallows despite repeated failure on all fronts. He was awarded death sentence by the Sessions Court for killing his father and stepbrother way back on April 24, 1986. His appeal was rejected by this Court and death penalty confirmed on March 28, 1988. His Special Leave Petition in the Supreme Court also met the same fate on July 11, 1988. So did his review petition which was also rejected on August 23, 1988 and consequently his conviction and sentence of death was confirmed and upheld by all Courts.

3. On conclusion of legal process, Nayyar naturally resorted to filing of clemency petitions. First petition was filed before the Governor, which came to be rejected on May 15, 1989. This was followed by two other petitions to the President which also earned dismissal. A Black warrant was issued against him for execution of sentence on February 15, 1991, which he avoided by obtaining stay order from the Supreme Court on a writ petition filed by his son which was dismissed on May 8, 1991.

4. Thereupon Nayyar launched yet another round of litigation in this court, this time through his wife, Shashi Nayyar. She filed Writ Petition No. 569 of 1991, seeking commutation of sentence on ground of delay in execution which was dismissed on Sept. 17, 1991. Aggrieved by this, she filed an L.P.A. which was also dismissed on Oct. 23, 1991.

5. Meanwhile, another Black warrant was issued for carrying out execution on Oct. 23, 1991. This aborted and execution could not be carried out on appointed time and date for reasons which will be adverted to later. Incidentally it is this failure which is at the root of present controversy.

6. Be that as it may, another warrant was issued by the Sessions Court for Oct. 26, 1991, which was stayed by the Supreme Court in Writ Petition (Criminal) No. 1339/1991, challenging constitutional validity of death penalty. This petition was dismissed on Oct. 29, 1991. Then came the last warrant fixing execution on Nov. 15, 1991 and promoting petitioners to file these two petitions and also a special Leave Petition before Supreme Court, which was eventually withdrawn. Petitioner, S. Maan, also filed a mercy petition before the Governor, which was rejected.

7. It is this back-drop that Nayyar's fresh bid to escassype noose has to be examined and considered. I do not propose to go into the controver surrounding Mr. Maan's locus standi to file petition No. OWP 1062 of 1991, demanding commutation of sentence for the condemned prisoner. Because even if it had to be held that Mr. Maan had no locus still questions and contentions raised would have to be considered and determined any way, given regard to seriousness of controversy, which persuaded me also to grant full-dress hearing to parties even at preliminary stage. Therefore, locus issue can conveniently be shelved at this stage and saved for determination on some other appropriate occasion.

8. Petitioner's case primarily revolves round jail authorities failure to execute the prisoner on Oct. 23, 1991. Therefore, what happened on that fateful day requires to be brought out, though briefly, as borne by record. Jail Superintendent's version is that Black warrant was received in his office on Oct. 22, 1991, directing execution to be carried out on Oct. 23, 1991 at 9 a.m. Consequently, preparatory steps were initiated, as provided in Chapter XXXI of Jail Manual. These included informing all concerned, constituting a Board of doctors, putting the hang-man on test and so on. A letter was addressed to prisoner informing him about the time of execution and if he had to make any will. When executioner was medically examined at 3 p.m. he was found to be very apprehensive and nervous. In the meanwhile, an application was received from prisoner's wife requesting for deferring of execution on the ground of pending Letters Patent Appeal before High Court. These two developments were brought to the notice of Sessions Judge, Jammu who pleaded his helplessness in the matter. All this happened on 22nd Oct. 1991.

9. On the crucial date (23rd Oct. 1991) prisoner woke up at 5 A.M. He had his bath and offered his prayer. Side by side preparatory exercise went on Hangman was again medically examined at 8 a.m. but he showed no improvement.

10. Wife and other relations were allowed to meet the prisoner at 8.30 a.m. It was about this time that Jail Superintendent accompanied by others concerned visited the cell. He was requested to put off the execution by prisoner's wife and Advocate Mr. Goni till fate of appeal filed before High Court was known. Upon this, so it seems, prisoner was informed that he will not be hanged. Thereafter, Jail Superintendent addressed a communication to Sessions Judge returning the Black warrant and requesting for sufficient time to be given for execution of death sentence. Taking cognizance of this, Sessions Judge vide his order dated Oct. 23, 1991 issued second warrant, directing execution to be carried out on Oct. 26, 1991 at 7 a.m. This warrant was stayed by Supreme Court in Writ1 Petition (Crl) No. 1339 of 1991.

11. The crux of petitioner's case is that Jail authorities failure to execute Nayyar on Oct. 3, 1991 amounted to execution virtually having been carried out and that he could not be subjected to the ordeal second time, as that would mean taking away his life in violation of procedure established by law. The argument is buttressed by potraying picture of acute torment and horror, pain, anxiety and agony suffered by the prisoner during interregnum between the time he was informed of execution and its postponement. All this entitled him to a reprieve and death sentence deserved to be vacated and substituted by a life term is the refrain of thesis advanced.

12. The submissions originate from Article 21 of the Constitution, as is usual in these types of cases. According to Dr. Wadera, learned counsel for petitioners, sweep and ambit of Article 21 extends till the life lasts. Its benefit is available even to a condemned prisoner waiting in a death row. Therefore, even such prisoner cannot be deprived of his life except according to just, fair and reasonable procedure established by law, which is to be strictly followed. Any breach of procedure is fatal and entitles a prisoner to release from captivity. In this case since procedure of execution in terms of warrant issued for Oct. 23, 1991 was not

complied with and as procedure established by law did not provide for a second warrant of execution, condemned prisoner could not be deprived of his life in violation of mandate of Article 21 of the Constitution.

13. Dr. Wadera asserted that Section 381, Cr.P.C. envisaged only one warrant and once it was issued by the Sessions Court it could be only returned unless execution was carried out, save in five situations, which could result in killing of original warrant enabling the Sessions Judge to issue a second one. He listed these five contingencies as under:-

- i) Stay order by Supreme Court;
- ii) Stay order by High Court;
- iii) Mercy Petition under consideration of Governor;
- iv) Mercy petition pending with the Presidents and
- v) Condemned prisoner being a pregnant woman at the time of execution.

14. The learned counsel prefaced his contention by maintaining that power to issue a death warrant was vested only with High Court. He placed reliance in this regard on provisions of Sections 376 and 381, Cr.P.C. to canvass that Sessions Judge had no competence to issue a second warrant and that he becomes functus officio, except in five legal situations, referred to hereinabove. His action of issuing fresh warrant for Oct. 26, 1991 was illegal as it was not authorised by any procedure established by law, particularly the , Criminal Procedure Code, which did not contain any provision for issuance of second warrant.

15. Placing reliance on Dena's case, AIR 1983 SC 1155 : (1983 Cri LJ 1602) learned counsel argued that if a prisoner was sentenced to death it was lawful to execute the punishment and that only and he could not be subjected to humiliation, torture or degradation before execution of that sentence, not even by way of necessary steps in the execution of the sentence nor could he be treated unreasonably, unfairly and cruelly. That being the position, the extent and-amount of horror, pain and agony suffered. by the prisoner in this case after he was

informed about proposed execution required to be taken consideration for altering sentence of death. To substantiate his contention, learned counsel referred to Science of 'Thanatology' and placed the prisoner's case in 'terminalty period' to high light the dehumanising factor.

16. Dr. Wadera also made some peripheral submissions questioning constitutional validity of Section 367, Cr.P.C. and some provisions of Jail Manual, which have no immediate bearing on the merit of controversy as such.

17. Supplementing these arguments, Mr. M. A. Goni pointed to 'brooding horror' that must have haunted the prisoner after being informed about the time of execution. To him, Jail authorities were not competent to order postponement of execution for reasons which were neither legal nor reasonable. According to him, Sessions Court had no competence to issue second Black warrant. He raked up the issue of denial of pre-sentence hearing to the prisoner and wanted it to be considered as a mitigating circumstance for vacation of death sentence. For this, he derived support from Malkiat Singh's case (reported in 1991 (2) Crimes 191 to urge pre-sentence hearing contemplated allowing parties to place relevant material before the court besides adducing any evidence to show any mitigating circumstances.

18. The edifice built by petitioner's counsel appeared crumbling on Mr. R. C. Gandhi, Addl. A.G. Launching a major counter offensive*. According to him 'theory of one warrant' was both illogical and irrational and if accepted would lead to most absurd results defeating a sentence of death in a situation where a warrant was mis-placed, defeced or stolen. Black warrant was only a means to achieve an end which is to carry into effect the sentence awarded. Therefore, till end was achieved any number of warrants could be issued by the Sessions Court, depending upon the circumstances in each case and besides warrant such other steps could have been taken as are felt necessary by the court. He referred to Section 400, Cr.P.C. to submit that only that warrant had to be returned to the court where sentence had been fully executed. Where it had not been (taken?) there was no bar to return the warant to the trial court requesting for a new endorsement in the original warrant or for issuance of second warrant. He cited Ranga-Billa case to show that

there was also no dearth of precedent for deferring the execution of death sentence.

19. Repelling contentions about dehumanising factor connected with postponement of execution of Oct. 23, 1991, Mr. Gandhi, AAG, submitted that pain and agony are constant companions of a condemned prisoner. A difference of degree here and there could not constitute a sole mitigating circumstance for altering the sentence of death.

20. Reading from Jail record, he pointed out that Jail authorities could never anticipate a sudden nervous break down of the executioner; on 22nd Oct. 1991. But for this they had taken all other necessary and appropriate steps as warranted by the Regulations contained in Jail Manual. Their action of deferring the execution was bona fide and covered by the, Jail Manual Rules and, therefore, could not be said to be procedurally unfair or unjust.

21. On petitioner's grievance about denial of presentence hearing, he read out from the judgment of this court to show that he had failed to point out any mitigating circumstance and as such, there was no question of reopening the issue.

22. On consideration of rival contentions, the following questions seek answer:

1. Is sentence of death liable to be vacated because its execution is temporarily deferred?

2. Does the resultant high intensity horror, agony and torture suffered by a prisoner for a brief period render the sentence unexecutable and entitle him to demand alternate sentence of life imprisonment or even acquittal?

3. Does Section 381, Cr.P.C. contemplate one and only one Warrant which once issued has to be given effect to and is there any bar for issuance of second warrant in case the first one is rendered ineffective for some reasons?

4. Is Section 367, Cr.P.C. ultra vires the constitution only because it is not identical to provisions contained in Section 354 of the Central Code of Criminal Procedure;

and

5. Can any irregularity committed in pre-sentence hearing provided for in Section 276, Cr.P.C. constitute a mitigating circumstance for conversion of death sentence to life imprisonment when such death sentence has been upheld throughout by all courts?

23. There can be no quarrel about the established legal position regarding the sweep and scope of Article 21. Its horizons are ever widening as has been noticed in Sher Singh's case, AIR 1983 SC 465 : (1983 Cri LJ 803) and it is relevant at all steps. Its benefits are for all to enjoy, be he a condemned prisoner or any other person. To a prisoner it gives him a right of fair procedure at all steps and even during incarceration. Therefore, 'Procedure established by law' as contemplated by Article 21 does not end with pronouncement of sentence. It includes carrying out of sentence also. In a case where a sentence is sought to be executed in violation of procedure established by law or without taking recourse to it, the sentence runs the risk of even getting over turned. It is also settled that word 'Law' in Article 21 does not connote general law, but law made by Legislature and the procedure established by such a law should be fair, just and reasonable.

24. It is also no more res integra that only jurisdiction which can be invoked by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict. It is true that courts are not powerless in exercising their writ jurisdiction to enforce a prisoner's rights guaranteed to him by Article 21, but it shall not be open to them to go behind or to examine the final verdict reached by the competent courts. The judgment of the apex court is binding on all courts under Article 141 of the Constitution. Therefore, if a death sentence is confirmed by the apex court, it falls to be executed in accordance with law since it is a part of procedure established by law. In Triveniben's case, AIR 1989 SC 1335 Supreme Court has cleared all cobwebs by holding that there cannot be a second on the validity of sentence based on Article 21.

25. Having said so, it requires to be examined whether a temporary postponement in execution of death sentence, supported by some reasons can entitle a condemned prisoner to seek alteration in the sentence. On a generalistic view, the

answer has to be negated, but even an indepth examination of the contention raised (which shall follow hereinafter) should not lead to any different conclusion.

26. Even though it is conceded by the learned counsel that contingencies can arise (which are envisaged by law) leading to deferring of execution of death sentence, yet it made out that postponement of execution becomes a mitigating' circumstance closing the prisoner with a right to ask for commutation of sentence. The contention appears emanating from a fallacious theory that procedure established by law provides for one and only one Black warrant to be issued which has to be obeyed like God's command and any deviation from its term and letter resulting in postponement of execution is violation of procedure established by law as contemplated by Article 21. So is issuance of a second warrant on the first becoming ineffective, bereft of any sanction of law and, therefore, any deprivation of life on the strength of this is violative of Article 21. Super added to this is the dehumanising factor born out of psycho-physical impact of horror, agony and torture suffered by the prisoner during the interval after he is informed or proposed execution.

27. The contention appears attractive on the face of it. But on a deeper examination, it comes out hollow and devoid of any substance. All events necessarily do not happen on schedule. Nor are all orders and commands implemented as they ought to be consistent with their letter and spirit. There is always a slip between the cup and the lip. Contingenies do arise, both seen and unforeseen which come in the way of schedules prescribed by law or otherwise. That is why the law makes room for such contingencies. Even in cases of execution of death sentence delay and postponement is envisaged in certain situations. Jail Manual takes care of these situations in paras 860 and 865.

Para 860: Delay in carrying out death sentence.

'Should any delay occur in executing a death sentence other than that arising from submissions of a mercy petition, the Superintendent shall forthwith report the circumstances to the Sessions Judge and return the original warrant either for the issue of new one or for the endorsement upon the same warrant of an order fixing another date for the execution.'

Para 965: Mishap to be reported:

(2) 'The occurrence of any mishap or departure from the orders laid down, shall be reported to the Inspector General.'

28. These regulations are self-explanatory and go to show that situations can occur wherein execution of a death sentence is liable to get delayed and deferred. As a matter of fact, para 860 does not confine it to a particular type of delay, but speaks of any delay which, however, should occur on a reasonable cause. Otherwise if left open, it may vest arbitrary power in Jail authorities to carve out delays and to defeat the sentence awarded.

29. Coming to the root of the matter, it has now to be surveyed whether, Cr.P.C. provides for one Black warrant only which once issued cannot be returned without the execution being carried out. And conversely does the Code...contain any bar against issuance of second warrant in case the first one is rendered in effective for some reason. This is the heart and soul of the controversy and an answer to the questions raised will decide the fate of these petitions. If on analysing of relevant provisions of the Code, it is found that it does not permit a second warrant to be issued it should be the end of the matter and should earn the condemned prisoner a much desired reprieve. To answer this, some sections of Code would have to be extracted for proper appreciation of controversy.

Section 374;

'Sentence of death or life imprisonment to be committed by court of Session. When the Court of Session passes sentence of death or life imprisonment, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.'

Section 376 - Powers of High Court confirm sentence or annul conviction. In any case submitted under Section 374, 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 Sessions Court might have convicted him or order a new trial on the same, or an amended charge; or

(c) may acquit the accused person:

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or if an appeal is presented within such period until such appeal is disposed of'.

Section 381:

'Execution of order passed under Section 376.- When a sentence of death or life imprisonment passed by a court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order thereon, cause such order to be carried into effect by issuing warrant or taking such other steps as may be necessary.'

Section 400:

'Return on warrant on execution of sentence.- When a sentence has been fully executed, the Officer executing it shall return the warrant to the court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.'

Chapter XXVII of the Code deals with submissions of sentences for confirmation by the High Court and Section 374 falling under this provides that when Court of Session passes a death sentence, or life imprisonment, the proceeding shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. Section 376 confers power on the High Court to confirm the sentence or to annul conviction or to pass any other order referred to therein.

30. Section 381 is the all important provisions and any rational interpretation placed on its terms should clinch the issue. This section mandates that on receiving order of confirmation and other order thereon in terms of Section 376,

Court of Session shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

31. Interpretation of two expressions contained in this section viz. 'a warrant', or 'taking such other steps as may be necessary' is the contentious issue. So is the import of pro forma prescribed for issuing of a warrant of execution which is the Form set forth in 5th Schedule appended to the Code and provided under Section 555. Petitioner's counsel interpret 'a warrant' to mean only one warrant to be necessarily issued by the Court of Session for execution of death sentence only. According to them a death sentence cannot be carried out in the absence of this warrant called the Black warrant. They make the other expression 'taking such other steps as may be necessary' applicable to life imprisonment cases or to other orders passed by the High Court (other than confirmation of death sentence) in terms of Section 376, Cr.P.C. For this they derive support from last two lines of prescribed Form of warrant which reads as under:

'and to return this warrant to the court with an endorsement certifying that sentence has been executed.'

32. Relying on this, they claim that the prescribed Form provided for in reference to Section 381, Cr. P.C. assumes a statutory character and its content becomes mandatory. Taking cue from this, it is submitted that once a warrant for execution of death sentence is issued, Jail Superintendent has no power to return it (except in five situations referred to elsewhere hereinabove) and the court of Session has also no competence to receive it. On this, it is contended that no second warrant is provided for in the Code.

33. Taking note of the new trend in the norms of interpretation of provisions of statutes, which calls for a look into the purpose of legislation rather than grammatical connotation of the words used in a provision. I must point out with all humility that interpretation placed by learned counsel on terms of Section 381 does a bit of violence to legislative intent and purpose of the provision. While it is conceded that court can't supply missing words used in a provision, it must be made clear that words used in a statutory provision should receive ordinary, fair and rational meaning to avert possibility of any unjust results following otherwise.

Viewed thus, it would be a travesty of established norms of interpretation to say that Section 381 contemplates issuance of only one warrant for execution of a death sentence.

34. 'A warrant' does not mean only one warrant, even when interpreted in isolation and out of context. If interpreted otherwise, it would lead to absurd, illogical, irrational and unjust results, defeating the very purpose of the statute i.e. carrying into effect order of death sentence. Assuming 'the only warrant' was lost, destroyed defaced, stolen and so on, what would happen to death sentence, should it be allowed to be defeated and frustrated on account of 'only warrant', having been rendered ineffective for some reason, such can't be the intent and purpose of law.

35. After all what is the nature of this warrant. It is an authority, an order, a means of communication authorising the Jail authority to execute a sentence of death. The end is to carry into effect the order of sentence of death or any other order envisaged in Section 381 read with Section 376, Cr. P.C. If that be so, there is nothing sacrosanct about it. A warrant once issued can go unexecuted and is liable to be rendered ineffective in a number of situations. But by no logic can it be said that since warrant had become infructuous death sentence should automatically stand vacated.

36. If Section 381, Cr. P.C. is interpreted in its true sense, it admits of no ambiguity as such, viewed in its proper context and totality it contemplates only two types of orders passed by court of Session viz. orders relating to sentence of death and life imprisonment. Once these orders are confirmed or any other order is passed thereon by the High Court, the Court of Session shall cause such order to be carried into effect. The Sessions court can do this by resorting to either option.... (I) by issuing a warrant or (II) by taking such other steps as may be necessary. It may be the long standing practice to issue a warrant for execution of a death sentence, but there is always an option available to the Sessions Court. In other words, it can't be said to be a Rule of Thumb to issue a warrant in all cases of execution of death sentence. Situations are conceivable wherein the court of Session could take other necessary steps to carry out the execution with or

without issuing the warrant. Think of Jail authorities and employees going on a lightening strike around the date fixed for execution. Would it not be in order for the Sessions Judge to take such other steps as he deems necessary, issuance of warrant notwithstanding. All this is to drive home that an order of death sentence survives even when the first warrant issued is rendered in effective for some reason.

37. No provision of the Code bars return of the first warrant without the execution having been carried out. Nor does it do so in case of issuance of a second warrant. Warrants can and do come and go depending upon situations covered under rules so long as order of death sentence is not carried into effect. Placing reliance on contents of Prescribed Form of warrant in support of contrary view is totally misplaced. I have examined various provision of the Code, but I have not come across any bar against issuance of a second warrant by Sessions' Court when first warrant becomes redundant for some reason. The submission that Sessions' court is in-competent to issue a second warrant for the reasons that High Court is repository of power for the issuing the warrants is equally misconceived. As noticed earlier it is true that in terms of Section 381, Cr. P.C. order to be carried into effect is the order of the High Court. It is also a matter of fact that Sessions Court is an implementing agency and its competence and authority flow from the order received from the High Court.

38. Given regard to this position, it is difficult to comprehend why Sessions Judge is incompetent to issue second warrant if his power to issue first warrant is not disputed. Looking at it from a different angle, even if it was accepted that High Court is the donor of power, the Sessions court, as delegatee would exercise all these powers possessed by the donor including the power to issue the second warrant. Moreover, if power to issue first warrant by the Sessions' court is conceded, power to issue second warrant is implicit and is beyond question.

39. This takes me to the dehumanising factor that is invoked in aid of demand for commutation of sentence to life imprisonment. The argument centres round the acute pain, torment, anxiety and horror that condemned prisoner may have suffered after he was informed about execution taking place on Oct.' 23, 1991.

40. Dr. Wadera took pains to portray the suffering that petitioner Nayyar must have gone through during the period which he termed as 'terminality' making reference to death related science of Thanatology. He fell back on all his resources to project the High intensity though avoidable torture and horror suffered by the prisoner on account of failure by Jail authorities to execute him on the appropriate date. According to him, prisoner had been made to taste death and that he could not be subjected to it second time as it would amount to killing him in stages which is not permissible under law and the Constitution.

41. I must confess that I am not endowed with any insight to conceive or gauge what Nayyar must have gone through during the relevant period of 'terminality'. There can be no two opinions on the position that dehumanising factor has a constitutional implication of depriving a prisoner of his life in unfair, unjust and unreasonable way offending Article 21. But it is also a fact that anguish, pain and horror are a part of the game and inevitable consequence of a death sentence. There can be difference of degrees here and there. But should a high degree condition entitle a prisoner to run away from gallows or to go scotfree. Psycho-physical impact on him between the last verdict upholding death sentence till it is actually inflicted takes its own toll. This is not a period mixed with any hope.

42. In any case torture and horror are not static concepts. They are always related to sensitivities. There may be people who may put up with acute form of torture and yet maintain all essentials of human dignity. How else one can explain that Nayyar had a sound sleep despite knowing about his execution taking place next morning and the executioner developed jitters at the prospect of carrying out execution. To my mind questions like these require to be judged on the basis of scientific investigation, if any available, and by applying the test of reason. As on today there is no barometer to read and gauge human emotions and feelings. Therefore, it may be hazardous at times to go by a projected situation in such cases.

43. There can be no dispute with the proposition that a condemned prisoner is required to face death sentence only and nothing more and that he can't be subjected to any humiliation, torture or degradation before the execution of that

sentence. But it also needs to be kept in view that process of hanging (which includes all preparatory steps towards execution) does not involve any barbarity, torture or degradation.

44. In the light of this discussion, should it be held that torment and horror said to have been gone through by the prisoner should constitute a sole circumstance for commutation of sentence. In my opinion, it can't and it should not. I say so for the reason that Nayyar's ordeal, if it is assumed that he entered 'Terminality' lasted a very short duration. Its impact also must have been very transitory. Add to this his record of undergoing similar experience before also. All this put together does not bring out any dehumanising factor deserving consideration as a mitigating circumstance. Therefore, I am not inclined to hold that pain and torture said to have been suffered by the prisoner could constitute a sole circumstance for altering his death sentence.

45. All this is not to suggest that postponement of execution of death sentence has to be treated as an ordinary matter. There may be situations where such postponement can't be traced to a valid and sound reason or where it is ordered whimsically or on extraneous considerations courts will not be made spectators in dealing with such situations. In the present case, I feel Jail authorities have by and large acted within the purview of rules. They have not acted arbitrarily or whimsically as was sought to be projected, or whimsically as was sought to be projected. The executioner last minute physical breakdown did create an unforeseen situation in which they could not have gone ahead with the execution. Dr. Wadera's plea that they should have kept a substitute in readiness to meet such contingency does not find support from Jail Regulations. Para 868 of Jail Manual provides that wherever services of public executioner are not available, execution shall be carried out by his Assistant or some trustworthy individual locally trained for the purpose. The relevant regulation does not cast any obligation on Jail authorities to arrange for an Assistant Executioner. He comes to when services of public executioner are not available. In this case his services were available, his last minute nervous breakdown notwithstanding. After all the executioner is a rare specie. Going by Mr. Gandhi's statistics their number does not exceed 10 throughout the country. Under the circumstances getting hold of the

executioner, not to speak of his Assistant, should be no mean task. Therefore, I have no doubt that the Executioner's last minute physical disability was in the nature of a mishap and constituted a good cause for deferring execution. This can't be said about the other reason advanced for post-pone-ment. It is true that L.P.A. filed by prisoner's wife was pending consideration of the High Court, but this by itself and in the absence of any stay order by the court, did not warrant deferring of execution. It appears that Jail superintendent mis-directed himself on the issue and allowed himself to be over taken by the events. His reliance on para 548(a) of the Jail Manual to derive power for post-pone-ment on this account is totally misplaced. Even otherwise, he appears to be not endowed with much sense of responsibility. During the proceedings he was directed to submit an affidavit clarifying certain issues. He promised to do it in the open court, but he ultimately disappeared for good leaving his counsel in lurch. All this is to point out the casual manner in which the officer tends to conduct himself even in the face of serious situations. His superior authorities need take note of his careless approach towards discharge of his duties and shall take steps to ensure that he does not act beyond his brief in future.

46. Grappling with other two issues raised by the petitioner does not pose much of a problem. Dr. Wadera's challenge to the vires of Section 367, Cr. P.C. only on the ground that it is not pari-materia with provisions of Section 354 of the Central Code is, to say the least, wholly misconceived. While saying so it needs to be borne in mind that J & K State has the distinction of enacting its own laws which may or may not conform to the pattern of laws made by the Parliament. Therefore, it can't be said that legislature of the State should act as a blind follower in what is enacted by the Parliament. Nor can it be contended that State Legislature should be commanded by this court to act in the same way as Parliament does while upgrading the provisions of a statute. It is well settled that the court has no jurisdiction to command the State or the Legislature to legislate in a particular way. Reliance can safely be placed in this regard on decision of Supreme Court (reported in AIR 1989 SC 1899 and AIR 1985 SC910).

47. The added safeguards provided in Section 354 of the Central Code may deserve to be incorporated in Section 367 of J & K, Cr. P.C. put a decision on that

falls within the domain of the State and its legislature. In any case absence of these does not render Section 367, Cr. P.C. bad on the ground that it is not in consonance with the legislative policy followed at the national level. Nothing else was canvassed before me on the issue to show that Section 367, Cr. P.C. is ultra vires any provision of the Constitution or that it had any immediate bearing on the merit of present controversy.

48. Mr. Goni's grievance on pre-sentence, hearing at trial stage is also of no avail to the prisoner at this stage. The matter has gone through various forums and the issue should be deemed to stand closed. It can't be allowed to be re-opened and there can be no second look at it. Mr. Gandhi, AAG, took me through the relevant portion of the judgment rendered by this court confirming death sentence to show that prisoner had failed to point out any mitigating circumstance even then. In this view, it need not be determined whether any irregularity committed in pre-sentence hearing, which may have gone unnoticed in subsequent remedies followed, is liable to constitute a mitigating circumstance to substitute the death sentence when all doors have been closed on the prisoner.

49. An over all view of the circumstances of the case lead me to conclude that temporary postponement of execution on 23rd Oct. 1991 was the off-shoot of a sudden situation that cropped up a day earlier and this was not on account of any deliberate or intentional default of Jail authorities. The last minute physical disability of the executioner furnished a good cause for deferring the execution even when the stage had been set to carry out the same. The pain, agony and horror, suffered by the prisoner after he was informed about execution was inevitable and could not be treated as the sole circumstance for substituting death sentence.

50. The challenge to Sessions Court's competence to issue a second death warrant, when the first one has been rendered ineffective for some reason, is both fallacious and misconceived. Black warrant is only a means to carry into effect the death sentence. So long as the end is not achieved there is no bar created by any provision of Criminal Procedure Code against issuance of a second warrant. The challenge to constitutional validity of Section 367, Cr. P.C. appears to be an

argument in despair and has no proximate relevance to the merit of controversy at this stage. The grievance regarding denial of pre-sentence hearing to the accused by the trial court is also not entertainable as this issue stands concluded by various courts and can't be re-opened at this stage with a view to grant any relief to the petitioners.

51. In the light of foregoing discussion, I see no impediment in holding that petitioners have failed to make out a case for vacation of death sentence, awarded and upheld by heirarchy of courts throughout. I, therefore, dismiss the two writ petitions and vacate the order staying execution of the condemned prisoner.

52. This shall also dispose of the applications filed by some public interest activists seeking intervention in the matter. It may be noted with regret that these applications were not perused by petitioners at any stage. It seems these were only filed to seek some publicity.

53. Before parting, I must acknowledge the able and competence assistance rendered to the court by the counsel for the parties, Mr. Wadera in particular fed the court with all that came his way. After all he was trying to save a life, which is both precious and noble.