IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MAQBOOL BAQAR
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

CRIMINAL SUO MOTU REVIEW PETITION NO.84 OF 2018
(On appeal from the judgment dated 13.06.2002 passed by this Court in Criminal Appeal No.378 of 2001.)
IN
CRIMINAL APPEAL NO.378 OF 2001
AND
CRIMINAL PETITION NO.947 OF 2018
(On appeal against the order dated 05.09.2018 of Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Revision No.118 of 2015.)

Sikandar Hayat and another ... **Petitioners**
(in both cases)

Versus

The State and another : (in Crl. S.M.R. No.84/2018)
The State and others : (in Crl. P.No.947/2018)
... **Respondents**

For the Petitioner : Ch. Muhammad Zahoor Nasir, ASC
(in Crl.S.M.R.P.No.87/2018)
Mr. Sanaullah Zahid, ASC
Syed Rafaqat Hussain Shah, AOR
(in Crl. P.No.947/2018)

For the Complainant : Mr. Naveed Hayat Malik, ASC.

The State : Mirza Muhammad Usman, DPG.

Date of Hearing : 28.01.2020

JUDGMENT

YAHYA AFRIDI, J. – Sikandar Hayat and Jamshed Ali (**Petitioners**), charged and tried in case FIR No. 247, dated 20.07.1993, registered under sections 302 and 34 of Pakistan Penal Code, 1860 (**PPC**) at Police Station City Jhelum (**FIR**), and presently on death row for about 25 years, have essentially urged

this Court through the instant two petitions to revisit the death sentence awarded to them by the trial Court in 1995, and finally confirmed by this Court way-back on 16-6-2002.

2. Before we consider the valuable contentions of the learned counsel of the parties, it would be important to note and keep in clear perspective the events leading to the instant petitions, which are rather chequered. Briefly, the same, in chronological order, are as follows:

Date	**Particulars of the Events**
19.07.1993	FIR registered naming the petitioners along with their two brothers as accused, for stabbing to death one Habib-ur-Rehman (**deceased**). The petitioners are attributed the fatal stab wounds on the chest of the deceased.
18.08.1993	Petitioners were arrested in present case.
04.09.1995	The Trial Court convicts the petitioners and sentences them to death, while the two other brothers of the petitioners are acquitted.
06.08.2000	The Lahore High Court upheld the conviction and sentences of the petitioners, and answered the murder References in the affirmative
13.06.2002	Petitioners' appeal dismissed and their Death sentence confirmed by this Court.
16.02.2003	Petitioners filed Applications before the Sessions for special remissions as juvenile condemned prisoners, seeking their sentence of death to be converted to life imprisonment in reference to memo No.JB/G-1-40680-709 dated 12.09.2003 (**Government Order**), wherein benefit of section 7 of the Juvenile Justice System Ordinance, 2000 (**Ordinance**) was to be extended in favour of the condemned prisoners who were juvenile at the time of the commission of the offences committed even before the promulgation of Ordinance (1st June 2000).
14.01.2004	Sessions rejected the application of the petitioners for special remission.
13.02.2004	Petitioners challenged the decision of the Sessions before the Lahore High Court in the **1st round**, partially accepted, and the matter was remanded to the Sessions for decision afresh **(1st Remand)**.
19.03.2005	Sessions again dismissed the applications of the petitioners for special remission.
08.05.2015	The Revision filed by the petitioners against the

	decision of Sessions dated 10.03.2005 was again partially accepted by the Lahore High Court in the **2rd round** , and the matter was again remanded to the Sessions to conduct ossification test of the petitioners **(2st Remand)**.
20.05.2015	Sessions again dismissed the plea of the petitioners claiming special remission.
05.09.2018	Lahore High Court in the **3rd round** dismissed the revision filed by the petitioners and maintained the order of the Sessions refusing to the petitioners special remission.

3. On reviewing the afore-mentioned events, two striking features relevant to the claim of the present petitioners emerge: firstly, in essence, both the petitioners are seeking to review the death sentence awarded to them after a stark delay of 16 years (5844 days) in filing the review petition by the petitioners; and secondly, the petitioners have since the confirmation of the death sentence awarded by this Court in the year 2002 not remained idle but have pursued their legal remedy to claim special remission provided under the Ordinance and the Government Order.

4. This Court had appointed Chaudhry Muhammad Zahoor Nasir, Advocate Supreme Court, to plead the case of the petitioners in the instant Suo Muto Review Petition No. 84 of 2018, whilst Mr. Sanaullah Zahid, Advocate Supreme Court represents the petitioners in Criminal Petition No. 947 of 2018, wherein the rejection of the lower *fora* to grant of the special remission in their sentences has been challenged. Both the worthy counsel for the petitioners have submitted their written submissions, which entail in detail, factual and legal aspects of the case.

5. In brief, the submissions put forth by Chaudhry Muhammad Zahoor Nasir, Advocate Supreme Court entail: that the fatal injuries caused to the deceased were not attributed to the present petitioners; that the two other accused who have been

attributed the same role as that of the petitioners were acquitted, whereas the petitioners have been saddled with the conviction and sentence of death; that the motive put forth by the prosecution has not been proved; that the petitioners have not been confronted to the recoveries in their statements under section 342 The Code of Criminal Procedure, 1898 (Act No V of 1898) **(Cr.PC.)**; they deserve their expectancy of life, as they have already served the entirety of life sentence, and have been incarcerated for more than the term of life sentence in the death cell; and that there were other mitigating circumstances which would surely create a doubt in the prosecution case warranting a lesser sentence.

6. Mr. Sanaullah Zahid, Advocate has contended that the petitioners (Sikandar Hayat aged 15 years 9 months 19 days and Jamshaid Ali aged 17 years 7 months 23 days) were juvenile i.e., less than 18 years of age at the time of commission of offence, thus, deserve to be granted special remission, within the contemplation of enabling provisions of Ordinance and Government Order; that the petitioners produced sufficient reliable oral and documentary evidence to prove their date of birth to prove them to be juvenile at the time of the commission of the offence.

7. In rebuttal, the worthy counsel for the complainant and the State counsel, vehemently assailed the contentions of the worthy counsel for the petitioners, asserting that the review of the judgment confirming the death sentence awarded to the petitioners could not be reopened at this belated stage and that the petitioners had intentionally delayed the proceedings and, thus, should not be rewarded for their abusing the process of the law.

8. On examining the submissions of the worthy counsel for the parties, especially in the light of the events highlighted earlier, the following issues would require to be addressed in the instant petitions: firstly, whether the Suo Motu Review Petition filed with delay of 5844 days is maintainable, and the delay in filing the same can and should be condoned; secondly, whether the insufficiency and weaknesses in prosecution's evidence during the trial, as asserted by the worthy counsel for the petitioners, could be considered in the instant Suo Motu Review Petition; thirdly, whether the evidence produced by the petitioners to prove their date of births was sufficient and if so, was the same correctly appreciated by the Courts below; and finally, whether there was any legal principle that may benefit the petitioners, at this belated stage, to seek a lesser punishment than that of death awarded by the competent court, and confirmed by this Court. We shall discuss all the above-noted issues in seriatim.

CONDONATION OF DELAY IN ENTERTAINING CRIMINAL PETITIONS

9. Article 188 of the Constitution of Islamic Republic of Pakistan (**Constitution**) mandates the Supreme Court of Pakistan **(Supreme Court)** to review any judgment pronounced or any order made by it subject to the provisions of any Act of the Parliament or any rule made by the Supreme Court. The Supreme Court has prescribed vide Order XXVI Rule 1 of the Supreme Court Rules, 1980 (**Rules**) the procedure for reviewing any order or judgment passed by it. As far as criminal proceedings are concerned, any error apparent on the face of the record, would suffice for the Supreme Court to review its judgment or order. However, as far as

any aggrieved party is concerned, Rule 2 of Order XXVI of the Rules mandates that the said application for review is to be filed within thirty days from the date of the judgment or order sought to be reviewed. Interestingly, the legislature prescribed no time period for the Supreme Court to review its judgment or order. Similarly, while prescribing the Rules for regulating the review jurisdiction of this Court, the Supreme Court has not provided for itself any time period to review its judgment or order. However, any aggrieved party seeking the review of judgment or order of the Supreme Court is mandated under Rule 2 *ibid* to apply within 30 days from the decision of the Supreme Court it sought to be reviewed. It would also be pertinent to mention that under Rule 6 of Order XXXIII of the Rules, the Supreme Court has been vested with inherent powers to make such orders, as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

10. The Parliament and the Supreme Court appear to be in consonance in leaving the authority of the Supreme Court to review its judgments and orders to be governed by the merits of each case and not being bound by any period of limitation. The intention is apparent. It is an error on the face of the record, ends of justice or to prevent abuse of the process of the Court, which would govern the exercise of the review jurisdiction of the Supreme Court. Thus any judgment or order, which warrants revisiting and correction can be reopened without being hindered by any time limit. It is the preservation of life, as mandated under Article 9 of the Constitution, which is to be preserved, protected and secured.

11. There is judicial consensus to condone the delay in entertaining petitions filed by condemned prisoners, especially,

when they face the capital sentence[1] or a long imprisonment sentence[2] or for being in jail and having no access to legal assistance or safe administration of justice for the reappraisal of evidence[3]. The rationale for this judicial deference to the condemned prisoner in a criminal case was explained by this Court[4] in terms:

> "Unlike civil litigation, in which after the expiry of the prescribed period of limitation, the opposite-party gets a vested right, in criminal cases generally the State cannot possibly claim the same privilege, as in the nature of things, it has to be impersonal having no other object in view than the fact that an accused should have the full opportunity to defend himself unhampered by the bar of limitation. It is for this reason that this Court has generally remained liberal, and condoned the delay in criminal cases coming before it."

12. In the instant case, the petitioners after having been finally declined any relief from this Court in the year 2002 did not remain indolent. In fact, they have pursued their remedy of seeking a remission under the enabling provisions provided under the Ordinance and Government Order. Their pursuit to seek the legal remedy has been presented before the appropriate legal judicial forums and can in no way be termed as an attempt to delay and abuse the process of the law. The judicial pronouncement regarding their claim to a remission in their sentences was finally determined by the High Court in the year 2018. Thus, in the circumstances of the present case, the petitioners who are through the instant petition, seeking after 16 years, the review of the judgment passed by this Court in the year 2002, cannot be

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1 ***Muhammad Din and others v. The State (PLD 1977 SC 52), Riaz Masih v. The State (1983 SCMR 423), Mst. Asia Bibi v. The State (PLD 2019 SC 64).***

2 ***Sadiq v. The State (PLD 1967 SC 356), Muhammad Sadiq v. Muhammad Sarwar (1979 SCMR 214), Muhammad Dawood v. The State (1986 SCMR 536), Muhammad Bakhsh alias Muhammad v. The State (1985 SCMR 72), Muhammad Nawaz v. The State (PLD 2002 SC 287)***

3 ***Bashir Ahmed alias Mannu v. The State (1996 SCMR 308)***

4 ***Mst. Asghari Khanum v. The State (P L D 1980 SC 14)***

outrightly denied a hearing without considering the merits of the case, and more so, when the petitioners are facing capital punishment. In these circumstances, the delay in filing the present Criminal *Suo Motu* Review Petition is condoned.

RULE OF EXPECTANCY OF LIFE

13. The right of expectancy of life, as presently viewed in our jurisdiction[5] is, *inter alia*, a right of a convict sentenced to death, who while consciously pursuing his judicial remedies provided under the law has remained incarcerated for a period equal or more than that prescribed for life sentence[6]. The courts have considered this delay in the final judicial determination of a convict's fate to be one of the mitigating circumstances for the commuting sentence of death to life imprisonment. This positive application of discretion by the appropriate court is regarded as the rule of expectancy of life.

14. In other common law jurisdictions, the right to expectancy of life is more pronounced and encompasses condition precedents much less stringent than our jurisdiction. This right, as explained by the Privy Council[7], is extended to convicts condemned to death, who have witnessed an inordinate delay in the execution of the death sentence, and the said delay was substantially due to factors outside convict's control or when the delayed execution of the death sentence was so pronounced that arouses in the convict's reasonable belief that his death sentence must have been

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5 ***Hassan and others v. The State and others*** **(PLD 2013 SC 793)**

6 Twenty five years: **Section 57 of Pakistan Penal Code, 1908 read with Rule 140 of the Prison Rules, 1978.**

7 ***Abbott v. A-G of Trinidad and Tobago [1979] 1 WLR 1342***.

commuted to a sentence of life imprisonment. In a later case from the same jurisdiction[8], the Privy Council, while hearing a petition of five condemned prisoners challenging the execution of their death sentences of being an affront to "inhuman or the degrading punishment", as contained in Section 17 of the Constitution of Jamaica. By a majority decision, the petition of the convicts was dismissed, and the execution of the condemned prisoners was upheld. However, there was a consensus in the opinion of their lordships that a long delay in the execution of the death sentence, especially when the condemned prisoner is not responsible for the said delay is an important factor to be taken into account in deciding whether to exercise prerogative of mercy or otherwise. The majority did not exercise the said prerogative, while the dissenting opinion by lord Scarman and lord Brightman opined that the discretion was to be positively exercised because of the delayed execution of the death sentence. Their opinion was based on precedents from other jurisdictions, which are relevant for reference the issue in hand, the same read that:

> "Such research as we have been able to conduct shows that many judges in other countries have recognised the inhumanity and degradation a delayed death penalty can cause. We cite four instances (but there are many others). In *Furman v Georgia* (1972) 408 US 238 Brennan J, who concluded that capital punishment was unconstitutional in the United States of America (a conclusion with which we are not concerned and on which differing opinions are held), commented (at 288) that 'the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death'. The Supreme Court of California has acknowledged in two cases the cruel and degrading effect of delay: *People v Chessman*(1959) 341 P 2d 679 at 699, and *People v Anderson*(1972) 493 P 2d 880 at 894. In the latter case, the court expressly mentioned the dehumanising effects of lengthy imprisonment before execution. Krishna Iyer J of the Indian Supreme Court has expressed a similar view when the delay after sentence was six years: *Rajendra Prasad v State of Uttar Pradesh* [1979] 3 SCR 78 at 130, with which should be read the comment

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8 ***Riley and others v Attorney General of Jamaica and another [1982] 3 All ER 469***

> of the same judge in an earlier Supreme Court case on the 'brooding horror of hanging' which had haunted a prisoner for over two years: *Ediga Anamma v State of Andhra Pradesh* [1974] 3 SCR 329 at 355. There is also a relevant case under the European Convention: *Tyrer v United Kingdom* (1978) 2 EHHR ***1*** (the Isle of Man case). It was a case of corporal punishment. The European Court of Human Rights noted a considerable delay of several weeks in carrying out the sentence of the juvenile court and commented that 'Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him': para 33. It is interesting also to note the point made in the dissenting judgment of Judge Fitzmaurice that most of the delay was due to the time taken on Mr Tyrer's appeal.
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> It is no exaggeration, therefore, to say that the jurisprudence of the civilised world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in *People v Anderson* it is cruel and has dehumanising effects. Sentence of death is one thing: sentence of death followed by lengthy imprisonment before execution is another.

15. Now, tracing the judicial trend on the right of expectancy of life in our jurisdiction, it is noted that after independence, in the early fifties, the courts did not consider the delay in disposal of an appeal of a convict to be sufficient mitigating circumstance to commute his sentence of death.[9] A decade on, there was a judicial shift in favour of convicts, and even a delay of two years in execution of the capital sentence from the date of award of the death sentence would suffice to invoke the rule of expectation of life[10];the death sentence awarded to a convict was not executed for more than three years from the date of the crime[11]; the release of the acquitted accused for a period of two years and ten months was enough to satisfy the rule of expectancy of life[12].A further decade on, in the seventies, there was a pendulum shift in the judicial opinion, whereby the court realizing the delay being a feature in our administration of criminal justice

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9 ***Intizam Hussain v. The Crown (PLD 1951 FC 142)***
10 ***Ghulam Hassan v. Zainullah and The State (PLD 1961 SC 230)***
11 ***Fazal Khan v. The State (PLD 1964 SC 54)***
12 ***Muhammad Ramzan v. The State (PLD 1966 SC 129)***

system did not readily accept the delay in disposal of an appeal of the convict to be the sole ground for mitigation and thereby commuting a capital sentence to one of life imprisonment[13]. It was in ***Muhammad Sharif v. Muhammad Javed*** **(PLD 1976 SC 452)** that this Court very aptly articulated the reason for this shift in judicial trend in terms that:

> "As regards the doctrine of expectancy of life, given the chronic delays in committal, trial and disposal of appeal as also the deliberate tactics of the convicts to delay the proceedings in order to escape the gallows there has been a shift in the trend of this Court as adumbrated in its judgments in ***Asadullah Khan v. Muhammad Ali*** **(PLD 1971 SC 541).**

16. The principles to govern the application of the rule of expectancy of life were in general terms articulated by this Court in the case of ***Hassan and others v. The State and others*** **(PLD 2013 SC 793)**, wherein this Court opined that:

> (i) In a case where delay is occasioned in final disposition of a legal remedy being pursued by a convict sentenced to death on a charge of murder and where the undergone period of his incarceration is less than that of a term of imprisonment for life there the principle of expectancy of life for its use for reduction of the sentence of death to imprisonment for life stands abandoned by the courts of this country.
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> (ii) In a case where the State or the complainant party is seeking enhancement of a sentence of imprisonment for life of a convict to death and before or during the pendency of such recourse the convict serves out his entire sentence of imprisonment for life and he has, or has not yet, been released from the jail there the principle of expectancy of life is still relevant for not enhancing the sentence of imprisonment for life to death. Article 13(a) of the Constitution is not directly relevant to such a situation but the spirit of that Article may be considered in such a case as a factor along with the other factors like expectancy of life and the facts and circumstances of the case, etc. for not enhancing the sentence of imprisonment for life to death at such a late stage.
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> (iii) In a case where a convict sentenced to death undergoes a period of custody equal to or more than a full term of imprisonment for life during the pendency of his judicial remedy against his conviction and sentence of death there the principle of expectancy of life may be a relevant factor to be considered along with the other factors for reducing his sentence of death to imprisonment for life.
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> (emphasis provided)

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13 ***Siddique v. The State (1970 SCMR 288), Samano v. The State (1973 SCMR 162), Muhammad Hassan v. The State (1973 SCMR 344),***

17. In ***Dilawar Hussain v. The State*** (2013 SCMR 1582), a five member bench of this Court, followed with approval the above-stated principles laid down in **Hasan's case** (*supra*), while hearing a review petition of a condemned prisoner, who had been in the death cell for eighteen years, awaiting the fate of his juridical remedies, positively applied the rule of expectancy of life, as a mitigating circumstance, and thereby commuting his death sentence to that of life imprisonment. The principle so laid down was in terms that:

> "According to our estimation, even a single stance providing mitigation or extenuating circumstance would be sufficient to award lesser punishment as an abundant caution. ..... Even otherwise, it would be unjust to impose double sentence on the petitioner for commission of one offence as by keeping the accused in death cell for 18 years, the delay in the disposal of his case is not at all attributable to him, it will be against the principle of natural justice that he is hanged by neck. In this view of the matter, we are of the considered view that such extenuating circumstances do exist in the instant case for giving the benefit thereof to the petitioner."

18. On reviewing the judicial precedents, stated above, it would be safe to conclude that the judicial consensus is that courts are not to blindly apply the rule of expectation of life on every such claim made by a condemned convict, but are to consider each case according to its peculiar facts and circumstances. And courts are to adjudge the said claim, if found to be genuine, not to be the sole ground but as one of the mitigating circumstances for commuting a capital sentence to a lesser punishment. Surely, a positive application of the rule of expectancy of life of every claim so made be a condemned prisoner would defeat the powers of an appellate court to convert an order of acquittal to a capital sentence or for that matter, of a revisional

court in enhancing the lesser sentence to that of death [14]. Thus, such a uniform application of the rule of expectancy of life, would negate statutory appellate or revisional powers vested in a court under the law, and thus such an application of the rule can not be accepted with approval.

SCOPE OF REVIEW IN CRIMINAL MATTERS

19. The judicial consensus that has developed in our jurisdiction is that review jurisdiction vested in this Court under Article 188 of the Constitution read with Order XXVI of the Rules can be invoked when there is an error apparent on the face of the record, or for ends of justice or to prevent abuse of the process of the Court, and this jurisdiction is not open to allowing re-hearing or re-arguing the merits and a criminal case which has finally been concluded. This Court in ***Dilawar Hussain's case*** *(supra)* has very aptly expounded the scope and principles governing the exercise of criminal review jurisdiction of this Court in terms that:

> "There is no denial of the fact that the scope of review in the Criminal Procedure Code is very limited and such an exercise can only be adhered to when there is a legal error on the face of record meaning thereby that the error shall be so apparent and glaring that no Court would permit it to remain a part of the proceedings and such an error must be emanated from the record on the basis of its own existence and not be the result of analytical logic and scrutiny of the evidence. However, an error apparent on the face of record manifestly is of a nature that, if ignored, complete justice could not be done. Thus, it is clear that inappropriate and suitable cases this Court always exercised its jurisdiction only for the cause of dispensation of justice. In the instant case, the petitioner has not only served out one sentence provided under section 302(b), PPC but has suffered the agonies of his remaining incarcerated in the death cell for a quite long period. In such circumstances, while keeping in view the principle of abundant caution we are of the considered view that the petitioner has made out a case for review of the earlier judgment of this Court."

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[14] ***Asasullah v. Muhammad Ali and 5 others (PLD 1971 SC 541)***

20. The crucial events leading to the murder of Habib ur Rehman have been described in a precise manner by this Court in its decision under review, which reads:

> "Briefly stated that the facts of the case as enumerated in the impugned judgment are to the effect that FIR (EX.PA/1) was registered on 20.7.1993 on the statement of Fazal-ur-Rehman PW-7 (Exh.P-A) recorded by Banaris Khan Sub-Inspector PW-10 that Habib-ur-Rehman deceased complainant's brother used to work as a peddler in Tauheed Hotel. On the fateful night, the complainant along with Farid came to the said brother at the Hotel. The latter was raising hearth for preparation of "Kabab" when suddenly Jamshed, Sikandar, Shamsher and Ishaq reached the spot. Sikandar appellant raised *Lalkara* that they would teach Habib-ur-Rehman a lesson for constructing hearth in front of their shop (Hotel). Habib-ur-Rehman deceased tried to run away but accused Shamsher chased him and caught hold of him from his hair, whereafter Sikandar and Jamshed inflicted one *Chhuri* blow each on the cheat of Habib-ur-Rehman in consequence of which he fell down. Thereafter, all the accused gave him *Chhuri* blows which hit him at his abdomen, chest and shoulder. The accused shouted that no one should come near them otherwise he will also meet the same fate. On the hue and cries raised by the PWs the accused decamped from the spot." They were, however, arrested and after completion of investigation sent up for trial and ultimately convicted and sentenced as per details mentioned therein above."

21. This Court is mindful of the judicial reluctance to positively apply mitigating circumstance in review petition. However, taking cue from the principle laid down by a five member bench of this court in ***Dilawar Hussain's case*** (*supra*), wherein it was held that:

> "Although it is very rare phenomenon to discuss the mitigating circumstances in the review petition, yet, the same are being taken note of as the aforesaid petition is alive before us only to consider the quantum of sentence as such, the same are being discussed here considering those factors to be legal error apparent on the face of record."

22. In the present case, as in ***Dilawar Hussain's* case** (supra), the petitioners are also seeking review of the quantum of the death sentence maintained by this court in its judgment under review. None denies that the parties had no previous enmity, and the tragic incident took place suddenly at their common workplace. One can not loose sight of the fact that four persons including the petitioners were tried for the crime, and two with the similar role

have been acquitted without any challenge by the prosecution or the complainant party. And most importantly, the right of expectancy of life had genuinely accrued to the petitioners having admittedly being incarcerated in the death cell for a period more than twenty-five years, while they were seeking justice from the appropriate judicial courts of our country. All these factors, which are apparent on the face of the record, when taken in a cumulative manner, cannot go unheeded, more so when the petitioners are facing capital punishment. Thus, these mitigating circumstances coupled together make out a case for review of the judgment of this Court dated 13-6-2002 passed in Criminal Appeal No. 378 of 2001.

23. As far as the juvenility of the petitioners is concerned, it is noted that the petitioners were granted more than adequate opportunity to discharge the onus that they were less than eighteen years on the date when the crime was committed. The evidence they produced did not convince the trial court as well as the appellate court to be sufficient, and that too for good reasons. All factual and legal issues were correctly appreciated by the two courts below, warranting no interference by this Court. However, this would never demean the proceedings initiated by the petitioners to claim their juvenility on the basis of their statutory rights. In case the claim of the petitioners to juvenility had been out rightly false, their said claim would not have taken three rounds to the trial court based on two remand orders by the High Court. In fact, the crucial ossification test to determine the age of the petitioners could not carried out but for their advanced age. However, on their general medical examination of the petitioners, the opinion of Dr. Khalid Javed (CW), took the petitioners to be in

their early youth, if not being juvenile at the time of the commission of the offence. Without conducting the ossification test, the possibility of determining the actual age of the petitioners at the time of the crime would remain undetermined. In such circumstances, despite the rejection of petitioners' said claim to their juvenility, the same could not be out rightly declared as totally fraudulent aimed to delay and abuse the due process of the law. Therefore, our criminal justice system can not be totally absolved of the delay of seventeen years in deciding the claim of the petitioners. Surely, no party should suffer for the *act of court*.

24. Accordingly for the reasons stated, hereinabove, this Court holds that:

i) **Miscellaneous Application No. 2000 of 2018.**

In the peculiar circumstances of the case, Criminal Miscellaneous Application No. 2000 of 2018 is allowed, and the delay in filing of Criminal *Suo Motu* Review Petition No. 84 of 2018 is condoned.

ii) **CRIMINAL SUO MOTU REVIEW PETITION NO.84 OF 2018 IN CRIMINAL APPEAL NO.378 OF 2001.**

Given the mitigating circumstances highlighted hereinabove: and in particular that, the right of expectancy of life of the petitioners being incarcerated for more than 25 years, while their legal challenge before the competent legal judicial forums continued; that for the same set of evidence, two co-accused have been acquitted without any distinguishing feature in their role compared to that of the petitioners, and that too, without corroboration of independent evidence, and more so, when the same has gone unchallenged by the prosecution or the complainant party; and finally that the crime was a sudden and

unpremeditated act, and thus warrants revisiting the sentence of death confirmed by this court in its judgment under review, and thus, the Criminal Suo Motu Review Petition No. 84 of 2018 is, therefore, allowed after condoning the delay in filing thereof, the judgment dated 13.06.2002 passed by this Court in Criminal Appeal No. 378 of 2001 is reviewed and recalled. Accordingly, Criminal Appeal No. 378 of 2001 is partly allowed to the extent of petitioners' sentences of death which are hereby reduced from death to imprisonment for life. The benefit under section 382-B, Cr.P.C. shall be extended to the petitioners.

iii) **Criminal Petition No. 947 of 2018**

No substantial question of law and fact has been highlighted before us warranting interference by this Court. Thus, the present petition being bereft of merit is dismissed. Leave to appeal is refused.

Judge

Judge

I have dissented with the above and recorded my own opinion.
Judge

Announced in Open Court
On _____ at Islamabad

Judge

Approved for reporting

Qazi Muhammad Amin Ahmed, J.- I regret my inability to subscribe to the judgment rendered by Yaya Afridi, J. with the concurrence of Maqbool Baqar, J.; their Lordships are amongst the best on the Bench. Contextual clarity for the dissent necessitates reference to the facts though at the cost of some repetition.

2. Sikandar Hayat, Jamshed Ali, Shamsher and Ishaque, real brothers *inter se*, were indicted for committing *Qatl-i-Amd of* Habib-ur-Rehman, 35/36, at 11:15 p.m. on 19.7.1993 within the remit of Police Station City Jhelum. The deceased, a hawker by profession, in the evening used to work at a restaurant/hotel adjacent to the one run by the accused. During the fateful night, he was busy in constructing a hearth for his owner; annoyed with the assignment, the accused, armed with *Churris*, confronted him when he attempted to flee into safety, however, soon subdued; Sikandar Hayat and Jamshed Ali, petitioners, inflicted one blow each, on his chest; Shamsher and Ishaq joined them to repeat multiple blows while he had fallen on the road. Deceased's brother Fazal-ur-Rehman (PW-7) and Haji Muhammad Hanif (PW-8) along with his brother Muhammad Zubair (given up) witnessed the occurrence. The deceased succumbed to the injuries at the spot. Medical Officer noted eight incised wounds; injuries attributed to the petitioners were blamed as cause of death. Trial culminated into acquittal of Shamsher and Ishaq, co-accused, while the petitioners were convicted under clause (b) of section 302 of the Pakistan Penal Code, 1860 and sentenced to death vide judgment dated 4.9.1995; a learned Division Bench of Lahore High Court at Rawalpindi upheld the convictions as well as sentences consequent thereupon vide judgment dated 16.8.2000, maintained by this Court vide judgment dated 13.6.2002. It would be pertinent to mention that the petitioners never pleaded juvenility during the trial and in their examination under section 342 of the Code of Criminal Procedure 1898 on 26.3.1995, their age is recorded as 26 years and 28 years, respectively. With an oblique reference to their youth, they did not plead minority in the memo of appeal filed before the High Court on 10.9.1995 nor such argument was addressed before the Bench; it was never argued

even before this Court. Doors foreclosed, the petitioners raised plea of juvenility, through separate criminal miscellaneous applications, for the first time on 16.10.2003 in the Court of Session at Jhelum; considering the plea as frivolous, petitions were dismissed through consolidated order dated 14.1.2004; assailed through revision petition No.11 of 2001; vide order dated 13.2.2004, the issue was remitted for decision afresh within three weeks. Petitioners' plea once again failed; the learned Sessions Judge Jhelum held a regular inquiry and found both of them as adult vide order dated 19.3.2005; they once again approached the High Court when the issue was again remanded on 8.5.2015 for ossification test upon the petitioners "*not later than 30th of June, 2015*". The test was conducted on 15.5.2015 and both the petitioners were declared as above 20 years of age on the day of occurrence with resultant dismissal of their pleas vide order dated 20.5.2015. Undeterred by incessant failures, the petitioners once again audaciously approached the High Court through Criminal Revision No.118 of 2015, dismissed vide judgment dated 5.09.2018, being assailed through Criminal Petition for Leave to Appeal No.947 of 2018; the petitioners in the wake of dismissal of their mercy petitions way back on 15.12.2006, besides filing the aforesaid petition also filed a review petition through Jail Superintendent after delay of 5844 days; these have been clubbed vide order dated 11.10.2018. While my learned brothers upheld dismissal of petitioners' plea of juvenility by the High Court, they had been pleased to allow the review petition after condonation of delay so as to alter penalty of death into imprisonment for life with all attending benefits and it is in this backdrop that I would record my own opinion, however, I endorse dismissal of Criminal Petition No.947 of 2018, albeit for reasons to be detailed hereinafter.

3. This Court being the last resort to the temporal justice, constitutionally inheres jurisdiction to review its judgment or order, *subject to the law and practice of the Court;* the Court can undertake the exercise either on a motion made by an aggrieved person or on its own so as to rectify an error apparent on the record with a view to do "*complete justice*". The escape route from

the finality of judgment/ order, under the rider of period of limitation is, nonetheless, narrowly jacketed. The regime is by now clearly defined and the applicant is required to surmount quite a few hurdles. Every judgment pronounced by this Court has to be essentially presumed to have been rendered after solemn, conscious and deliberate consideration on all points, factual as well as legal, arising out of the case and unless an error apparent on the record or material irregularity substantially impinging upon the outcome of the case, meriting a contra adjudication, an error simpliciter would not sustain the attempt. Similarly mere preponderance of the view canvassed being more reasonable does not space the possibility to reverse the clock. The Court would certainly not permit a party to re-argue its case nor would allow appellate scrutiny of the decision of its own peers in the garb of review proceedings. In the case of *Lieutenant Col. Nawazada Muhammad Ameer Khan Vs. The Controller of the Estate Duty* (PLD 1962 SC 335), it has been observed by A.R. Cornelius C.J. advantageously reproduced below:-

> *"For the present purpose, the emphasis should, in my opinion, be laid upon the consideration that, for the doing of "complete justice", the Supreme Court is vested with full power, and I can see no reason why the exercise of that full power should be applicable only in respect of a matter coming up before the Supreme Court in the form of a decision by a High Court or some subordinate Court. I can see no reason why that purpose in its full scope, should not also be applicable for the purpose of reviewing a judgment delivered by the Supreme Court itself: provided that thereby found a necessity within the meaning of the expression "complete justice" to exercise that power. It must, of course, be borne in mind that by assumption, every judgment pronounced by the Court is a considered and solemn decision on all points arising out of the case, and further that every reason compels towards the grant of finality in favour of such judgments delivered by a Court which sits at the apex of the judicial system. Again, the expression "complete justice" is clearly not to be understood in any abstract or academic sense. So much is clear from the provision in Article 163 (3) that a written order is to be necessary for the purpose of carrying out the intention to dispense "complete justice". There must be a substantial or material effect to*

> *be produced upon the result of the case if, in the interests of "complete justice" the Supreme Court undertakes to exercise its extraordinary power of review of one of its own considered judgments. If there be found material irregularity, and yet there be no substantial injury consequent thereon, the exercise of the power of review to alter the judgment would not necessarily be required. The irregularity must be of such a nature as converts the process from being one in aid of justice to a process that brings about injustice. Where, however, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan there it would be the duty of the Court unhesitatingly to amend the error. It is a duty which is enjoyed upon every Judge of the Court by the solemn oath which he takes when he enters upon his duties, viz., to "preserve, protect and defend the Constitution and law of Pakistan."*

I entertain no manner of doubt that unless it is unambiguously demonstrated that a judgment or order sought to be reviewed is patently against the law or the Constitution, it cannot be reversed or modified on compassion, mercy or generosity; even if it entailed hardship for a party; that would be imperative to preserve the finality of decision rendered by this Court. It has been observed in the case of *Venkata Narasimah Appa Row v. The Court of Wards* ***(1886) II A C 660***, as under:-

> *"There is a salutary maxim which ought to be observed by all Courts of last resort—Interest reipublicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of decisions of such a tribunal as this."*

Same view had been taken in the case of *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and others* ***(AIR) 1941 F C 1***, reproduced below:-

> *"It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court be re-opened and re-heard."*

On the principle of finality of a decision by the last Court, unanimity is universal; clog is imperative inasmuch as divergence in human opinions and outlook would stand in impediment to the

finality of a legal process with a resultant chaotic uncertainty. In Brown Vs. Alien, Justice Robert Jackson, famously quipped, "*we are not final because we are infallible but we are infallible only because we are final".* The regime is even more stringent in criminal cases as notwithstanding application of rules regarding procedure as well as admission of evidence, these are essentially decided on the appreciation of facts in each case; once the Court has taken a conscious and considered decision about the culpability of an offender and settled the wage, considered conscionable in circumstances, nothing is left to re-consider the evidence so as to take a different view as such an exercise would tantamount to re-hearing of appeal in a decision already rendered by the peers of equal station and stature. The law expounded by this Court on the subject of review of criminal judgments can be summed up as follows:-

I. *that in order that an error may be received as a ground for review, it is necessary that it must be the one which is apparent on the face of the record, however, if the judgment under review, or a finding contained therein, though suffers from an erroneous assumption of facts, is sustainable on the other grounds available on the record then though the error may be apparent on the face of the record yet it would not justify a review of the judgment or the finding in question. In other words, the error must not only be apparent, but it must also have a material bearing on the fate of the case;*

II. *it must be so manifest and evident that without requiring elaborate discussions, it evinces consequences that no Court would countenance them to remain on the record;*

III. *that the review proceeding is neither in the nature of a rehearing of the whole case nor is it an appeal against the judgment under review;*

IV. *that in criminal matters the Supreme Court will not interfere in review with the quantum of sentence, if a legal sentence has been imposed,*

> *or upheld, after due consideration of all the relevant circumstances.*

Reference may be made to the following cases:-

> *Ayyaz Baig alias Bau Chuhanwala v. The State (2002 SCMR 380)*
> *Yaqoob Khan and others v. The State (PLD 1996 SC 97)*
> *Siraj Din v. Nazar Hussain & others (1979 SCMR 364)*
> *Kala Khan & others v. Misri Khan & others (1979 SCMR 347)*
> *Ghulam Sarwar & others v. The State (1979 SCMR 43)*
> *Irshad v. The State (1979 SCMR 406)*

In the face of clearly defined/declared law on the subject, the petitioners have sought review of the judgment dated 13.06.2002 on the following grounds, reproduced in verbatim:-

یہ کہ تمام تر کہانی استغاثہ فرضی، بے بنیاد اور من گھڑت ہے۔
یہ کہ سلا ان کا وقوعہ سے کوئی تعلق واسطہ نہ ہے۔ اپیلانٹ کو مقدمہ میں بالکل جھوٹ ملوث کیا گیا ہے۔
یہ کہ سلا ان کے خلاف مدعی فریق اپنا مقدمہ بلاشک وشبہ ثابت کرنے میں ناکام ثابت ہوا ہے۔
یہ کہ سلا ان کے خلاف پیش ہونے والے گواہان بالکل فرضی ہیں اور واضح تضادات موجود ہیں۔
یہ کہ عدالت ماتحت نے شک کا فائدہ اپیلانٹ کو دینے کی بجائے استغاثہ کو دے کر قانونی غلطی کی ہے۔
یہ کہ سلا ان کو دورانِ ٹرائل مکمل صفائی شہادت کا موقع بھی فراہم نہ کیا گیا ہے۔

Petitioners' pleas for review on the cited grounds cannot be entertained without destroying the entire *Corpus Juris* as these essentially require attendance to the arguments reconstructed again so as to appraise afresh entire evidence to explore the possibility to substitute findings recorded and conclusion arrived at by the previous Bench. Therefore, it does not lie within our competence to re-examine or revisit conscious and considered analysis undertaken by our predecessors so as to take retrospectively a different view by taking into account consequences of acquittal of co-accused or on the manner whereunder the occurrence took place with a view to reassess the quantum of sentence; such a course cannot be adopted without tossing the finality of this Court into peril.

Adverting to the plea of condonation of delay of 5844 days, a period exceeding 16 years, the following plea is raised before the Court:-

درخواست بمراد

Condonation of Delay

جنابِ عالی! سلا ن حسبِ ذیل عرض گزار ہیں:

i. یہ کہ سلا ن کی نظر ثانی اپیل مندرجہ بالا معزز عدالت میں دائر کی جارہی ہے۔ جس کی کامیابی کے قوی امکانات ہیں۔

ii. یہ کہ سلا ن/ اپیلانٹ کی سزا عدالت عظمیٰ سپریم کورٹ آف پاکستان سے مئورخہ 13.06.2002 کو کریمنل اپیل نمبر 378 آف 2001 کے تحت بحال رکھی گئی۔

iii. سلا ن کے گھر والوں نے نظر ثانی اپیل بذریعہ کونسل خود سپریم کورٹ میں دائر کرنے کا کہا تھا۔ لیکن بوجہ غربت اور فیس کی کمی کی وجہ سے سائل کے ورثانے بذریعہ کونسل سپریم کورٹ میں نظر اپیل دائر نہ کی جس وجہ سے تاخیر سے نظر ثانی اپیل دائر کی جارہی ہے۔

لہٰذا اربابِ اختیار سے استدعا ہے کہ درخواست منظور فرما کر Delay کو Condone فرما کر نظر ثانی اپیل کو اندر معیاد تصور فرما کر On Merit حکم صادر فرمایا جائے۔

The Court is generous in condoning delay to the convicts having regard to the corporal consequences of their sentences; the generosity, however, is mostly extended in appeals; condonation of delay for review is a different regime. Financial incapacity has been cited to preclude approach to the Court. No doubt petitioners' defence pursuits would have presumably depleted their resources, consequent upon income statedly generated by a small restaurant, nonetheless, the record reflects contrarily; they were represented during the trial by an eminent local lawyer. In the High Court they were represented by a lawyer no less than Sardar Muhammad Aslam. In the Supreme Court, however, the petitioners were represented by a counsel at State expense. After dismissal of their appeal in this Court, they repeatedly moved Court of Session to claim juvenility; failure in each attempt was assailed in the High Court; last dismissal in the High Court is now challenged through Cr.P.L.A No.947 of 2018; in each move, at all the tiers, they were represented by counsel of their choice and, thus, their claim of financial incapacity, standing in impediment to their approach seeking review is a story that may not find a buyer. Even otherwise, without a counsel or cost, they could have approached the Court in time. Horrors of the sentence proposed upon the petitioners, notwithstanding, the explanation put forth for condonation of delay of 5844 days sans both logic as well as truth.

4. Adverting to the plea of juvenility, the idea never crossed petitioners' mind till dismissal of their appeal in this Court. The Punjab Youthful Offenders Ordinance (Pb. Ord. XXIII of 1983), 1983, held the field when they were indicted and subsequently examined by the trial Court on 26.3.1995 under section 342 of the Code ibid, they candidly disclosed their age as 26 and 28 years, respectively. In their subsequent scramble, asserted dates of birth as 27.11.1975 and 01.10.1977 turned out as a farce; during the inquiry, their dates of birth were found as 21.10.1971 and 3.04.1977 on the basis of applications moved by them for issuance of National Identity Card; further confirmed by Form-B of National Database & Registration Authority; considering documentary evidence as being inconclusive, they were subjected to ossification tests conducted on 13.5.2015 wherein their age was approximated between 40/45 years, each with maximum extended allowance, being 22 years on the day of occurrence. Petitioners' silence at all forums till 2003, compounded by reasonably accurate scientific analysis with the additional premium of two years, safely brings their case out of remit of juvenility without risk of error. In the eye of storm, they desperately attempted to salvage themselves from the executioner noose. The plea failed throughout, even before my learned brothers on the Bench.

5. Death penalty, concomitant horrors notwithstanding, is a legal sentence; in the administration of criminal justice, considered as a conscionable wage for heinous crimes such as homicide, it is widely practiced across the globe; preference for alternate penalty of imprisonment for life requires a judicially recognized and evidentially established mitigating circumstance while keeping the scales in balance. There are no benign murders nor anguish and trauma endured by the victim of a violent death can be classified in euphemistic categories, nonetheless, certainly there are situations that admit no consideration to alter the penalty of death and the case in hand is one of those. The deceased, in his prime youth, a minion to sustain his life was brutally stabbed to death to the horrors of onlookers while he scrambled for safety, over an issue, most trivial.

Penalty of death is forfeiture of natural span of life of an offender; the wage became due after dismissal of petitioners' appeal in this Court as well as mercy petition with the President of the Republic way back on 15.12.2006; they craftily managed time to escape gallows through a pursuit far from being fair and just. After having confronted indictment as adults and given their age as such under legal assistance, there was no occasion, moral or legal, for them to fabricate a plea evidently false, pursued through abuse of process of law and as such the ill-gotten span of time cannot, in my humble view, be summed up to extend premium of life onto them under the doctrine of expectancy of life, particularly after dismissal of their plea of juvenility by this Court. A frivolous, motivated and oblique pursuit to defeat the ends of justice cannot be equated with *bona fide* recourse to law nor the time manipulated thereby validly pressed into service to claim any concession. Unanimous dismissal of their plea affirms the above hypothesis and, thus, grant of concession which has not even been prayed for, would be self destructive. The choice lies between the lives of unanimously adjudicated assassins and a jurisprudence wisely contoured over the centuries, I shall behold the latter. Petitions fail. Dismissed.

Qazi Muhammad Amin Ahmed
Judge

ORDER OF THE BENCH

The Bench reaches at following conclusion:-

1. By majority of two to one (Mr. Justice Qazi Muhammad Amin Ahmed, dissenting), Criminal Suo Motu Review Petition No. 84 of 2018 is allowed, consequently the judgment passed by this in Criminal Appeal No. 378 of 2001 is reviewed and recalled. The sentences of the

petitioners/appellants in Criminal Appeal No. 378 of 2001 is reduced from death to imprisonment for life with benefit of section 382-B, Cr.P.C.

2. Criminal Petition No. 947 of 2018 is dismissed and leave to appeal is refused unanimously.

Judge

Judge

Judge

Announced in open Court
On 28th July, 2020 at Islamabad

Judge