

IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

Present:

Mr. Justice Jamal Khan Mandokhail
Mrs. Justice Ayesha A. Malik
Mr. Justice Syed Hasan Azhar Rizvi

Criminal Review Petition No. 103 of 2017 IN
Criminal Appeal No. 643 of 2009

(To review the judgment of this Court dated 28.10.2015 passed in
Crl. Appeal No. 643 of 2009)

Ghulam Shabbir ...Petitioner

Versus

The State etc ...Respondents

For the Petitioner: Mr. Hasnat Ahmad Khan, ASC

For the State: Mr. Irfan Zia, DPG

Date of Hearing: 05.06.2024

JUDGMENT

Jamal Khan Mandokhail, J.- Facts in brief are that the petitioner was arrested pursuant to FIR No. 243 dated 15.07.1990 for committing murder of two persons and causing injuries to two others. The Trial Court *vide* judgment dated 07.12.1994 convicted the petitioner under section 302(b) of the Pakistan Penal Code ("**PPC**") and sentenced him to death on two counts. He was also convicted under section 307 PPC and sentenced to rigorous imprisonment for five years on two counts. The petitioner's appeal was dismissed by the High Court *vide* judgment dated 07.02.2000. His criminal appeal was dismissed by this Court on 28.10.2015, as a result, his convictions and sentences were upheld. The petitioner has filed the instant criminal review petition on the ground that he has already served his life term, therefore, has prayed for conversion of his death sentences into imprisonment for life. Reference has been made to the cases of Dilawar Hussain¹, Hassan² and Khalid

¹ 2013 SCMR 1582

² PLD 2013 SC 793

Iqbal³. His review application was entertained on 19.09.2017 and notices were issued to the respondents.

Contention:

2. The learned counsel for the petitioner submitted that section 302(b) of the PPC provides two sentences i.e., punishment for death or imprisonment for life as *Tazir*. He stated that though the petitioner was sentenced to death on two counts, but before deciding his criminal appeal by this Court, he had served 26 years sentence without remissions, which is more than imprisonment for life. A premise of an arguments of the learned counsel is that after serving one of the sentences, the petitioner cannot be punished for another sentence in respect of one and the same offence, but this Court while deciding the criminal appeal of the petitioner, did not consider the dictum laid down in the cases of Dilawar Hussain, Hassan and Khalid Iqbal (*supra*). According to the learned counsel, on the strength of the ratio decided in the referred judgments, the petitioner's sentence is required to be converted from death to imprisonment for life.

Discussion:

3. Arguments heard and have perused the record. It is a fact that after his arrest in this case on 16.07.1990 till date, the petitioner has served out more than 34 years sentence, without any remission, out of which he remained in death cell for about 24 years. While entertaining the instant review petition, it was felt necessary to reconsider the case of the petitioner on the strength of the above referred cases. Dilawar Hussain was awarded death sentence. His appeal was heard by a five-Members Bench of this Court. Before his appeal could be decided, he had served 25 years sentence (including remissions), out of which, he remained in death cell for about 18 years. It was held that where there is an iota of circumstance leading the Judges to exercise their discretion towards awarding lesser punishment, the Court must do so. On this analogy, this Court concluded that long detention of the convict has resulted into completion of his life term, which is one of the sentences provided under section 302(b) PPC, as such, he cannot be sentenced twice. Consequently, the sentence of death awarded to Dilawar Hussain was converted into imprisonment for life. Such view has been endorsed

³ PLD 2015 SC 50

by this Court in the case of Hasan, relevant portion at Para 18 is reproduced herein below:

"...In the present case the convicts-appellants have already spent about 22 years in death-cells and their total period of custody exceeds a full term of imprisonment for life each even if the remissions earned by them are not taken into consideration. The case of the present appellants is, therefore, a better case for reducing their sentences of death to imprisonment for life on the charges of murder than the case of the convict in the above mentioned judgment rendered by a 5-member Bench of this Court. In view of availability of that recent precedent withholding the benefit of the principle of expectancy of life from the appellants in the present case may be oppressive, if not unjust."

Similarly, in Paragraphs 20 and 21, it is held as under:

"20. The discussion made above shows that as of today the following principles of practice are being followed by the courts of this country in respect of the principle of expectancy of life:

(a) ---

(b) ---

(c) 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."

21.....*Applying the same standard or principle, it may not be unreasonable to conclude that where a convict sentenced to death on a charge of murder fails to obtain a final judicial determination qua validity of his conviction or desirability of sentence of death for such a long time that his period of custody stretch to a period equal to or exceeding a full term of imprisonment for life, which is one of the two alternative legal sentences provided in section 302(b), P.P.C., there the State, acting through its judicial Organ, may acknowledge failure of its constitutional responsibility of ensuring expeditious justice and may exercise discretion in the matter of the sentence of such convict by reducing it from death to imprisonment for life. It has already been mentioned by us above that after recording of their convictions and sentences by the learned trial court in the year 1991 the appellants' sentences of death had been confirmed by the Lahore High Court, Lahore in the year 1999 and they had then approached this Court through Criminal Petitions in the year 1999 wherein leave to appeal was granted to them in the year 2004. Now after about fourteen years of their approaching this Court and after spending more than twenty-five years of their lives in custody, out of which*

period they have spent about twenty-two years in death-cells, the appellants' appeals have come up for decision before this Court. We have also observed above that the stark reality staring us in the face is that both the appellants have already spent in custody a period more than a full term of imprisonment for life and if we uphold their sentences of death at this late stage then the appellants would, for all practical purposes, be punished with death after spending a period in custody which is more than a full term of imprisonment for life and such a bizarre situation may run contrary to the letter and the spirit of section 302(b), P.P.C. which provides for a sentence of death or a sentence of imprisonment for life. Such a case may not strictly be termed as a case of double punishment but it can more appropriately be called a case of an unconscionably delayed punishment, delayed to such an extent that the punishment is aggravated beyond the contemplation of the relevant law itself."

4. Their lordships in Hassan have observed that both the appellants remained incarcerated for more than a full term of imprisonment for life, therefore, after serving life term, maintaining death sentences awarded to the appellants would be a bizarre situation, which may run contrary to the letter and spirit of section 302(b) PPC. Under such circumstances, considering their long detention in prison as one of the grounds for a lesser punishment, the sentences of death awarded to Hassan and another were converted into imprisonment for life each.

5. Besides, this Court in the case of Sikandar Hayat⁴ has again endorsed the *ratio* decided in Dilawar Hussain, and has held that delay in final conclusion of the case is to be considered as a mitigating circumstance for conversion of death sentence into life imprisonment. Paragraph 13 of the judgment is relevant, which is reproduced herein below:

13. The right of expectancy of life, as presently viewed in our jurisdiction 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. 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.

⁴ PLD 2020 SC 559

6. However, in the case of Khalid Iqbal, a Five-Member Bench of this Court has taken a slightly different view, holding that delay in the execution of sentence alone is no ground for mitigation. In Para 9 of the said judgment, the case of Dilawar Hussain has been distinguished as under:

"This Court in the case of Dilawar Hussain (supra) had commuted the sentence of Dilawar Hussain from death to life imprisonment, not on the sole ground that the convict remained incarcerated in the death cell for 18 years but also considering other factors to reduce the quantum of sentence...."

7. In Khalid Iqbal, this Court opined that in addition to delay in execution of sentence, any other mitigating circumstance is also necessary for awarding lesser punishment. However, at the same time, the learned Members concurred with the view taken by this Court in Dilawar Hussain that long detention of the convict for no fault of his has resulted into completion of his life term, being one of the sentences, provided under section 302(b) PPC, as such, he cannot be sentenced twice. By applying such principle, it was observed that the convict Khalid Iqbal had exhausted all his legal remedies but the Executive did not process his case for execution of death sentence. He remained in death row for more than imprisonment for life. Consequently, the sentence of death awarded to Khalid Iqbal was converted into imprisonment for life.

8. This Court in the case of Hassan was faced with almost a similar situation, wherein, at Paragraph 21 of the judgment, it was held as under:

"...Upon the analogy of sections 497, 426 and 382-B, Cr.P.C. noted above the legislative intent may lean in favour of extending some relief to the appellants placed in such a predicament which is not of their own making and the least that this Court can do for them in such an unfortunate situation is to exercise its discretion in the matter of their sentences by reducing their sentences of death to imprisonment for life on the basis of the facts and circumstances of the case detailed above and also on the basis of the principle of expectancy of life. In the case in hand after committing the abominable crime of murder the appellants have been vegetating and rotting in death cells awaiting their execution for so long that they now appear to have become victims themselves, victims of a monumental systemic failure which the system must acknowledge and own and in return it should extend the appellants some respite or reparation."

Crux of the discussion in the light of the referred judgments of this Court is that longstanding detention in prison up to or more than the period of imprisonment for life is a complete and distinct punishment, as provided by section 302(b) PPC. The death row prisoner is kept in solitary confinement and inhuman conditions, despite the fact that it is not a part of the sentence.

9. In light of the above discussion, we would consider the case in hand. By the time, when his appeal was dismissed by this Court on 28.10.2015, the petitioner remained incarcerated for about 25 years, without earning remissions. Despite confirmation of his death sentence by this Court, the petitioner is awaiting execution of his sentence for the last nine years. The case of the petitioner is at a higher pedestal as compared to the convicts of the above-referred cases. It is a fact that till date, the petitioner has served out a sentence of more than 34 years without earning remissions, out of which, he remained incarcerated in death cell for about 24 years. If remissions are counted, his detention may come to almost forty years. The living conditions in death cell are miserable and altogether different from the living conditions of other prisoners, including lifers. In death cell, the convict is under a strict supervision, surveillance and is isolated. The space of a cell provided for each condemned prisoner is about 9 x 12 feet, with a single toilet to be used jointly by all the prisoners confined in their respective cells, which compromises their privacy. The prisoner is permitted to go out of the cell twice a day, but only for half an hour each. The death row prisoner is not permitted to participate in any extracurricular activities, nor is entitled for the benefits and rights available to other prisoners, incarcerated in general prison. The convict is forced to live in such an inhuman condition. The date and time of execution of his sentence is uncertain, which in the given circumstance results into horrible feelings and creates anxiety. It is not just the prisoner who suffers, it's the family too, who serves the penalty by way of mental torture, in taking care of him, while incarcerated.

10. The petitioner is awaiting execution of his death sentence and till date, which is uncertain. He has served out his sentence for more than life term and that too, in a miserable and inhuman condition while incarcerated in death cell for twenty four years, which has compromised his personal values and dignity. Because of the fact that the courts are overburdened, it takes years and sometimes decades in conclusion of the

proceedings in normal course. The delay in conclusion of judicial proceedings and execution of sentence awarded to the petitioner was on account of the system, hence, was beyond his control. Due to this hard fact, the petitioner has faced the agony of prolonged criminal proceedings, hence, is a victim of circumstances, therefore, he cannot be penalized for the act of the Court or the Executive. He fulfils the criteria laid down by this Court in the above-referred judgments. A longstanding delay upto or above the period of imprisonment for life is one of the grounds necessary for awarding lesser punishment, keeping in view the principle of expectancy of life. Facts and circumstances of the case in hand enable us to exercise our discretion by converting the sentence of death awarded to the petitioner to that of imprisonment for life.

11. In a number of cases, we have observed that after confirmation of death sentence by the High Court, the convict(s) are shifted to death cells, where they are kept for years and sometimes for decades, on account of delay in conclusion of criminal proceedings and thereafter, for execution of their sentence by the Executive. There is no doubt that after confirmation of death sentence, the convict must face its consequence but the delay in conclusion of criminal proceedings and thereafter, delay in executing the death sentence of a convict would amount to punishing him twice for one and the same act, which is neither permissible under the law nor under the injunctions of Islam. Awarding death sentence to a person does not mean that he/she be treated inhumanly by keeping them in death cell for long unlimited period of time. All prisoners living in death cell are not only deprived of their constitutional rights, but they also live under mental stress. Once the judgment attains finality, it must be implemented and executed at the earliest. The issue of prisoners detained in death cell once came up before the Federal Shariat Court in the case of Dr. Muhammad Aslam Khaki⁵, which declared section 30 of the Prison Act, 1894 repugnant to the injunctions of Islam. In the said judgment, the Federal Shariat Court has issued certain directives to the Government, but it seems that the said judgment has not been acted upon.

12. Even otherwise, to enjoy the equal protection of law and to be treated in accordance with law is an inalienable right of every citizen enshrined in Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 (**'Constitution'**). Likewise, Article 14 of the Constitution

⁵ PLD 2010 FSC 1

provides that the dignity of a man shall be inviolable. His conviction does not disentitle him from his constitutional rights. All the prisoners are subject to prison law and rules in vogue, but these must not be inconsistent with or in derogation of the fundamental rights. The reality of increased number of cases causes delay in their disposal and it also takes considerable long period of time to execute death sentence, which result in prolonged detention of prisoners, hence, the prisoners spend the best period of their lives in prison. The issue of prisoners came up before the United Nations, which issued the United Nations Standards Minimum Rules for the Treatment of Prisoners (**'Nelson Mandela Rules'**). According to Rule 3 of the Nelson Mandela Rules, *the conditions of imprisonment should not be used as an additional punishment or aggravate the inherent suffering of detention*. Pakistan being a member of the United Nations, ratified the same. The existing prison laws are outdated. There is no effort to make them in accordance with the international standard. Even these laws are not properly implemented.

13. We have observed that such an important human rights issue has escaped the attention of the Federal as well the Provincial Governments, because it is not on their priority. It is, therefore, need of the hour that the Federal Government and the Provincial Governments must reconsider the prisoners laws, enabling the prisoners to be treated in accordance with law, to enjoy the equal protection of law. Prisons should provide an atmosphere to prisoners in order to maintain their human identity and respect, their personal values, especially, a dignity which is their constitutional right, especially those incarcerated in death cells.

14. It is also important to mention here that the President has a power to pardon a death row prisoner, as provided by Article 45 of the Constitution. The prisoners in death cells present mercy petitions before the President through concerned Superintendent Jail, but mostly they are filed after considerable period of time without any explanation. Besides, there is no procedure or mechanism in vogue nor is there any limitation for filing and deciding the mercy petitions by the President, hence, it takes years to decide. This is also one of the causes of delay in execution of the sentence of death. The matters pertaining to submission and disposal of mercy petitions also require consideration. All the respective governments should consider making of policy, enacting laws and/or amending the existing laws, in line with the international

standards, in order to minimize the period of detention of death prisoners in death cells to a possible minimum extent.

Thus, in view of the above, the petition is partly allowed. The judgment under review dated 28.10.2015 passed in Crl. Appeal No. 643 of 2009 is upheld, with modification in the quantum of sentence. Resultantly, the conviction of the petitioner, Ghulam Shabbir, under section 302(b) PPC is maintained, however, death sentences awarded to him on two counts are converted into imprisonment for life on two counts, with benefit of section 382-B, Code of Criminal Procedure. The conviction and sentence of the petitioner under section 307 PPC are upheld. All the sentences shall run concurrently.

Judge

Judge

Judge

Announced in Open Court on _____

Judge

Copies of the judgment be sent to:

- The Secretary, Ministry of Interior, Government of Pakistan.
- All the Provincial Chief Secretaries and Secretaries, Home Departments.
- The Attorney General for Pakistan, Advocates General and Prosecutors General of all the Provinces.

K.Anees and Waqas Ahmed, LC

Approved for Reporting