



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 17TH DAY OF AUGUST, 2023

PRESENT

THE HON'BLE MR JUSTICE G.NARENDAR

AND

THE HON'BLE MR JUSTICE C.M. POONACHA

WRIT PETITION NO. 3297 OF 2013 (GM-RES)

BETWEEN:

SAIBANNA S/O NINGAPPA NATIKAR
AN INDIAN CITIZEN,
AGED ABOUT 60 YEARS,
CURRENTLY INCARCERATED
IN BELGAUM CENTRAL PRISON,
BELGAUM-590001

...PETITIONER

(BY SMT. RAGINI AHUJA AND SMT. URMILA PULLAT, ADVS.
FOR SRI. B.N.JAGADEESHA, ADV.)

AND:

1. THE UNION OF INDIA
(REPRESENTED BY THE
SECRETARY TO THE
MINISTRY OF HOME AFFAIRS,) JAISALMER HOUSE, 26,
MANSINGH ROAD, NEW DELHI-110011.
2. THE STATE OF KARNATAKA
(REPRESENTED BY
THE SECRETARY TO THE
MINISTRY OF HOME AFFAIRS,) VIDHANA SOUDHA
DR B.R.AMBEDKAR VEEDI,
BANGALORE-560001.





3. THE INSPECTOR GENERAL OF PRISONS,
KARNATAKA.
NO.4, SHESHADRI ROAD,
BANGALORE-09.
4. THE SUPERINTENDENT OF
BELGAUM CENTRAL PRISON,
BELGAUM-590001
KARNATAKA.

...RESPONDENTS

(BY SRI. H.JAYAKARA SHETTY, CGC FOR R1,
SRI. VIKRAM HUILGOL, AAG A/W
SRI. KIRAN KUMAR, HCGP FOR R2-R4.)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE EXECUTION OF THE SENTENCE OF DEATH ON THE PETITIONER PURSUANT TO THE REJECTION OF HIS MERCY PETITION BY THE OFFICER OF THE HON'BLE PRESIDENT OF INDIA ON 4.1.13 IS UNCONSTITUTIONAL COPY NOT PRODUCED ETC.

THIS PETITION, HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, G.NARENDAR J., MADE THE FOLLOWING:

ORDER

1. Heard the learned counsel Smt. Ragini Ahuja appearing on behalf of the petitioner, the learned HCGP Sri Kiran Kumar for respondent Nos.2 to 4, learned CGC Sri Jayakara Shetty for respondent No.1 and the learned Senior counsel Sri Vikram A Huilgol, Amicus Curiae.



2. Facts in brief - are that the petitioner, a 70 years old death row convict has approached this Court being aggrieved by the rejection of his Mercy Petition dated 29.04.2005 by proceedings of His Excellency the President of India dated 04.01.2013.

3. The factual matrix of the case is that the petitioner appeared before the jurisdictional Afzalpur Police Station on 09.01.1988 and lodged an FIR stating that he had killed his wife Malkawwa as she was in an illicit relationship with another man and that had greatly disturbed him. The police effected arrest and completed the formalities and he was sent to judicial custody and during his stay, he came in contact with PW-1, one Dattu, who offered the hand of his daughter in marriage after his release. The petitioner was released on bail in S.C.No.32/1988 somewhere around July 1988 and during his stay on bail, the marriage with one Nagamma, daughter of PW-1 ensued and out of the marriage, the petitioner and the said Nagamma begot one girl child by name Vijayalakshmi.



4. On 02.02.1993, the petitioner was convicted and sentenced to undergo imprisonment for life in S.C.No.32/1988. On 19.08.1994, the petitioner was released from prison on parole for a period of one month. On 13.09.1994, the wife Nagamma and daughter Vijayalakshmi were found murdered and the petitioner was found lying on the floor with five life threatening or near fatal injuries, including a grievous injury on the head. The petitioner was admitted to hospital with head injury and stab injury in the abdomen. The petitioner was discharged on 26.09.1994 and the petitioner was arrested and the case came to be registered as S.C.No.11/1995.

5. Thereafter, trial commenced and a singular charge under Section 303 of Indian Penal Code was framed despite the fact that the provision had already been struck down on 07.04.1983 by a Constitutional Bench in ***Mithu vs. State of Punjab***¹. During the time of sentencing on 08.01.2003, this fact was brought to the notice of the Trial

¹ (1983) 2 SCC 277



Judge in S.C.No.11/1995. Nevertheless, the Trial Judge continued to place reliance on the provisions of Section 303 of IPC and proceeded to impose the maximum penalty of death sentence in terms of a non-existent provision of law. The Criminal Appeal No.497/2003 was preferred by the petitioner while in custody and hence, the Division Bench appointed an Amicus Curiae and after hearing, the Bench delivered the unanimous verdict with regard to the guilt but delivered a split verdict while answering the reference in CrI. R. C. No.2/2003. While the Senior Judge opined that it was not one of the rarest of rare case, the Companion Judge opined otherwise and upheld the imposition of the maximum punishment of death sentence. The matter was referred to a third Judge and the learned third Judge, after hearing, was pleased to pass a judgment affirming the view of the Companion Judge. Pursuant to the views of the third Judge, the Criminal Reference case No.02/2003 came to be answered in the affirmative on 10.10.2003 and the judgment of conviction and the death sentence passed by the learned Sessions Judge, Gulbarga



came to be upheld and the Criminal Appeal came to be rejected. Further, the sentence was suspended by four months and leave was granted to appeal in the Hon'ble Apex Court. The Hon'ble Apex Court was pleased to dismiss the petitioner's appeal on 21.04.2005 and the case came to be reported in *(2005) 4 SCC 165*.

6. The petitioner addressed a Mercy Petition on 29.04.2005. It was inadvertently addressed to the Union Government and the Union Government sent the Mercy Petition back on 30.05.2005 as the Mercy Petition was first required to be looked into by the Governor of the State. The mercy petition did not see the day of the light till 11.01.2007. In the interregnum, the Hon'ble Apex Court had an occasion to examine its judgment in petitioner's case. The Hon'ble Apex Court on 12.12.2006, while presiding over the case in ***Aloke Nath Dutta vs. State of West Bengal***², after examining petitioner's case, on reliance by the party, proceeded to hold in paragraph

² *(2007) 12 SCC 230*



No.150 that the “view taken” by the Co-ordinate Bench of the Hon’ble Apex Court in the petitioner’s case “is doubtful”.

7. The Government of Karnataka recommended for rejection of the mercy petition and accordingly, the mercy petition came to be rejected on 03.02.2007. The records reveal that consideration of the mercy petition was between 11.01.2007 and culminated with the order of rejection on 03.02.2007 and in the interregnum i.e., between 30.05.2005 to 11.01.2007 the same was in hibernation and lying idle i.e., for a period of one year and seven months. The records do not reflect the reasons for the non consideration of the mercy petition for the period of one year and seven months. This was followed by a mercy petition on 14.02.2007 by the South India Cell for Human Rights Education and Monitoring, addressed to the His Excellency the President of India.



8. On 13.05.2009, the Hon'ble Apex Court while disposing off the case in ***Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra***³ once again, upon reliance being placed on the petitioner's case, proceeded to observe in paragraph Nos.49 to 52, that the petitioner's case is "inconsistent with *Mithu and Bachan Singh*" cases. It is pertinent to note that both *Mithu's* and ***Bachan Singh vs. State of Punjab***⁴ case have been rendered by a Five Judge Constitution Benches.

9. On 12.09.2011, one more mercy petition was addressed to His Excellency the President of India by one Advocate Dr. Yug Mohit Chaudhry. In the said mercy petition, the observations of the Hon'ble Apex Court in *Bariyar's* case was pointed out. On 16.08.2012, 14 mercy petitions were addressed by 14 Retired Judges including a retired Judge of the Hon'ble Apex Court, 5 former Chief Justices and 8 former Judges of the High Courts. The mercy petitions were addressed to His Excellency the

³ (2009) 6 SCC 498

⁴ (1980) 2 SCC 684



President of India. Once again, the observations of the Constitution Bench in *Bariyar's* case was pointed out and pleaded for consideration of the mercy petition.

10. The appeals by the independent and respected citizens did not find favour with His Excellency and on 04.01.2013, the mercy petition by the petitioner and those on his behalf came to be rejected. The rejection was orally informed to the petitioner on 17.01.2013. It is alleged that though his signature was obtained on a letter, no copy of the same has been furnished to him. That despite a request on 19.01.2013, the prison authorities refused to furnish the same to the petitioner's Advocate, who visited the prison to have his signatures affixed in the affidavit and in support of the instant petition.

11. Aggrieved by the belated rejection of his Mercy Petition, the petitioner is before this Court praying for the following reliefs:-

- A. *"Issue appropriate writs, orders or directions and in particular a writ of*



Declaration, declaring that the execution of the sentence of death on the Petitioner pursuant to the rejection of his Mercy Petition by the office of the Hon'ble President of India on 4.1.2013 is unconstitutional; copy not produced.

- B. Declare that the order of the office of the Hon'ble President of India dated 4.1.2013 rejecting the Mercy Petitions filed by and on behalf of the Petitioner are illegal, void and unenforceable;*
- C. Issue appropriate writs, orders or directions commuting the Petitioner's death sentence to one of life imprisonment;*
- D. Issue any such other writs, orders and directions as this Hon'ble Court deems fit in the facts and circumstances of the case in the interest of justice and equity."*

12. Learned counsel for the petitioner Smt. Ragini Ahuja, would vehemently contend that this is a classic case of gross travesty of justice and in the attending



circumstances, petitioner is praying for commutation of the death sentence imposed on him on the basis of three supervening circumstances. She would contend that, even on merits, the consideration is grossly vitiated by non-application of mind on the part of both, the first and second respondents. She would contend that the sole witness on the strength of whose testimony the petitioner has been convicted leaves much to desire. She would draw the attention of this Court to the observations of the Trial Court and the High Court in appreciating the evidence of PW-21. She would submit that even accepting that PW-21, who is an eye witness, her claims should have been taken with a pinch of salt as the incident, even as per the complaint, occurred past mid-night and her claim that she saw the commission of the offence in the chimney light, rings hollow as no chimney has been seized and marked as a MO. She would further contend that the Courts have given a convenient go-by to the counter complaint lodged by the petitioner that deadly blows were inflicted upon him by PW-5 and PW-6 and that the injuries suffered were



sufficiently grievous enough to cause death in the normal course. Having submitted so, she would fairly submit that she is not canvassing on the merits of the findings rendered by the Hon'ble Courts and that the above is being pointed out to demonstrate the absence of a fair trial.

13. She would further submit that she is canvassing the instant petition on three supervening circumstances, which vitiates the sentence imposed. She would contend that the first supervening circumstance is the inordinate and unexplained delay of more than 7 years 8 months and 9 days that has occurred in consideration and disposal of the mercy petition. She would contend that the second supervening circumstance is the illegally imposed solitary confinement upon the petitioner, post the date of sentencing i.e., from 09.01.2003 and which continued for years together. She would contend that the third supervening circumstance is the procedural lapses, non-



application of mind and non-consideration of the relevant circumstances.

Regarding Delay in consideration

14. With regard to the contention regarding delay, she would set-out certain dates. She would submit that there was a prolonged delay in the trial and which delay is not attributable to the petitioner. That judgment of conviction was rendered on 04.01.2003 in respect of an incident that occurred on 13.09.1994. That on 08.01.2003, petitioner was awarded the death sentence by the Trial Court. That on appeal, this Hon'ble High Court delivered a split verdict with regard to the confirmation of the death sentence with the learned Senior Judge modifying the punishment to life sentence and the companion Judge upholding the death sentence. The third Judge affirmed the view of the companion Judge of death sentence and on 10.10.2003, the Division Bench confirmed the death sentence. On appeal, the Hon'ble Apex Court after hearing, was pleased to uphold and confirm the death sentence on 21.04.2005.



On 29.04.2005, the petitioner addressed a Mercy Petition to the first respondent. On 30.05.2005, the first respondent forwarded the same to the second respondent for consideration of the Mercy Petition by His Excellency Governor of Karnataka under Article 161 of the Constitution of India. On receipt of the same, the file remained dormant and idle till 11.01.2007 and same was taken up for consideration thereafter. It is contended that the actual deliberation and consideration of the Mercy Petition was between 11.01.2007 and 03.02.2007, on which date, His Excellency the Governor was pleased to reject the same. She would submit that between 30.05.2005 and 11.01.2007 i.e., for a period of one year and seven months, there was absolutely no progress and the file remained completely dormant.

15. Elaborating further, she would contend that the respondents have not at all explained the delay much less satisfactorily explaining the same. She would contend that this alone would suffice to vitiate the sentence imposed.



Further, she would point out that the rejection of the Mercy Petition was communicated by second respondent under letter dated 27.02.2007 and subsequently, the file relating to the Mercy Petition was forwarded by the State Government to the Union Government. She would submit that the first respondent has claimed that they received the letter dated 27.02.2007 from the second respondent on 03.04.2007. She would contend that though illogical, she would take it as correct for arguments sake.

16. She would then draw the attention to the subsequent dates. She would submit that between 03.04.2007 and 29.07.2011, there was absolutely no consideration of the Mercy Petition. She would point out that on 29.07.2011, the first respondent sought to withdraw the Mercy Petition from the President's Secretariat i.e., after a delay of three years and ten months. That the withdrawal of the file from the President's Secretariat was on the sole ground, that the file had remained unconsidered. She would submit that the Ministry of Home Affairs resubmitted the file to



the President's Secretariat on 12.08.2011 for re-examination. That subsequently, the first respondent by a recommendation dated 05.09.2011, recommended for rejection of the Mercy Petition. That the withdrawal and resubmission took more than one and half months. Post this fact, one Mercy Petition praying for clemency for the petitioner and several others came to be submitted on 12.09.2011. The Clemency Petition was made by one Advocate and was pursuant to the judgment of the Hon'ble Apex Court dated 13.05.2009 and rendered *Bariyar's case* noted supra. The learned counsel would take us through Paragraph Nos.49 to 52 of the referred ruling, which reads as under:-

"49. In this context Saibanna v. State of Karnataka makes an interesting reading. The accused therein was a life convict. While on parole, he committed murder of his wife and daughter. This Court sentenced him to death on a reasoning, which effectively made death punishment mandatory for the category of offenders serving life sentence, opining: (SCC p. 172, paras 17-18)



"17. ... A prisoner sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence is commuted or remitted and that such sentence could not be equated with any fixed term (See Gopal Vinayak Godse v. State of Maharashtra) If that be so, there could be no imposition of a second life term on the appellant before us as it would be a meaningless exercise.

18. In the teeth of Section 427(2) of the Code of Criminal Procedure, 1973 it is doubtful whether a person already undergoing sentence of imprisonment for life can be visited with another term of imprisonment for life to run consecutively with the previous one."

50. Mandatory death punishment (prescribed under Section 303 of the Penal Code) was struck down as unconstitutional by this Court in Mithu v. State of Punjab. This Court observed: (SCC p. 286, para 7)

"7. ... If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the



Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. The ratio of Bachan Singh, therefore, is that, death sentence is constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life.”

(emphasis in original)

51. *O. Chinnappa Reddy, J. in his concurring opinion agreed with the majority opinion and observed: (Mithu case, SCC p. 298, para 25)*

“25. Judged in the light shed by Maneka Gandhi v. Union of India, and Bachan Singh, it is impossible to uphold



Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable (sic irresuscitable) is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303 of the Penal Code, must be struck down as unconstitutional.”

(See also Reyes v. R., R. v. Hughes, Fox v. R., Bowe v. R. and Coard v. Attorney General)

52. *Saibanna to that extent is inconsistent with Mithu and Bachan Singh”*

[Emphasis by this Court]



17. She would contend that the Hon'ble Apex Court has categorically held that the judgment rendered in the petitioner's case, confirming the death penalty, is inconsistent with the law laid down in *Mithu's* case and *Bachan Singh's* case. Elaborating further, she would submit that it is pertinent to note that both cases are by Constitution Benches. Thereafter on 16.08.2012, 14 retired judges of the Hon'ble Apex Court and Hon'ble High Courts, submitted representations to His Excellency The President praying for clemency on behalf of the petitioner and others. The learned counsel would submit that thereafter on 01.10.2012, the President's Secretariat returned the file. She would contend that between 05.09.2011 (date of resubmission to President's Secretariat) and 01.10.2012 (date of second withdrawal from the President's Secretariat), the file yet again remained dormant and idle with the President's Secretariat. She would submit that there is absolutely no explanation much less a reasonable explanation for the inordinate delay.



18. The learned counsel would contend that the file was once again re-submitted by the first respondent on 01.11.2012 and would submit that the same took about one month. She would point out that ultimately His Excellency the President was pleased to reject the mercy petition on 04.01.2013. She would point out the timeline and submit that yet again, two months lapsed without there being any explanation for the same. The learned counsel would submit that the net result of the delay was five years and nine months at the hands of the first respondent i.e., between 03.02.2007 when the His Excellency the Governor rejected the mercy petition and 04.01.2013 when His Excellency the President rejected the mercy petition. She would submit that this Court was pleased to grant interim order of stay on 22.01.2013 staying the execution of the petitioner. She would submit that the delay of more than seven years and eight months in disposing of the mercy petitions cannot be condoned and the same vitiates the sentence imposed and the same is required to be commuted to a life sentence. She would



submit that in all the, petitioner has been undergoing incarceration since 1988 except for a brief interlude between 1988 and 1992 and the 24 days he spent on parole in 1994 i.e., since 13.9.1994 the petitioner has been in uninterrupted incarceration, that too, in solitary confinement.

19. The learned counsel would place reliance on ***Shatrughan Chauhan and Another vs. Union of India and Others***⁵ rendered by a Full Bench and would place reliance on paragraph Nos.30, 31, 33, 36, 38, 39, 40, 48, 49, 51 and 52. She would then take the Court through ***B. A. Umesh vs. Union of India and Others***⁶ and would take the Court through paragraph Nos.8, 9, 11 and 14 with regard to the effect of delay on the consideration of mercy petition.

20. Nextly, the learned counsel would place reliance on the ruling rendered in the case of ***Peoples' Union for***

⁵ (2014) 3 SCC 1

⁶ 2022 SCC OnLine SC 1528



Democratic Rights (PUDR) vs. Union of India and Others⁷. The Division Bench has gone into the entire gamut of the issue regarding delay in consideration of the mercy petition. The learned counsel would also place reliance on the ruling rendered in ***Mahendra Nath Das vs. Union of India and Others***⁸ and would take the Court through paragraph Nos.2, 3, 23, 25 and 26 and that the facts in the said case bears a similarity with the facts of the instant case.

21. She would also place reliance on the ruling in ***Jagadish vs. State of Madhya Pradesh***⁹ and would take the Court through paragraph Nos.35, 38 and 45. She would contend that the factual circumstances in *Jagadish's* case and the petitioner's case are quite similar. She submits that in *Jagadish's* case, the convict had killed his wife and five children. Despite the same, the Hon'ble Apex Court, taking note of the inordinate delay in disposing off

⁷ 2015 SCC OnLine All 143

⁸ (2013) 6 SCC 253

⁹ (2009) 9 SCC 495



the mercy petition, has been pleased to commute the death sentence.

SOLITARY CONFINEMENT AS AN ADDITIONAL PUNISHMENT:

22. The learned counsel for the petitioner would contend that the second supervening circumstance, which aids the petitioner to seek commutation is the act of the jail authorities in resorting to Single Cell Confinement, of the convict/petitioner. The learned counsel would submit that Single Cell Confinement or in other words, what is known as 'Solitary Confinement' and if the same is not authorized by law, the same amounts to imposing an additional suffering and punishment over and above the sentence of death already imposed. The learned counsel would take the Court through Section 30 of the Prisons Act, 1894, to buttress her argument. She would submit that a separate confinement of a death row prisoner is permissible but that would not mean to be housed in a cell without visibility of other prisoners. She would submit that a prisoner cannot be treated as a death row convict till the



rejection of his mercy petition and that only after rejection of the mercy petition, can prisoner be treated as a death row convict and be housed in a separate cell, but with visibility of the other prisoners.

23. She would contend that the petitioner was pronounced guilty on 04.01.2003. That on 08.01.2003, the Trial Court was pleased to sentence him to death. That the prison authorities on receipt of the information about the sentence imposed, proceeded to lodge him in a high security block and confined him in a single cell with no other inmate. She would vehemently contend that the petitioner has been undergoing solitary confinement since then. That the petitioner has suffered almost two decades of solitary confinement. She would contend that despite several pronouncements of the Hon'ble Apex Court, the prison authorities have acted with scant regard for the same and have proceeded to deploy their own methods.



24. The learned counsel has placed reliance on the ruling of *B.A. Umesh's* case with regard to unsanctioned solitary confinement being a ground to seek commutation of the death sentence. The learned counsel would take the Court through paragraph No.7 of the citation and would contend that the cases of the said *B.A. Umesh* and the petitioner herein are on parity insofar as it relate to the type of incarceration. She would then take this Court through paragraph Nos.8 and 9 to contend that the appellant therein and as was the petitioner herein, was lodged in a single cell of the so called high security block/barrack. She would take the Court through paragraph No.13.B. and would contend that the case of the instant petitioner is also similar and that the fact of the petitioner having been detained in a single cell from 09.01.2003 had not been brought to the notice of either His Excellency the Governor or His Excellency the President. The learned counsel would take this Court through paragraph Nos.22, 23, 25 and 26. She would contend that the instant petitioner was also lodged in the so called Andheri Block referred to in



paragraph No.26. In paragraph Nos.27 and 28 the Hon'ble Apex Court has observed as under:-

"27. The law on the point, as declared in Sunil Batra is very clear and as was held by this Court in Ajay Kumar Pal, segregation of a convict from the day when he was awarded death sentence till his Mercy Petition was disposed of, would be in violation of law laid down by this Court in Sunil Batra. In the instant case, the death sentence was awarded to the appellant in 2006 by the trial Court and the Mercy Petition was finally disposed of by the Hon'ble President on 12.5.2013, which means that the incarceration of the appellant in solitary confinement and segregation from 2006 to 2013 was without the sanction of law and completely opposed to the principles laid down by this Court in Sunil Batra.

28. In Ajay Kumar Pal, on the issue of segregation of the convict in violation of the principles laid down in Sunil Batra, this Court observed:—

"9. Furthermore, as submitted in the petition, the petitioner has all the while been in solitary confinement i.e. since the day he



was awarded death sentence. While dealing with Section 30(2) of the Prisons Act, 1894, which postulates segregation of a person "under sentence of death" Krishna Iyer, J. in Sunil Batra observed : (SCC p. 563, para 197-A)

"197-A. (5) The crucial holding under Section 30(2) is that a person is not 'under sentence of death', even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is 'under sentence



of death', even if he goes on making further Mercy Petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means 'to be under a finally executable death sentence'."

(emphasis in original)

Speaking for the majority in the concurring judgment D.A. Desai, J. stated thus : (Sunil Batra case, SCC p. 572, para 223)

"223. The expression 'prisoner under sentence of death' in the context of sub-section (2) of Section 30 can only mean the prisoner whose sentence of death has become final, conclusive and infeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority."



10. In the light of the enunciation of law by this Court, the petitioner could never have been "segregated" till his Mercy Petition was disposed of. It is only after such disposal that he could be said to be under a finally executable death sentence. The law laid down by this Court was not adhered to at all while confining the petitioner in solitary confinement right since the order of death sentence by the first court. In our view, this is complete transgression of the right under Article 21 of the Constitution causing incalculable harm to the petitioner.

11. The combined effect of the inordinate delay in disposal of Mercy Petition and the solitary confinement for such a long period, in our considered view has caused deprivation of the most cherished right. A case is definitely made out under Article 32 of the Constitution of India and this Court deems it proper to reach out and grant solace to the petitioner for the ends of justice. We, therefore, commute the sentence and substitute the sentence of



life imprisonment in place of death sentence awarded to the petitioner. The writ petition thus stands allowed.”

25. Further, was pleased to grant relief in paragraph No.33 as under:-

“33. Considering the entirety of facts and circumstances on record, in our view, ends of justice would be met if while commuting the death sentence awarded to the appellant, we impose upon him sentence of life imprisonment with a rider that he shall undergo minimum sentence of 30 years and if any application for remission is moved on his behalf, the same shall be considered on its own merits only after he has undergone actual sentence of 30 years. If no remission is granted, it goes without saying that as laid down by this Court in Gopal Vinayak Godse v. State of Maharashtra, the sentence of imprisonment for life shall mean till the remainder of his life.”

26. She would then take the Court through **Sunil Batra vs. Delhi Administration and Others**¹⁰, and would take

¹⁰ (1978) 4 SCC 494



the Court through paragraph Nos.90 to 95 wherein, the Hon'ble Apex Court has been pleased to analyze and elucidate on the concept of single cell isolation, or cellular confinement / solitary confinement as a punishment. In fact, in paragraph No.93 the Hon'ble Apex Court has analyzed the import of Section 30 (2) of the Prisoners Act and has concluded that segregation does not imply isolation in a single cell and has interpreted it to mean the posting of a guard between the several inmates of the cell and the condemned prisoner. Elaborating on solitary confinement the Hon'ble Apex Court has been pleased to hold as under:-

"96. Solitary confinement has the severest sting and is awardable only by Court. To island a human being, to keep him incommunicado from his fellows is the story of the Andamans under the British, of Napoleon in St. Helena ! The anguish of aloneness has already been dealt with by me and I hold that Section 30(2) provides no alibi for any form of solitary or separated cellular tenancy for the death sentencee, save to the extent indicated.



97. This study clearly reveals that solitary confinement as a sentence under the Penal Code is the severest. Less severe is cellular confinement under Section 46(10) of the Prisons Act and under Section 46(8). Obviously, disciplinary needs of keeping apart a prisoner do not involve any harsh element of punishment at all. We cannot, therefore, accede to any argument which will upset the scheme or subvert the scale of severity. Section 30(2), understood in the correct setting, plainly excludes any trace of severity and merely provides for a protective distance being maintained between the prisoner under death sentence and the other prisoners, although they are accommodated in the same cell and are allowed to communicate with each other, eat together, see each other and for all other practical purposes continue community life.”

27. The learned counsel would also place reliance on the observations of the Hon’ble Apex Court in paragraph Nos.113 and 115 to contend that the lodging of the petitioner in a solitary confinement between 09.01.2003 till confirmation of the sentence by the Hon’ble High Court



on 10.10.2003 was *per se* illegal and violative of Article 21 of the Constitution of India and it amounted to imposition of a punishment that was neither sanctioned nor imposed by the Court. She would further place reliance on paragraph Nos.119, 120 and 122 to buttress her argument with regard to her contention that the unsanctioned solitary confinement inheres a right in the petitioner to seek commutation of the death sentence. She would also place reliance on paragraph No.191 and she would also take the Court through paragraph Nos.191, 197 and 197-A.

28. The learned counsel would also place reliance on the observations of the Hon'ble Apex Court in paragraph No.55, 56, 57, 60, 61 and 241 to 244 of *Sunil Batra's* case and paragraph No.122 of *Shatrughan Chauhan's* case to advance her argument of procedural irregularity in consideration of the mercy petition.



29. We had appointed learned Senior counsel Sri Vikram A. Huligol as *Amicus Curie*. The learned senior counsel, placing reliance on the original file placed before us, made available to the Court by the first respondent and the report called for and placed before us by fourth respondent, would submit that unavoidable delay and not mere delay would amount to a supervening circumstance. He would candidly submit that avoidable, unexplained and extraordinary delay are grounds for consideration.

30. He would further elaborate and submit that the line of rulings and the law evolved by the Hon'ble Apex Court would go to demonstrate that solitary confinement is also a fact that invests a right in the death row convict to pray for commutation of the death sentence. He would submit that the words "confirmed by the judicial process" as found in paragraph No.40 of ***Triveniben vs. State of Gujarat***¹¹ case leaves no doubt that the same would terminate with the affirmation by the Hon'ble Apex Court

¹¹ (1988) 4 SCC 574



of the confirmation of the sentence by the High Court under Section 366 of Cr.P.C.

31. The learned Amicus Curiae elaborating further would submit that delay in consideration and disposal of the mercy petition is to be construed as being fatal and that mere 7 days window granted to the death row convict is an indicator in itself. He would take this Court through Rule 5 of the Procedure regarding petitions for mercy in death sentence cases. He would then take the Court through report of the fourth respondent and would candidly submit that the petitioner has been housed in the Andheri Block of the prison and which prison is the one as noticed and evaluated by the Hon'ble Apex Court in *B.A. Umesh's* case. He would further submit that in the light of the law laid down in *Sunil Batra's*, *Shathrughan Chauhan* and *B.A. Umesh's* cases, solitary confinement is impermissible and also even in terms of the Prison Manual except as provided in law. That despite the several pronouncements, the third and fourth respondents have



failed to adhere to the law laid down by the Hon'ble Apex Court.

32. He would submit that the time spent on adjudication of the mercy petition is required to be excluded while calculating the fact of delay. He would submit that avoidable, unexplained and inordinate delay alone inheres a right in the death row convict to seek commutation. He would also take the Court through paragraph Nos.90 and 91 of *Sunil Batra's* case pertaining to cellular isolation and would also take the Court through Sections 73 and 74 of the IPC. He would also place reliance on the ruling of *PUDR's* case supra. He would candidly admit that none of the delays can be attributable to the petitioner convict.

33. The learned CGC for respondent No.1 would reiterate the contention adopted in the statement of objections. He would contend that delay is neither deliberate nor wanton. But only on account of the fact that several mercy petitions were received and the consideration of the



numerous mercy petitions resulted in delay and that the passage of time cannot be described as an unexplained delay. That he would pray for the rejection of the writ petition.

34. We have heard the learned counsels for the respective parties and the learned Amicus Curiae and have given our anxious consideration to the various contentions advanced on behalf of the parties.

35. We have also closely examined the file placed by the first respondent and so also, the Report placed before this Court by the fourth respondent (pursuant to our directions).

36. The learned counsel for the petitioner has canvassed the case of the petitioner on a three tier basis i.e., the first limb of argument relates to delay in deciding the Mercy Petition. The un-controverted timelines are as below:-

Sl.No.	Dates		
1	29.04.2005	Mercy Petition by the petitioner to the President's Secretariat	



2	30.05.2005	The President's Secretariat forwards the same to the first respondent to be sent onwards to the Governor for exercise of power under Article 161. The same is forwarded by the first respondent to the State Government. The note records that in the event of rejection, the file may be forwarded to the first respondent.	The Petition is kept idling for one month, till forwarded to State. No Explanation.
3	Undated	The same is received by the second respondent	
4	07.04.2006	As no response was received, the judicial cell of the Ministry of Home Affairs - respondent No.1 was pleased to send a reminder	Thus, between 30.5.2005 to 10.7.2006 No action taken by State.
5	10.07.2006	The first respondent called upon the second respondent to forward the requisite documents	



6	20.07.2006	The office of the first respondent records that papers have been received from the office of the second respondent. It is also noted that the State Government has not forwarded its paragraph wise remarks. The note also records that the State Government is yet to consider the plea for mercy.	
7	27.02.2007	Letter issued by the Government of Karnataka stating that His Excellency, Governor of Karnataka has rejected the Mercy Petition which was received in the Ministry of Home Affairs on 03.04.2007	Again between 10.7.2006 to 27.2.2007 Petition is kept pending without being processed and there is no explanation.
8	19.04.2007	A note is recorded that the Governor has rejected the mercy petition but the note further records that the	This further demonstrates the indolent approach of



		date of rejection and other documents have not been forwarded and the State is called upon to furnish the same to place it before the President for consideration.	the State and it reflects no attention and action on the file for 2 ½ months.
8	04.07.2007	Draft summary was prepared to be placed before the President of India	The petition is kept idling for more than 2 ½ months, till it was forwarded to the President's Secretariat.
9	20.08.2007	The draft summary was revised	
10	27.08.2007	Revised summary was placed for consideration	
11	12.09.2007	Summary copy was modified	
12	14.09.2007	Modified summary was put up for consideration	Again between 20.8.2007 to 14.09.2007 the petition is kept pending before R1.



13	17.09.2007	Approval of Home Minister was solicited in the proposal and a summary for the President was also put up for his kind approval and signature	
14	27.09.2007	The summary was forwarded to the President's Secretariat	
15	28.09.2007	Case summary by the Home Minister is forwarded to the President's Secretariat	Thus the file was under consideration between 04.07.2007 to 27.09.2007.
16	12.08.2011	The file note records that as the file was lying with the President's Secretariat, without any decision on the mercy petition, the file was withdrawn on the directions of the Home Minister.	Between 28.9.2007 to 12.8.2011 the file was in cold storage and this delay of 3 years and 11 months is unexplained
17	17.08.2011	File was re-submitted for consideration of the Home Minister	
18	05.09.2011	Decision of Hon'ble	



		Home Minister recommending rejection of the Mercy Petition	
19	06.09.2011	Summary for President duly signed by Home Minister placed for consideration of President	
20	08.09.2011	Summary of the decision of the Hon'ble Home Minister was conveyed to the Hon'ble President of India	
21	12.10.2012	Another summary of the case pursuant to the subsequent judgment of the Hon'ble Apex Court in Santosh Bariyar, Dilip Tiwari and Rajesh Kumar cases was drawn up in view of the Hon'ble Apex Court holding 7 decisions awarding death sentence (including the petitioner's case) have been rendered <i>per incuriam</i> . Further paragraph No.6 has also noted the striking down of Section 303 of IPC in Mithu's case. The case summary dated 12.10.2012 drawn by	The file was processed between 12.08.2011 and 08.09.2011.



		the Joint Secretary again records that the President's Secretariat has returned the file on 27.09.2012.	
22	12.10.2012	Joint Secretary sent his report and stated that if approved, a summary of the case will be prepared accordingly and re-submitted the case for consideration of President	Again between 08.09.2011 to 12.10.2012 the file was hibernating with first respondent, for over a period of 1 year and 1 month.
23	18.10.2012	Thereafter, again the Secretary recommended to reject the mercy petition of the petitioner.	
24	04.01.2013	Decision of the Hon'ble President of India rejecting the mercy petition under Article 72 of the Constitution of India.	
25	15.01.2013	Communication sent to the Government of Karnataka regarding rejection of mercy petition.	



37. The schedule of events would clearly demonstrate a clear lapse on the part of the State Government and the Union Government. The Mercy Petition, which was forwarded to State Government on 30.05.2005 did not merit a consideration till 11.01.2007. The pleadings in paragraph No.6 of the statement of objections by the State discloses that the proposal pertaining to the mercy petition was placed before the Cabinet on 10.01.2007 and the Cabinet as per Annexure-R2 decided to recommend for rejection on 11.01.2007 and the same was communicated to the Governor on 18.01.2007. The Hon'ble Governor on 03.02.2007 decided to reject the mercy petition by holding that it is not a fit case. The decision of the Governor was communicated by the second respondent to first respondent on 27.02.2007.

38. Thus, the pleadings and documents placed, would show that the mercy petition was lying dormant between 30.05.2005 to 10.01.2007. There is absolutely no explanation for the above period explaining as to why the



mercy petition did not merit expeditious consideration nor were any factors, which preempted expeditious consideration are made known to the Court. The next leg of delay is between 11.01.2007 and 03.02.2007 i.e., between 12.01.2007 and 02.02.2007. The records i.e., Annexures R-2 and R-3, disclose that though the recommendation of the Cabinet reached the office of the Governor on 11.01.2007, the decision to reject the mercy petition is drawn up on 03.02.2007.

39. Firstly, there is no explanation for the delay in the hands of the State Government, occurring between 31.05.2005 and 09.01.2007 i.e., for a period of one year 9 months and 9 days. The second leg of delay is between 12.01.2007 and 02.02.2007 at the hands of the Governor's Secretariat. There is absolutely no explanation as to why the decision making process was not expedited and the mercy petition was lying idle for more than 20 days. The third leg of delay is in the communication by second respondent to first respondent, which yet again



took about 24 days. The decision of the Governor was communicated after a delay of more than 24 days i.e., on 27.02.2007. While forwarding the decision of the Governor, neither the charge sheet nor the split verdict of the Division Bench was forwarded, which in our considered opinion, is a procedural default. Thereafter comes the decision of His Excellency the President on 04.01.2013. Thus, the fourth leg of delay is yet again unexplained i.e., between the dates 28.02.2007 and 03.01.2013. In this period, we find that the recommendation of the first respondent has been withdrawn and resubmitted on two occasions i.e., the first occasion on 29.07.2011 and second occasion on 12.08.2011. There is absolutely no rhyme or logic for the withdrawal and resubmission of the case summary. The fourth and final leg of delay can be compartmentalized into four block periods. Though the communication was received on 27.02.2007, the first respondent submitted the file to the President's Secretariat on 27.09.2007 at the first instance i.e, after a delay of more than five months. The next activity we observe is



when the recommendation/case summary dated 27.09.2007 was withdrawn from the President's Secretariat and yet again, there is no explanation for the delay of nearly 3 years and 11 months, the second block period.

40. Thereafter, the recommendation was resubmitted on 12.08.2011 and the recommendation to reject is made by first respondent on 05.09.2011 again with a delay of more than one and half months. The recommendation was returned to the first respondent on 01.10.2012 and again it is resubmitted on 01.11.2012. The time taken to submit is again unreasonable time of one month. Thereafter, on 04.01.2013, on resubmission, the President was pleased to reject the mercy plea of the petitioner i.e., after a passage of more than two months.

41. A cumulative reading would clearly demonstrate that there has been a delay in consideration of the mercy petition on the part of the Governor and the delay



occasioned is more than one year 11 months and the delay occasioned in the consideration of the mercy petition by the Hon'ble President is more than 5 years and 9 and half months. In totality, the cumulative delay in considering and disposing of petitioner's mercy petition is more than 7 years and eight months.

42. In that view of the factual matrix, as deduced by us, we have no hesitation in holding that the consideration of the mercy petition has seriously prejudiced the rights of the petitioner. We draw succor and support from the observations of the Hon'ble Apex Court in the cases of *Ajay Kumar Pal vs. Union of India and Another*¹², *Shatrughan Chauhan, B. A. Umesh, PUDR* and *Jagdish* (the relevant paragraphs have been extracted supra for the sake of convenience). The delay of more than 7 years and eight months has neither been explained nor demonstrated as not being, in-ordinate. The observations of the Hon'ble Apex Court in *Sunil Batra's* case regarding

¹² (2015) 2 SCC 478



the mental status of a death row convict is an eye-opener to the extreme mental trauma undergone by a death row convict, which in turn has a bearing and causes physical trauma also which is borne out by the medical records attached to the Reports, secured by us.

43. The Hon'ble Apex Court in catena of decisions (referred to supra) has clearly analyzed evaluated and considered the effect of delay in considering the mercy petition and has held that an un-explained and in-ordinate delay would inhere a death row convict to seek for commutation of the sentence. The facts and circumstances detailed above would clearly point to delay, which in our opinion, is an in-ordinate one. The delay not only being inordinate, the pleadings do not disclose any explanation much less any worth-while explanation for the delay. In that view of the matter, we have no hesitation in holding that the delay in consideration of the mercy petition is an inordinate and unexplained delay and the same inheres a



right in the petitioner to seek commutation of the death sentence.

44. By order dated 10.07.2023, we had called for a Report from the fourth respondent. The fourth respondent has placed before us a compilation of papers, which includes the letter addressed by the fourth respondent to the Government Pleader and 15 documents have been annexed to the same. The first document is a conviction warrant issued by the Court of the Prl. Sessions Judge, Gulbarga, in S.C.No.32/1988 and the accused has been admitted to the prison on 02.02.1993. It is pertinent to note that in respect of the offence for which he was charged in S.C.No.32/1988, he was sent to judicial custody in January, 1988 and continued in the prison till he was released on bail in 1990 and remained on bail, till he was convicted and sentenced to life imprisonment on 02.02.1993 and admitted to the Central Prison, Gulbarga on the same day. The said document also carries an Endorsement that the petitioner was transferred to Central



Prison, Belgaum on 09.01.2003 i.e., following the death sentence awarded in the second case in S.C.No.11/1995. The letter enclosed is a correspondence addressed by the CAO of the District and Sessions Judge, Gulbarga to fourth respondent certifying the period spent by the petitioner as an under trial i.e., 09.01.1988 to 12.07.1988. The second document records the duration of the parole as 24 days i.e., from 20.08.1994 to 12.09.1994 and the admission of the prisoner. Annexure R-3 is the document evidencing the admission of the petitioner into Central Prison, Belagavi on 10.01.2003. The judgments of the High Court and the Hon'ble Apex Court are also annexed therewith, which are annexed as Annexure R-4, R-5 and R-6. Annexure R-7 is the charge hand over report of the night shift warders to the day shift warders, of the Anderi Division, the translated version of report dated 10.10.2004, reads as under:-

"On this evening at 18:05, when the staff of Day and Night Shift Warders of Andheri Division examined the each cells in the back section, the windows, doors and the bars were in proper order, and also examined the beds and blankets, the plates



45. The first prisoner is the petitioner and the Report states that he has been held in Room No.1. The said Anderi Block or Division is none other than the one that has been referred to by their Lordships in *B. A. Umesh's* case. The said report is dated 10.10.2004. The next annexure is yet again the charge hand over report dated 10.11.2004, several more similar reports dated 16.12.2004, 05.01.2005, 04.02.2005, 02.03.2005 have been produced. Another report (with an illegible date) and several more similar reports dated 24.03.2005, 26.03.2005, 12.07.2005, 25.06.2007 evidences the same. The charge hand over report dated 25.06.2007 would also reflect the presence of B.A. Umesh. The charge hand over report dated 03.12.2007 yet again reflects the name of the petitioner and Umesh Reddy. The report of 17.04.2009 and the report dated 12.02.2013 clearly reflect that the petitioner was incarcerated in the Anderi Block. The report dated 10.03.2013, an undated report, report dated 26.06.2013, 19.09.2013, 02.12.2013, 25.02.2014 would demonstrate the single cell confinement. The charge hand



over report of 20.03.2014, 25.01.2018, 27.04.2018, 13.09.2018, 15.12.2018, 30.09.2018, 03.01.2019, 20.03.2019, 14.04.2019, 14.05.2019 and 20.05.2019 clearly demonstrate that the petitioner was held in single cell confinement in the Anderi Block or High Security Block of the Belagavi Prison. The photographs of which block and the individual cells within the High Security Block have also been produced as Annexure R-8. In fact, a board on the compound gate would describe it as a Detention Block. The extract of the Jail Library is placed as Annexure R-9 and reflect that he has borrowed some books.

46. Thus, the Report would unambiguously demonstrate that between 10.01.2003 to 20.05.2019, the petitioner has been kept in a Single Cell in the Block called Anderi Division of the Belagavi Prison. Even on the face of it, the petitioner has undergone singular cell confinement for almost 16 long years. The document would show that he has been permitted to come out to the yard in the morning, wash his clothes but neither the pleadings nor



the documents demonstrate that he was allowed to mingle with other prisoners.

47. The report unequivocally demonstrates that petitioner has been made to suffer a singular cell confinement/solitary confinement without the sanction of law. It is undisputed that prior to 10.01.2003, the petitioner was kept in detention at Gulbarga Central Prison. Anenxure R-11 is the Health Report extract, which would reflect that 31.12.2003 onwards he has been regularly visiting the Doctor and in fact, the note dated 16.01.2013 would record mild dehydration and fear psychosis that is, after the rejection of his mercy petition on 04.01.2013. It would also show that on certain dates, he has been restless and has consistently complained of pain on both sides of the chest and 3-4 time loose motion quite often. These are only testimony to the trauma that is caused by the solitary confinement or singular cell confinement. In fact, we had also called for a report on the health condition and an extract of the same between



04.07.2015 to 05.06.2023 has been placed before this Court on 15.06.2023.

48. Thus, it can be authoritatively said that the petitioner has been undergoing incarceration from 09.01.1988 till today except for a short period between 13.07.1988 to 02.02.1993 and thereafter from 02.02.1993 till today, the petitioner has been lodged in Gulbarga Jail and is transferred to Belgavi Prison on 10.01.2003 and from which date, the petitioner has been kept in solitary confinement. The observations of the Hon'ble Apex Court in *B. A. Umesh's case supra* in paragraph Nos.14 to 18, 23, 27 to 32 squarely cover the instant case too.

49. In view of our above discussion and taking into consideration the entirety of facts and circumstances and in view of the fact that the petitioner has undergone imprisonment for more than 30 long years, in our view, ends of justice would be met if the death sentence awarded to the petitioner is commuted to one of Life imprisonment, with liberty to move an application for remission.



50. Accordingly, the sentence of death awarded by the learned Principal Sessions Judge, Gulbarga in S.C.No.11/1995 and confirmed by this Court in CrI.R.C.No.2/2003 and affirmed by the Hon'ble Apex Court in Criminal Appeal No.656/2004, is commuted and the sentence of life imprisonment is imposed on the petitioner.

51. Liberty is reserved to the petitioner to make an application for remission to the State Government and if such application is made, the same shall be considered and disposed off on its own merits.

52. The original file be returned to the learned CGC Sri H Jayakara Shetty for respondent No.1.

53. The writ petition stands ordered accordingly.

**Sd/-
JUDGE**

**Sd/-
JUDGE**