

Before Rajiv Sharma & Gurvinder Singh Gill, JJ.

STATE OF HARYANA—Prosecutor

versus

USMAN KHAN AND OTHERS—Respondents

Murder Reference No. 4 of 2017

July 12, 2019

Indian Penal Code, 1860—Ss. 364-A, 302, 201, 406 read with Section 120-B—Appellant Usman Khan and Pankaj Kumar charged and tried for offences under Ss. 364-A, 302, 201, 406 read with Section 120-B of the IPC having kidnapped and murdered young child of 11 years—Appellant sentenced to death—Preferred appeal and death reference came up for confirmation before the High Court—Held, relying on ‘Bachan Singh v. State of Punjab’ and ‘C. Muniappan and others versus State of Tamil Nadu’, not rarest of the rare cases which deserves death sentence—Death sentence commuted to life imprisonment.

Held that, Lordships of the Hon'ble Supreme Court in Bachan Singh v. State of Punjab, (1980) 2 SCC 684, have categorically held that the death penalty is to be imposed only when the alternative of life imprisonment is totally inadequate, and therefore unquestionably foreclosed, i.e. if it is the only inevitable conclusion. The aggravating circumstances shall also be taken into consideration.

(Para 31)

Further held that, Lordships of Hon'ble Supreme Court in C. Muniappan and others Vs. State of Tamil Nadu, (2010) 9 SCC 567 have laid down the social effect of punishment and proportional considerations, when the principle of rarest of rare is to be applied. Their Lordships have further held that death sentence can be given in rarest of rare cases if the “collective conscience” of a community is so shocked that death penalty is the only alternative. The “rarest of the rare cases” comes when the convict would be a menace and threat to the harmonious and peaceful coexistence of the society.

(Para 32)

Further held that, we are of the view that this case does not fall within the ambit of the principle of “rarest of rare cases” for awarding death sentence to the appellants.

(Para 36)

Shubhra Singh, A.A.G., Haryana.
 J.S. Bedi, Senior Advocate, with
 Lovekirat Singh Chahal and Shivand Malik, Advocates
for appellant Vijay Kumar.

Arshdeep Singh Cheema, Advocate
for appellant Usman Khan.

Mohan Singh Rana, Advocate
for appellant Pankaj Kumar.

RAJIV SHARMA, J.

(1) Since common questions of law and facts are involved in Murder Reference No.4 of 2017, CRA-D-235-DB, CRA-D-246-DB and CRA-D-363-DB of 2017, therefore, these are taken up together and being disposed of by a common judgment.

(2) Murder Reference No. 4 of 2017 has been made by learned Additional Sessions Judge, Faridabad, for confirmation of death sentence awarded to Pankaj Kumar, Usman Khan and Vijay Kumar, vide judgment dated 24.01.2017 and order dated 30.01.2017, rendered in Sessions Case No. 48 dated 10.06.2013/17.05.2014.

(3) Criminal Appeals No. D-235-DB, D-246-DB and D-363-DB of 2017 have been preferred by Pankaj Kumar, Usman Khan and Vijay Kumar, respectively, against the aforesaid judgment dated 24.01.2017 and order dated 30.01.2017.

(4) Appellants Pankaj Kumar, Usman Khan and Vijay Kumar were charged with and tried for offences punishable under Sections 364-A, 302, 201, 506 read with Section 120-B IPC. Appellants Pankaj Kumar and Usman Khan were also charged with and tried for offence punishable under Section 25 of the Arms Act. All the appellants were convicted for the offences punishable under Sections 364-A, 302, 201, 506 read with Section 120-B IPC. Appellants Pankaj Kumar and Usman Khan were also convicted for the offence punishable under Section 25 of the Arms Act. The appellants were sentenced as under :-

Name of appellant(s)	Under Section	Sentence
Pankaj Kumar, Usman Khan and Vijay Kumar	364-A IPC	Death Sentence
Pankaj Kumar, Usman	302 IPC	Death Sentence

Khan and Vijay Kumar		
Pankaj Kumar, Usman Khan and Vijay Kumar	120-B IPC	Death Sentence
Pankaj Kumar, Usman Khan and Vijay Kumar	201 IPC	Seven years rigorous imprisonment and fine of Rs. Payment of fine, one month rigorous imprisonment.
Pankaj Kumar, Usman Khan and Vijay Kumar	506 IPC	One year rigorous imprisonment.
Pankaj Kumar, Usman Khan and Vijay Kumar	25 of Arms Act	One year rigorous imprisonment.

(5) The case of the prosecution, in a nutshell, is that on 27.03.2013, complainant Sahabuddin (PW.1) received a telephone call on his mobile from mobile No. 84453 26849. The caller made him speak to his son Rahul. Rahul was saying "Papa Papa". The caller told him that his son Rahul was in his custody and demanded Rs.15 lacs as ransom. He threatened to kill Rahul, if matter was reported to the police. Sahabuddin made a telephone call to his brother Nazir (PW.8) and asked him to lodge the FIR. He also made a call to Police Control Room regarding kidnapping of his son. Statement of Nazir was recorded vide Ex.PJ. According to him, he was running a bicycle repair shop in C Block, SGM, Faridabad. Two sons of his brother Sahabuddin, namely Rahul, aged 11 years, and Sakir, aged 5 years, were playing outside his shop. He had gone to his house for some personal work. At about 12.23 PM, Sahabuddin informed him on telephone that someone had made a telephone call to him that his son Rahul was in their custody. The caller demanded ransom of Rs. 15 lacs. The caller made him to talk to Rahul. They searched for Rahul, but could not locate him. FIR was registered. Rough site plan of the place of occurrence was prepared. Statement of Sakir, younger brother of Rahul, was also recorded. He named Vijay as one of the accused. Nazir in his supplementary statement named Usman, Pankaj and Vijay as accused. Sahabuddin produced one CD containing his conversation with the caller. On 29.03.2013, it transpired that mobile number used by the accused was activated from Tannu Electronics, Kinnoni, District Meerut. The police enquired from the owner of the shop who sold the SIM. The police gathered the information that accused Pankaj was using SIM in the name of his maternal uncle Jagat Pal. The police reached at Bagpat Chowk, Partap Pur Mor, Meerut. Car bearing

registration No. HR-51AD-7565 make Accent was seen parked. Accused Usman and Pankaj were sitting on front seats of the car. They tried to flee. They were overpowered. One mobile phone was recovered from the pocket of Usman. The car and mobile phone were taken into possession. Usman and Pankaj made disclosure statements. They disclosed that dead body of Rahul was thrown in the bushes adjacent to Gang canal. The dead body was got recovered. The dead body was identified by Nazir. Blood stained earth was lifted from the spot. The body was sent for post mortem examination. On 30.03.2013, accused Usman made a disclosure statement about concealment of knife used in the crime. Accused Pankaj made disclosure statement that he had kept concealed one pistol near bushes. The knife and .315 bore country made pistol were got recovered by accused Usman and Pankaj on 31.03.2013. The investigation was completed and challan was put up after completing all the codal formalities.

(6) The prosecution examined a number of witnesses. The accused was also examined under Section 313 Cr.P.C. They denied the case of the prosecution. According to them, they were falsely implicated.

(7) The appellants were convicted and sentenced to death, as noticed above. Hence these three appeals by them against their conviction and sentence, and the death reference by learned Additional Sessions Judge, Faridabad, for confirmation of death sentence.

(8) Learned counsel appearing on behalf of the State has sought confirmation of death sentence. Learned counsel appearing on behalf of the appellants have vehemently argued that the prosecution has failed to prove its case against their client.

(9) We have heard learned counsel for the parties and gone through the judgment and record very carefully.

(10) PW.3 Dr. Satish Bhaskar deposed that he conducted post mortem on the body of Rahul on 29.03.2013. The cause of death was shock and haemorrhage as a result of ante mortem injury. The post mortem report is Ex.PC.

(11) PW.1 Sahabuddin is the father of deceased Rahul. He testified that on 27.03.2013, he got a telephone call from mobile phone No. 84453 26849. He was made to talk to his son Rahul on telephone. The caller told him that Rahul was in his custody. The caller demanded Rs. 15 lacs as ransom. He threatened to kill Rahul, in case the matter

was reported to the police. The phone was disconnected. He again tried to contact the caller on the same mobile, but the same was not connected. He made a call to his younger brother Nazir. He enquired from his brother Nazir whether Rahul was at home. Nazir told him that Rahul was not present at home. Nazir told him that Rahul was playing near cycle repair kiosk. Somebody had kidnapped him. The FIR was registered. He also made call to the police on 100 number. He again got a telephone call from the same number threatening him that since he had reported the matter to the police, he would be taught a lesson. The conversation was recorded in his phone. He came to his house. He had shown his disability to arrange Rs. 15 lacs. He told the caller that he could arrange only Rs.50,000/-. He was threatened to arrange a sum of Rs. 10 lacs by 28.03.2013. He again received a telephone call on 28.03.2013 whether he had arranged Rs. 10 lacs. He replied that being poor he could not arrange the money. He was given time till 2.30 PM. Thereafter, he did not receive any call. The location of the accused was traced by the police. Accused Usman and Pankaj were apprehended by the police in his presence on 28.03.2013. He identified the accused in the court. Accused Usman and Pankaj confessed that they killed Rahul and got the dead body recovered from the bushes of Gang canal near the bank. They also disclosed that one Vijay Bihari had also participated in the crime. The body was taken to hospital on 29.03.2013. In his cross-examination, he deposed that his son was studying in Deep Public High School in 5th class. He had received 6-7 calls from the accused from 27.03.2013 to 28.03.2013. The accused were apprehended and interrogated in the Police Station after they were apprehended.

(12) PW.2 Sakir was though minor, but his capability to understand the nature of questions was ascertained by the trial court. He identified the accused present in the court. He deposed that two accused were sitting in a silver colour car and one accused namely Vijay Bihari caught his brother Rahul and forcibly took him inside the car. Thereafter, they took Rahul in that car and he kept shouting. He informed this incident to his mother. His uncle Nazir had also come there. They made efforts to search Rahul.

(13) PW.4 Sharvan Kumar prepared scaled site plans Ex.PD and Ex.PE.

(14) PW.8 Nazir deposed that on 27.03.2013, son of his brother, namely Rahul, was playing outside the shop. He was in the house. At about 12.23 PM, his brother Sahabuddin informed him on telephone.

Sahabuddin enquired from him about his nephew Rahul. He told that Rahul was playing outside the shop. His brother told him that he had received a call from some unknown person. He was asked to arrange Rs. 15 lacs as ransom. Rahul was not found. FIR was registered. His brother received a call on his mobile which was made by one Pankaj, threatening that in case, matter was reported to the police, they would kill Rahul. Many persons as well as police officials had reached their house. Accused Vijay was also standing in the crowd. Vijay was making calls from his mobile to those persons and was apprising them about the situation. They had gone to Meerut on 28.03.2013. In his cross-examination, he deposed that he knew accused Vijay personally as he was residing near their house. He along with his brother and other police officials reached the spot, where the dead body was lying.

(15) PW.9 SI Jameel Ahmad deposed that on 31.03.2013, he was posted in CIA, NIT Faridabad. He was associated with Sanjeev Kumar Inspector in investigation. Accused Usman got recovered a knife. It was taken into possession. Accused Pankaj got recovered a country made pistol of .315 bore. It was also taken into possession. Chappal of the deceased was also taken into possession.

(16) PW.11 ASI Dilawar Singh deposed that accused Vijay Kumar made disclosure statement on 03.04.2013 in his presence, on the basis of which he got recovered mobile phone. It was taken into possession.

(17) PW.12 Uma Shankar Sharma deposed that Vijay Kumar was his tenant. He was residing in his house since July, 2011. Accused Vijay was residing in the colony for the last eighteen years. Accused Usman and Pankaj used to visit the room of Vijay Kumar.

(18) PW.13 Sanjit Kumar deposed that he was having a mobile shop in the name and style of M/s Tanu Electronics in village Kainoni, Meerut, Uttar Pradesh. On 08.03.2013, a SIM was purchased from his shop by accused Pankaj. The SIM was purchased in the name of Jagat Pal Shukla.

(19) PW.14 R.K. Singh proved certified customer application form in the name of accused Vijay Kumar.

(20) PW.15 Surender Kumar proved certified customer application form in the name of Sahabuddin.

(21) PW.19 Hayad Singh Jethi proved the attested copy of the call details of mobile No. 84453 26849 from 08.03.2013 to 29.03.2013

vide Ex.PLL. Certificate under Section 65-B of the Evidence Act was proved vide Ex.PMM.

(22) PW.20 Sanjeev Kumar deposed that accused Usman got recovered a knife from Gang canal near Bhola village. Accused Pankaj Kumar got recovered a country made pistol of .315 bore. Accused Vijay Kumar was interrogated. All the three accused demarcated the place of occurrence. Vijay Kumar made disclosure statement and got recovered a mobile phone. In his cross-examination, he deposed that the bushes from where the knife was recovered were at a distance of about 50 meters from the road.

(23) PW.24 Mohd. Shabir prepared three copies of CD from memory card qua conversation between Sahabuddin and accused.

(24) PW.27 SI Samsuddin is material witness. He recorded statement of Nazir, Ex.PJ. FIR Ex.PW.27/B was registered. He inspected the spot on 28.03.2013. He recorded statement of younger brother of Rahul, namely Sakir. He also recorded supplementary statement of Nazir, naming Vijay, Pankaj and Usman as accused. He deposed that Sahabuddin produced one CD. It was taken into possession. On 29.03.2013, he along with SI Tej Ram went to Meerut. The mobile number being used by accused was activated from Tannu Electronics, village Kinoni. The owner of the shop disclosed that the mobile number was 84453 26849. They searched for the accused. They arrested accused Usman and Pankaj from Bagpat Chowk, Parthpur Mor. Mobile phone which was being used for ransom was recovered from accused Pankaj. Usman and Pankaj got the dead body recovered. Blood stained earth was also lifted. He obtained certified copies of call details of mobile No. 84453 26849 on 24.04.2013. In his cross examination, he deposed that they went to Meerut in official vehicle on 29.03.2013.

(25) PW.29 Tej Ram deposed that investigation of the case was entrusted to him on 29.03.2013. He recorded statement of Sanjeet Kumar. Accused Usman and Pankaj were arrested. One mobile was recovered from the pocket of Usman. Usman and Pankaj got recovered the dead body. They made disclosure statements Ex. PW and Ex.PX, on the basis of which knife and pistol were recovered. In his cross-examination, he deposed that on 29.03.2013, they left for Meerut at 7.30 AM. Arrest memos were prepared by him vide Ex.D1 and Ex.D2.

(26) PW.1 Sahabuddin has categorically deposed that he received a telephone call from mobile phone No. 84453 26849

demanding ransom for release of his son Rahul. He enquired from his brother Nazir whether Rahul was at home. Nazir told him that Rahul was playing with his younger brother Sakir in front of the shop and he had gone to his house. FIR was registered. They searched for Rahul but could not find him. They along with the police went to U.P. Appellants Usman and Pankaj were arrested. The dead body of Rahul was got recovered. According to PW.27 SI Samsuddin and PW.29 Tej Ram, they had gone towards U.P on 29.03.2013. PW.1 Sahabuddin and PW.8 Nazir are illiterate. According to them, they went towards Meerut (U.P.) on 28.03.2013, but the fact of the matter is that they had gone with the police party on 29.03.2013. The knife and pistol were recovered at the instance of appellants Usman and Pankaj. PW.2 Sakir had identified the appellants in the court. According to him, he had seen two appellants sitting in the court. Appellant Vijay caught and forcibly dragged his brother Rahul in the car. Initially, names of the appellants were not mentioned but in the supplementary statement of Nazir, the appellants were named. It is duly proved on record that telephone call was made from mobile No. 84453 26849. The SIM was being used by Pankaj, though purchased in the name of his uncle, as per the statement of PW.13 Sanjit Kumar. The call details were also obtained. Only one discrepancy in one digit of IMEI number would not effect the case of the prosecution, since all the other digits are the same. The wrong mentioning of one digit could be due to loss of memory with the passage of time. The appellants were arrested and memos in this regard were prepared. Appellant Vijay was arrested on 01.04.2013. He got recovered a mobile phone, which was taken into police possession vide memo Ex.PZ.

(27) According to the Forensic Science Laboratory report, Ex.PB, blood was detected on exhibit-1a (Pants), exhibit-1d (underwear) and exhibit-3 (knife). Blood stains were also detected on exhibit-1b (vest), exhibit-1c (T-shirt) and exhibit-2 (cotton wool swab).

(28) The post mortem was conducted by PW.3 Dr. Satish Bhaskar on 29.03.2013. The post mortem report is Ex.PC. The cause of death was shock and haemorrhage as a result of ante mortem injury.

(29) The prosecution has proved its case against the appellants beyond reasonable doubt. The appellants kidnapped and killed young boy, aged 11 years, for ransom.

(30) However, learned counsel appearing on behalf of the appellants has vehemently argued that this case is not rarest of the rare

case and the death sentence may be commuted to life imprisonment.

(31) Their Lordships of the Hon'ble Supreme Court in *Bachan Singh* versus *State of Punjab*¹, have categorically held that the death penalty is to be imposed only when the alternative of life imprisonment is totally inadequate, and therefore unquestionably foreclosed, i.e. if it is the only inevitable conclusion. The aggravating circumstances shall also be taken into consideration.

(32) Their Lordships of Hon'ble Supreme Court in *C. Muniappan and others* versus *State of Tamil Nadu*² have laid down the social effect of punishment and proportional considerations, when the principle of rarest of rare is to be applied. Their Lordships have further held that death sentence can be given in rarest of rare cases if the "collective conscience" of a community is so shocked that death penalty is the only alternative. The "rarest of the rare cases" comes when the convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Their Lordships have also held as under :-

"87. In *Machhi Singh v. State of Punjab* this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, and stated that in these cases such a penalty should be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances. The Court further held that the relevant factors to be taken into consideration may be motive for, or the manner of commission of the crime, or the anti- social or abhorrent nature of the crime, such as:

- (i) Murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.
- (ii) Murder of a large number of persons of a particular

¹ (1980) 2 SCC 684

² (2010) 9 SCC 567

caste, community, or locality, is committed.

- (iii) Murder of an innocent child; a helpless woman, is committed.

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91. Thus, it is evident that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society. The “rarest of the rare case” comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act on any spur of the moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death sentence may be the most appropriate punishment for such a ghastly crime.

92. Life imprisonment is the rule and death penalty an exception. Therefore, the court must satisfy itself that death penalty would be the only punishment which can be meted out to a convict. The court has to consider whether any other punishment would be completely inadequate and what would be the mitigating and aggravating circumstances in the case. Murder is always foul, however, the degree of brutality, depravity and diabolic nature differ in each case. Circumstances under which murders take place also differ from case to case and there cannot be a straitjacket formula for deciding upon circumstances under which death penalty must be awarded. In such matters, it is not only the nature of crime, but the background of criminal, his psychology, his social conditions, his mindset for committing offence and effect of imposing alternative punishment on the society are also relevant factors.”

(33) Their Lordships of Hon’ble Supreme Court in ***Rabindra Kumar Pal @ Dara Singh*** versus ***Republic of India***³ have explained the principles for imposition of death sentence. Their Lordships have also held as under :-

“90. Though the trial court awarded death sentence for Dara

³ (2011) 2 SCC 490

Singh, the High Court after considering the entire materials and finding that it is not a rarest of the rare case, commuted the death sentence into life imprisonment. The principles with regard to awarding punishment of death have been well settled by judgments of this Court in *Bachan Singh v. State of Punjab*, *Machhi Singh v. State of Punjab* and *Kehar Singh v. State (Delhi Admn.)*. It is clear from the above decisions that on conviction under Section 302 IPC, the normal rule is to award punishment of life imprisonment and the for the rarest of rare cases.

91. Whether a case falls within the rarest of the rare case or not, has to be examined with reference to the facts and circumstances of each case and the court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for death sentence. However, more than 12 years have elapsed since the act was committed, we are of the opinion that the life sentence awarded by the High Court need not be enhanced in view of the factual position discussed in the earlier paras.”

(34) Their Lordships of Hon'ble Supreme Court in *Mohd. Mannan @ Abdul Mannan* versus *State of Bihar*⁴ have discussed the broad guidelines for imposition of death penalty. Their Lordships have also held as under :-

“23. It is trite that death sentence can be inflicted only in a case which comes within the category of the rarest of rare cases but there is no hard-and- fast rule and parameter to decide this vexed issue. This Court had the occasion to consider the cases which can be termed as the rarest of rare cases and although certain comprehensive guidelines have been laid to adjudge this issue but no hard- and-fast formula of universal application has been laid down in this regard. Crimes are committed in so different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue. Nevertheless it is widely accepted that in deciding this question the number of persons killed is not decisive.

⁴ (2011) 5 SCC 317

24. Further, crime being brutal and heinous itself does not turn the scale towards the death sentence. When the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present the court has to see as to whether the accused is a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The court has to further enquire and believe that the accused condemned cannot be reformed or rehabilitated and shall continue with the criminal acts. In this way a balance sheet is to be prepared while considering the imposition of penalty of death of aggravating and mitigating circumstances and a just balance is to be struck. So long the death sentence is provided in the statute and when collective conscience of the community is petrified, it is expected that the holders of judicial power do not stammer de hors their personal opinion and inflict death penalty. These are the broad guidelines which this Court has laid down for imposition of the death penalty.

25. When we test the present case bearing in mind what has been observed, we are of the opinion that the case in hand falls in the category of the rarest of rare cases. The appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and pre-planned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 ft of height and such a child was incapable of arousing lust in normal situation. The appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and the innocent child was made prey of the appellant's lust.

26. The post-mortem report shows various injuries on the face, nails and body of the child. These injuries show the

gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate is to inflict the death sentence which is natural and logical. We are of the opinion that the appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court.

(35) In *Shatrughan Chauhan & another* versus *Union of India & others*⁵, their Lordships of the Hon'ble Supreme Court reiterated the principles as under:-

“90. It was, therefore, held in Sunil Batra case that the solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 of the Prisons Act for prisoners “under sentence of death”. 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, it was held that 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, has not been disposed of. Of course, once rejected by the Governor and the President, and on further application, there is no stay of execution by the authorities, the person is under sentence of death. During that interregnum, he attracts the custodial segregation specified

⁵ 2014 (3) SCC 1

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”.

91. Even in Triveniben, this Court observed that keeping a prisoner in solitary confinement is contrary to the ruling in Sunil Batra and would amount to inflicting “additional and separate” punishment not authorised by law. It is completely unfortunate that despite enduring pronouncement on judicial side, the actual implementation of the provisions is far from reality. We take this occasion to urge to the Jail Authorities to comprehend and implement the actual intent of the verdict in Sunil Batra.”

(36) We are of the view that this case does not fall within the ambit of the principle of “rarest of rare cases” for awarding death sentence to the appellants.

(37) Consequently, the appeals filed by appellants Pankaj Kumar, Usman Khan and Vijay Kumar, i.e. CRA-D-235-DB, CRA-D-246-DB and CRA-D-363-DB of 2017, are partly allowed to the extent that death sentence awarded to the appellants under Sections 364-A, 302 and 120-B IPC is commuted to life imprisonment and to pay a fine of Rs.25,000/- each. In default of payment of fine, they shall further undergo simple imprisonment for a period of six months, each. The sentence imposed upon appellant Vijay Kumar for offences under Sections 201 and 506 IPC and the sentence imposed upon appellants Pankaj Kumar and Usman Khan for offences under Sections 201, 506 IPC as well as Section 25 of the Arms Act are upheld. Murder reference No.4 of 2017 is answered accordingly.

Inder Pal Singh Doabia