In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

Writ Petition No. 7185 of 2021.

In the matter of:
An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

In the matter of:
Zillur Rahman and others.
……. Petitioners.
Vs.
Bangladesh and others.
…Respondents.

Mr. Mohammad Shishir Manir with
Mr. Mohammad Saddam Hossen with
Mr. Mizanul Haque with
Mr.Abudllah Sadiq with
Mr. Mohammed Noab Ali with
Mr. Mohammad Sazzad Sanoar with
Mr. G.M. Mozahidur Rahman, Advocate
…For the petitioners.
Mr. A.M. Aminuddin, Attorney General with
Mr. Amit Talukder, D.A.G with
Mr. MMG Sarwar, A.A.G with
Mr. Md. Rayhan Kabir, A.A.G with
Mr. Nasim Islam, A.A.G
.For the respondent No.02.
Mr. Khondoker Shahriar Shakir, Advocate
…For the respondent Nos. 4.
Mr. Probir Neogi with
Mr. S.M. Shahjahan, Senior Advocates
..As Amici Curiae.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Md. Bazlur Rahman.

Heard on 20.11.2023, 27.11.2023, 04.12.2023 and 12.12.2023.
judgment on: 13.05.2024.

SHEIKH HASSAN ARIF, J

1. At the instance of three death-row prisoners, Rule Nisi was issued calling upon the respondents, including the Government and prison authority of Bangladesh, to show cause as to why Rule 980 of the Bengal Jail Code, should not be declared violative of Article 35(5) of the Constitution of the People's Republic of Bangladesh read with Sections 73 and 74 of the Penal Code, 1860 and as to why the actions of the respondents confining the death-row petitioners in death cells before attaining finality of their sentence by the judicial and administrative forum, should not be declared to be without lawful authority and is of no legal effect.

2. **Background Facts**:

2.1 Facts, relevant for the disposal of the Rule, in short, are that the petitioner No. 01 has been in Chattogram Central Jail as a death-convict, being prisoner ID No. 8989/A, pursuant to conviction and sentence dated 13.12.2020 passed by the Bivagio Druto Bichar Tribunal, Chattogram in Sessions Case No. 258 of 2004, arising out of Satkania Police Station Case No. 01 dated 04.10.1999 (corresponding to GR Case No.

184 of 1999), under Sections 302 and 34 of the Penal Code, 1860, and his appeal, being Criminal Appeal No. 9065 of 2020 as preferred before the High Court Division of the Supreme Court of Bangladesh, is still pending along with connected Death Reference No. 120 of 2020. Similarly, petitioner No. 02 has been in Sylhet Central Jail with his prisoner ID No. 9215/A having been convicted and sentenced to death vide judgment and order dated 16.03.2020 passed by the Sessions Judge, Sunamgonj in Sessions Case No. 07 of 2020, arising out of Derai Police Station Case No. 02 dated 14.10.2019 (corresponding G.R Case No. 124 of 2019), under Sections 302 and 34 of the Penal Code, 1860. His appeal, being Criminal Appeal No. 2855 of 2020, is also pending before the High Court Division along with connected Death Reference No. 44 of 2020. Petitioner No. 3, being a death-convict, has been in Cumilla Central Jail with his prisoner ID No. 5734/A having been convicted and sentenced to death vide judgment and order dated 22.01.2020 passed by the Nari-O-Shishu Nirjaton Daman Tribunal, Khagrachari in Nari-O-Shishu Nirjaton Case No. 05 of 2020, arising out of

Dighinala Police Station Case No. 01 dated 11.09.2009 (corresponding G.R Case No. 263 of 2009) under Sections 11(Ka) of the Nari-O-Shishu Nirjaton Daman Ain, 2000 (amended in 2003). His criminal appeal, being Criminal Appeal No. 856 of 2020, is also pending before the High Court Division along with connected Death Reference No. 14 of 2020.

2.2 It is commonly stated by the petitioners that the period and stages in the process of execution of death sentence are too long as per law of the land. That upon conviction and imposition of sentence of death by the trial Court or Tribunal, the case is placed before the High Court Division for confirmation of such death sentence in view of the provisions under Section 374 of the Code of Criminal Procedure. That even if the death sentence is confirmed by the High Court Division, the convict has right of appeal before the Appellate Division under Article 103 (2) (b) of the Constitution, and even if he loses in the said appeal, he has right to prefer review petition before the Appellate Division in view of Article 105 of the Constitution. That even if the said review is rejected

by the Appellate Division, he can prefer mercy petition before the Hon'ble President of the Republic under Article 49 of the Constitution. That if such mercy petition is rejected by the Hon'ble President, only then such death sentence can be executed by the jail authority. It is also contended by them that in such protracted process of final execution of death sentence, such prisoner, under the prevailing practice in Bangladesh, is kept in an isolated small cell, commonly known as "condemned cell", and he/she is kept isolatedly from other prisoners having no right to interact with them and to take part in various welfare activities in jail including sports, religious gathering like milad, vocational training etc. It is also contended that such isolated confinement in such condemned cell is against the very spirit of the Constitution under Article 35, which is one of the vital fundamental rights of the citizens or any of person even in jail. It is also contended that because of such long isolated confinement, such prisoners are punished on regular basis by keeping them in the condemned cell isolatedly for which they have not committed any offence and/or for which no sentence has been

imposed on them by any competent Court. Therefore, according to them, such treatment of death convict-prisoners is violative of Articles 27, 31, and 32, and some other vital provisions of the Constitution. That such confinement in a solitary cell amounts to a separate punishment as provided by Sections 73 and 74 of the Penal Code, 1860, and such punishment can only be imposed by a competent Court. This being so, it is contended that the death convict prisoners, like the petitioners, are subjected to double jeopardy in that they are being punished twice for the same offence, particularly when sentence of such offence is death as given by a competent Court and that such sentence may become executable only after rejection of their mercy petition by the Honorable President of the Republic.

2.3 It is also contended by them that in the process of such execution, a period more than 20 years is ordinarily elapsed for no fault of such convict-prisoners, but because of the failure of our criminal justice system in ensuring speedy trial in favour of such accused/prisoner, as provided by Article 35 (3)

of the Constitution. Therefore, it is contended that by such isolated confinement in the so called condemned cell, the authorities concerned, including the jail authority, have been violating various fundamental rights of the petitioners as guaranteed in the Constitution. Under such circumstances, the petitioners moved this writ petition and obtained the aforesaid Rule. At the time of issuance of the Rule, a division bench of the High Court Division, vide ad interim order dated 05.04.2022, directed the jail authority, namely, Inspector General of Prison (respondent No. 04) to submit report within 06 (six) months showing the number of death convicts, the number of death cells, general arrangements in a death cell, and the available facilities for the death convicts in the prisons of the country, followed by subsequent orders of this Court expressing dissatisfaction about the information supplied by the jail authority and further directing them to provide more information as regards general arrangements in the death cells and the available facilities. Pursuant to such orders, the jail authority (respondent No. 04) has

filed different affidavits-in-compliance giving certain information.

2.4 During pendency of the Rule, and on the application of the petitioners, this Court also added the Supreme Court Registry as respondent Nos. 8, 9 and 10, particularly on the contention of the petitioners that the Registry of the Supreme Court was refusing to give any information as regards disposal of death reference cases and/or death cases by different benches of the High Court Division and the Appellate Division of this Court in a particular period, and as regards data involving confirmation or rejection of such death sentences by the High Court Division and the Appellate Division. On a subsequent attempt by the petitioners seeking order on the registry for such information, this Court kept the said application with record for considering the same at the time of disposal of the Rule itself. In this regard, it is also contended by the petitioners that they sought different information in writing from the jail authority through petitioners' learned advocate on 09.06.2021 making specific queries about how many death convicts and how many death cells were there in

Bangladesh prisons, what steps were being taken if the number of death convicts increased beyond capacity, the available number of cells, how many death convicts were kept in single cell, and whether there was any arrangement for sports, exercise and other recreational activities for the death convicts. However, it is contended, the jail authorities failed to provide any such information, which is clear violation of the Right to Information Act. That it is also published in one of the daily newspapers, namely, the Daily Ittefaq, on 18.06.2021, that three benches of the High Court Division of the Supreme Court of Bangladesh were hearing death reference cases sent to them seeking confirmation of death sentences imposed by the trial Courts during a period in 2015 and 2016, which clearly supports the case of the petitioners as regards inordinate delay in the process of execution of death sentence. That although the jail authority gave some information as regards total number of convict-prisoners and the number of condemned cells etc., such information was not enough.

2.5 It is also contended by them that certain developments have already taken place in Indian jurisdiction, particularly vide judgment in **Sunil Batra vs. Delhi Administration, (1980) 3 SCC-488,** wherein the provisions under Section 30(2) of the Prisons Act were read down to mean that “a prisoner under death sentence” would mean when such death sentence became executable only. It is also contended that the said principle, as declared by the **Sunil Batra case,** was subsequently followed by Indian Supreme Court in another case, namely, **Shatrughan Chauhan vs. Union of India, (2014) 3SCC 01,** wherein even delay in disposal of mercy petition filed by the convict prisoner to the President was accepted to be a ground for commutation of sentence to life imprisonment. That the same principle was subsequently elaborated and endorsed by the Indian Supreme Court in another case, namely, **Inhuman Conditions in 1382 Prisons case reported in (2019) 2 SCC-435**. It is again contended by the petitioners that Rule 980 of the Jail Code should also be read down or the irrelevant provisions in the said Code should be declared to be non-

applicable in view of the provisions under Section 30(2) of the Prison Act, 1894 as well as the aforementioned provisions of our Constitution guaranteeing fundamental rights. Accordingly, it is contended that the term “under sentence of death,” as occurring in sub-section (1) of Section 30 of the Prisons Act, should be read as “under executable sentence of death” as has been held by the Indian Supreme Court in the said **Sunil Batra Case.**

2.6 The Rule is contested by the Government (respondent No. 2) through Ministry of Law and IG Prison (respondent No. 4) by filing separate affidavits-in-opposition, although in same tone and vigour. It is mainly contended by Government (respondent No. 02) that the decision of Indian Supreme Court in any particular case may only have persuasive effect, and such decision cannot be treated as declaration of law in our country. Therefore, it is contended that such decisions of Indian Supreme Court are not applicable in the facts and circumstances of the present case. It is also contended by government that since Section 30 of the Prisons Act, 1894 has specifically provided

for keeping the death sentenced convict in a cell apart from all other prisoners, the provisions under Rule 980 of the Jail Code have been formulated only in order to serve the purpose of the parent law. This being so, it is contended, since the constitutionality of the said parent law has not been challenged, and no Rule has been issued thereon, the Rule issued in this writ petition cannot be made absolute inasmuch as that in making the Rule absolute, the provision under Section 30 of the Prison Act has to be declared unconstitutional.

2.7 Echoing the same contention, respondent No.4 (Inspector General of Prison) contends that the Rule, as has been issued by this Court, is infructuous inasmuch as that the constitutionality of Section 30 of the Prisons Act has not been questioned by the petitioners. Therefore, it is contended that the petitioners do not have any case. It is also contended that the death sentence convicts are treated equally in death cells according to law, and they are provided with all opportunities as per Jail Code and applicable laws. It is also contended that confining a death sentenced prisoner in a separate cell does not in any

way infringe the right of such prisoner as provided by Articles 27, 31 and 32 of the Constitution, particularly when such right can be restricted by law and, accordingly, since the rights of the convict prisoners are restricted by the very conviction and sentence themselves and the provisions under Section 30 of the Prisons Act, they cannot be treated like freemen or other prisoners. It is also contended by this respondent that although there is no term called ‘death cell’ or ‘condemned cell’ in the Prison Act or Jail Code, the provisions under Rules 735 and 736 of the Jail Code provide for separate cells and solitary confinement in different circumstances for different purposes, as for example, to keep confessing prisoners, female prisoners, prisoners under medical observation, lunatics under observation, quarantine prisoners etc. Therefore, it is contended that such separation prisoners for some particular purposes, as provided by jail code and law, cannot be regarded as torture, cruel or degrading punishment or treatment as provided by Article 35 of the Constitution. It is also contended that in view of the provisions under Article 35 (6), the rights guaranteed under sub articles (3)

and (5) of Article 35 will not be applicable as regards operation of any existing law which prescribed any punishment or procedure for trial. Therefore, it is contended that the petitioners do not have any case before this Court under writ jurisdiction and, accordingly, the Rule should be discharged.

3. **Amici Curiae**:

In the course of hearing, considering the importance of the issues raised in this writ petition involving interpretation of constitutional provisions as well as some provisions of the Prisons Act, 1894, this Court, vide order dated 13.11.2023, requested two senior counsels, namely, Mr. Probir Neogi and Mr. S.M. Sahjahan, to assist us as amici curiae. Accordingly, the said learned advocates have made extensive submissions in addition to the elaborate submissions made by Mr. Mohammad Shishir Manir, learned advocate appearing for the petitioners, Mr. A.M. Aminuddin, learned Attorney General appearing for respondent-Government (respondent No. 02), and Mr. Khondoker Shahriar Shakir, learned advocate for the Inspector General of Prisons (respondent No. 4). However, for the sake of avoiding repetitions, we will only refer to the

core submissions made by them on points of law and facts.

Submissions:

3.1 Mr. Mohammad Shishir Manir, learned advocate appearing for the petitioners, has made the following submissions:

(1) That the inhuman condition in death cells in Bangladesh, and the treatment of the prisoners therein are clear violation of the fundamental rights of such prisoners as guaranteed under Articles 27, 31, 32 and 35 of the Constitution.

(2) That the process of execution of death sentence given by a trial Court is too long in our country, and such process takes about 15 to 20 years, in general, and, sometimes, more than 20 years. That because of such delay, a death sentenced prisoner is kept in death cell, which is an isolated cell, by taking recourse to the provisions under Section 30(2) of the Prisons Act and the impugned Jail Code, namely, Rule 980.

(3) That the Indian Supreme Court has, already read down the previsions under Section 30 of the

Prisons Act, thereby, declaring that the terms ‘under sentence of death,’ as provided by subsection (1) of Section 30, be read as “under executable sentence of death”, and as such, since a death sentence becomes executable for all practical purposes only when the mercy petition is rejected by the Hon’ble President, a prisoner under death sentence cannot be kept in isolated cell depriving him of all necessary amenities of life, in particular to socialize with other prisoners and to take part in recreational, religious, and vocational activities along with other prisoners in jail.

(4) That different medical researches have suggested that such long confinement of a human being under continuous expectation of execution of death sentence causes huge mental disturbance and irregularity. In support of his such contention, he has referred to two research works published by the Department of Law, University of Dhaka and Project 39A of India, in particular different pages therein where specific

findings have been given on particular prisoners showing mental disturbances.

(5) That for reading down the relevant provisions under Section 30 of the Prisons Act, this Court will not need to declare the said provision unconstitutional. Rather, this Court can follow the universally recognized method of interpretation of law by reading it down to a particular meaning as has been done by the Indian Supreme Court in the aforesaid **Sunil Batra Case**. In support of his such submissions, he has referred to different paragraphs of a book authored by our late lamented constitutional lawyer Mr. Mahmudul Islam under the title 'Interpretation of Statutes and Documents'.

(6) That narrowing down the meaning of a particular provision of statute has long been practiced and adopted by the superior Courts of this sub-continent. In support of his such submission, he has referred to different decisions of our High Court Division, namely, the decisions in **A B Mohiuddin Ahmed, Executive Engineer vs. Bangladesh and others, 49 DLR-353**; **Small**

Traders Cooperative Bank Ltd. vs. Government of Bangladesh and others, 27 BLC-291 etc.

(7) By referring to different international instruments like Bangkok Rules and Mandela Rules, he submits that such treatment of prisoners in condemned cell has already been declared as inhuman torture by such instruments. Therefore, as part of international community, Bangladesh should also adopt such principle:

3.2 Mr. Probir Neogi, learned senior counsel as amicus curiae, has made the following submissions:

(i) By referring to the preamble of the Constitution, he submits, that the Constitution of Bangladesh itself has mentioned that fundamental human rights, equality and justice etc. are the fundamental aim of the State. Therefore, according to him, the fundamental human rights, which have been enshrined in our Constitution specifically under Part III and have been made enforceable by the High Court Division as an obligation on the High Court Division, cannot be

allowed to be flouted by any law enacted by Parliament or Rules or Jail Code made thereunder. According to him, the provisions under Article 35(5) of our Constitution prohibiting inhuman torture and degrading treatment are almost same in Article 5 of the United Nations Universal Declarations of Human Rights. Therefore, he submits, a prisoner goes to prison with all fundamental rights guaranteed in his favour by Part III of our Constitution except to the extent that such rights are restricted by specific law providing specific restrictions and such restrictions have to be reasonable restrictions in view of the provisions under Article 31 of the Constitution. In support of his such contention, he has referred to the aforesaid decision of the Indian Supreme Court in **Sunil Batra Case** and another decision of Indian Supreme Court in **Habans Singh vs. U.P., AIR 1991 SC 531**.

(ii) By referring to different paragraphs from the renowned book 'Constitutional Law of

Bangladesh', as authored by our late lamented Mr. Mahmudul Islam, in particular the paragraphs dealing with Articles 32 and 31 of the Constitution, he submits that the fundamental rights guaranteed by the Constitution cannot be restricted by any unreasonable legislation, and the Parliament in restricting such rights is limited to the extent that it does not conflict with reasonableness as provided by Article 31 of the Constitution. Therefore, according to him, if it is found by this Court that the relevant provisions under Section 30 of the Prison Act or Rule 980 of the Jail Code and the treatment of jail authority in respect of the convict prisoners are somehow violating such guaranteed fundamental rights in an unreasonable way against the spirit of Article 31, such provisions, or actions of the respondents, may be struck down by the High Court Division under writ jurisdiction.

3.3 Mr. S.M. Shahjahan, learned senior counsel appearing as amici curiae, has almost supported the submissions made by Mr. Shishir Manir. He has also

referred to the decision in **Sunil Batra Case.** According to him, the term “under sentence of death” as provided by sub-section (1) of Section 30 of the Prisons Act, should be read down like it was done by the Indian Supreme Court as ‘under executable sentence of death’ to make it harmonious with the Constitution. He submits that if the aforesaid term is read down as “executable sentence of death”, a death sentenced prisoner can only be kept in the isolated cell after his mercy petition is rejected by the Hon’ble President.

3.4 Mr. A.M. Aminuddin, learned Attorney General, appearing for the Government (respondent No. 02), has made the following submissions:

(a) That this Court should keep itself within the terms of the Rule issued in this writ petition, and should not go beyond the terms of the Rule.

(b) That the fundamental rights guaranteed under Articles 31, 32, 35 (5) of the constitution are only applicable to the extent they are not restricted by law, which is clearly mentioned in sub article (6) of Article 35 of the Constitution. Therefore,

according to him, since the death sentenced prisoners are kept in isolated cell, or solitary confinement, because of such restrictions imposed by law itself, namely, Section 30 of the Prisons Act, 1894 and Rule 980 of the Jail Code, such restrictions cannot be called in question in view of sub article (6) of Article 35 of the Constitution.

(c) That as per Rule 736 of the Jail Code, separate cells for different purposes are necessary, and such purposes have been enumerated in the Jail Code itself. Therefore, such confinement of prisoners in separate cells for separate purposes, including the purpose for keeping the death sentenced prisoners in separate cell for security and other purposes, cannot be called as torture or inhuman treatment, and such arrangement in jail cannot be called in question in this writ petition, particularly when the petitioners have not challenged the constitutionality of Section 30 of the Prisons Act, 1894.

(d) That the restrictions on a death sentenced prisoner, as imposed by law and arranged by the jail authority on the strength of such law, cannot be called unreasonable restrictions, particularly when a competent Court of law has already imposed death sentence on him upon assessing evidences on record.

3.5 Mr. Khondoker Shahriar Shakir, learned advocate appearing for IGP Prison (respondent No. 04), has referred to different annexures to the affidavit-in-opposition, supplementary-affidavit-in-opposition and the affidavit in compliance filed by respondent No. 04 pursuant to the orders and directions of this Court. Resonating the submissions made by learned Attorney General, he submits that the isolated cells, or condemned cells, in different jails in Bangladesh having created/arranged by the jail authority on the strength of law, namely, the provisions under Section 30 of the Prisons Act and Jail Code, 980, such arrangements cannot be disturbed under this writ jurisdiction, particularly when the vires of parent law has not been questioned.

3.6 By referring to general arrangements in jail, as elaborately explained by respondent No. 04 in his first supplementary-affidavit by annexing some photographs of the condemned cells in Bangladesh, he submits that it is apparent from the said report that the death sentenced prisoners are provided with all basic facilities like foods, exercise, meeting opportunities with their relatives etc. Therefore, according to him, the petitioners in this writ petition do not have any substantive case to call in question such arrangements in jail.

3.7 By referring to a draft copy of the proposed law, namely, **বাংলাদেশ কারা ও সংশোধন পরিষেবা আইন, ২০২৩ (খসড়া),** he submits that a new approach has in the meantime been adopted by the jail authority which is reflected in the said proposed law. According to him, although under Section 59 of the proposed law provision has been proposed for keeping the death sentenced prisoners in separate cells, alternative arrangements have also been proposed for keeping such prisoners in Wards. Therefore, according to him, with the enactment of the said proposed law by the

Parliament, the concerns of the petitioners will be radically reduced.

4. **Deliberations and Findings**:

4.1 Our beloved Bangladesh is one of the small number of countries in the world which still maintains death sentence as the highest punishment in its criminal justice system. Most countries in the world have already abolished death sentence mainly on the ground that life of a human being is given by the Almighty, and such life can only be taken away by the Almighty. Other main reason for abolishing death sentence is that it is imposed by the Courts which are run by human beings and as such not infallible. Up to mid 2002, 110 death sentenced convicts were exonerated in USA merely on the basis of DNA testing (see New York Times, Aug 27, 2002). Such number has become much bigger in the meantime. According to the Amnesty International data of 2022, 55 countries now have death penalty, nine of them have it for the most serious crimes, such as multiple killings or war crimes, and 23 countries did not use it for years as of 2022. UK rejected death penalty in 1965. Even Lord Denning—one of the most

prominent judges of the 20th Century—suggested that the accuseds in Birmingham bombing of 1974 killing 21 people should have been hanged, although the conviction against them was later quashed by the UK Court of Appeal in 1991. However, they had already spent 16 years in prison with almost all the newspapers in England dubbing them as murderers. In USA, even with the most modern criminal justice system, one in every ten death convicts finally gets acquitted after long incarceration (see Dr. Bharat Malkari, Birmingham Law School: Birmingham. ac. uk.). In 1988, the Court of Appeal in UK posthumously quashed the conviction of Mahmoud Hussein Mattain, who was hanged in Cardiff Prison on 8 September 1952. In delivering the landmark judgment in the said case, Lord Justice Rose observed: the case clearly demonstrated that *"Capital punishment was not.....an appropriate culmination for a criminal justice system which was human and therefore fallible"* (see Moving Away from the Death Penalty—Wrongful Convictions, www.gov.uk). Recent media report in Japan, which is one of the only two G7 (other is USA) countries which

still maintains death sentence, has reported that one death sentenced convict aged 87 years has been ordered retrial by the highest judiciary after he spent about 45 years on death row (see The Daily Guardians, 13 March 2023).

4.2 Death sentence in our country is the highest punishment for offences of highest gravity, and it is the first sentence, out of six, as provided by Section 53 of the Penal Code. However, apart from these six sentences, there are some other sentences or substituted sentences, which have not as such been incorporated under Section 53. One of such substituted sentences is ‘Solitary Confinement’ as provided by Sections 73 and 74 of the Penal Code. It has been provided therein that a competent Court may impose such sentence of solitary confinement in certain cases for a whole period not exceeding three months, and in no case, exceeding 14 (fourteen) days at a time and not exceeding 7 (seven) days in one month. Therefore, it appears that although the Legislature has allowed such punishment of solitary confinement as a substitute for rigorous

imprisonment, it has deliberately put embargo even on the Court not to give such punishment beyond the period of three months in total, exceeding fourteen days at a time and exceeding seven days in one month. Thus, it has been considered by the Legislature to be such a harsh punishment that a person cannot be kept under such punishment exceeding three months in total, exceeding fourteen days at a time and exceeding seven days in a month.

4.3 It has to be kept in mind that we, under writ jurisdiction, cannot question the wisdom of the Legislature in maintaining death sentence in our country, particularly when it is the policy decision of the government of the day which is reflected in the prevailing legislations etc. While this Court has no reservation about such authority of the government, we can examine the process of executing such sentences, particularly when serious violations of fundamental rights have been alleged. It is not denied by the parties that when an accused is sentenced to death by a Court of Sessions or Tribunal, he is sentenced because of the allegations against him for

commission of heinous crime(s) has been proved beyond reasonable doubt as per law. It is also not denied that in such a case, an accused has already been incarcerated in prison for a reasonable length of time during investigation and/or trial period. Murder trials in our country sometimes take more than 20 years. If such murder case is attributed any political colour, it may even take more than that. As for example, the FIR in Bangabandhu murder case even could not be lodged for more than 21(twenty one) years. Investigation in Shagor-Runi murder case (brutal killing of two renowned young journalists) has not yet been completed even after 12(twelve) years of the occurrence and as such it could not see the light of trial as yet. Unfortunately, this case has been continuously ridiculing our criminal justice system and damaging it to an unrepairable stage which was remedied to some extent by the Bangabandhu murder case and the cases before the International Crime Tribunals.

4.4 It is true that such delay in commencing trial in criminal cases is very rare. Even then, following

protracted stages need to be completed before a death penalty case reaches its conclusion:

(a) It cannot be denied that investigation and trial, in ordinary course, take at least 5 to 10 years to reach their conclusion. After such lengthy period, when an accused is sentenced to death, he is immediately sent to jail. Because, in such a case, law does not empower the trial Courts to grant bail. (see Section 426 Cr.P.C.).

(b) After he is sent to jail upon such conviction and sentence by the trial Court, his case is placed before the High Court Division (HCD) of the Supreme Court of Bangladesh for confirmation of death sentence, as the law has specifically provided that such death sentence imposed by the trial Courts *"shall be subject to confirmation by the High Court Division"* (see Sections 31 and 374 of the Cr.P.C.). The ordeal and agony of the convict even continues thereafter for at least six years in the High Court Division (HCD), particularly when it is known to our legal community that disposal of a death reference in HCD now takes at least six years.

(c) Again, if the said death sentence is confirmed by the HCD (after the said six years period), he has right of appeal before the Appellate Division (AD) under Article 103 (2)(b) of the Constitution, and in such case, he does not need to seek any leave from the AD to prefer such appeal. Thus, when he prefers such appeal before the AD, it takes further 8 (eight) years period, in the normal course, to reach its conclusion.

(d) Now, if his such appeal is dismissed by the Appellate Division after the said 8 (eight) years period, he still has the right to prefer review petition under Article 105 of the Constitution. No one denies that filing review petitions before the AD has now become very common practice, both in civil and criminal matters. Again, when a review petition is filed by the convict, it takes further 2 to 3 years or more. Advocates from the Bar have informed this Court that the Appellate Division is now hearing the review petitions filed in 2020.

(e) Now, if such review petition is rejected by the Appellate Division, say after about 3 years, the

convict has the constitutional right to submit mercy petition before the Hon'ble President of the Republic under Article 49 of the Constitution read with Section 402A of the Code of Criminal Procedure (see also Clause 991 of Jail Code).

(f) If we assume that disposal of such mercy petition does not take much long time, still, such death sentence cannot be executed even after rejection of such mercy petition if it is found that the convict is of mentally unsound mind (see Clause 993 Jail Code) and/or the convict is a pregnant lady (see Section 382 of Cr.P.C. and Clause 994 of Jail Code).

4.5 As per the statistics kept by the relevant sections of the Supreme Court for the years 2022-2023, 416 death reference cases were received by the High Court Division (HCD) in that period. In those cases, confirmation of death sentences was sought in respect of 796 death sentenced prisoners. However, if we compare this data with the disposal rate of the HCD for the said two years period, it appears that the High Court Division disposed of only 253 death

reference cases which were sent from the trial Courts at least six years back. Thus, near about 50% of death reference cases could not be disposed of during that period, which led to the piling up of such cases. Although confirmation of death sentences in respect of 557 convicts was sought in the said disposed of cases, the High Court Division confirmed death sentences in respect of only 129 convicts, i.e., 24% (less than one fourth) convicts. Not only that, in the said period the High Court Division acquitted 170 death sentenced convicts (more than one third) and commuted to life imprisonment in respect of 203 convicts (near about one third). Now, the statistics of our Appellate Division. During the said two years period, 105 convicts preferred appeals before the Appellate Division as against confirmation of their death sentences by the High Court Division. However, the Appellate Division retained death sentences only in respect of 7 convicts, acquitted 05 convicts and commuted the death sentences to life imprisonments in respect of 26 convicts. It may be noted here that no such appeal was disposed of by the Appellate Division in 2023. However, it is unfair to

blame our judiciary for such delay, or less rates of disposal, particularly when we all know that our country stands at the lowest in the world in respect of number of judges as against number of cases come to court and pile up in a particular period. No doubt, our judges are the most hard-working judges in the world. Most of them work inhumanly to increase the rate of case disposals. The ratio of number of judges in India as against pending cases is better than us. Still, recent research has revealed that at the present pace, India will need 300 years to dispose of all cases. From this, we can guess the situation in Bangladesh.

4.6 Be that as it may, not only that a death sentence normally takes 15-20 years time to make it executable death sentence, the rate of executable death sentences becomes too low at the end making it a mockery of justice for the people against whom death sentences become unexecutable. The said people remain in isolated cells of the jails concerned which are commonly known as ‘Condemned Cells’. Not only that, during such long incarceration (which is

about 15 to 20 years), they are not even allowed to prefer any bail applications before the High Court Division or the Appellate Division pending their appeals on any exceptional ground. In this regard, we have examined the provisions under Section 426 of the Code of Criminal Procedure, which has clearly allowed the High Court Division, as appellate court, to entertain bail application by such convict-appellant. This provision does not discriminate between appellant who has been sentenced to life imprisonment and the appellant who has been sentenced to death. However, the embarrassing part is that we have not yet seen a single example wherein a bail application by the death sentenced-appellant has been entertained by any of the benches of the High Court Division or the Appellate Division which have been hearing death reference cases and/or criminal appeals preferred by the death sentenced prisoners. Not a single example could be cited from the Bar wherein a death sentenced-appellant has been granted bail by the High Court Division or the Appellate Division on his such application in pending appeal. Therefore, it appears

that the highest judiciary of this country, namely, the Supreme Court, has also been committing discrimination between death sentenced prisoners and other prisoners in so far as their pending appeal-bail is concerned, particularly when it cannot be denied by us that there is huge disparity in respect of imposing death sentences by our trial Courts [see the study by Malik (2000) and Rahman (2017:Chapter-6]

4.7 It has to be borne in mind that the reason for such inordinate delay in completing investigation, trial, death reference/appeal, and/or other legal or constitutional procedures cannot be attributed to the latches on the part of the convict. Rather, such delay is the result of inefficiency and failure of our criminal justice system, particularly when the convict has been granted a very vital fundamental right under Article 35, i.e. the right to speedy trial. At this juncture, we may examine the provisions under sub-article (6) of Article 35 of the Constitution, as the same has been repeatedly mentioned by the respondents in their affidavits-in-opposition and argued by the learned

Attorney General. For our ready reference, Article 35 of the Constitution is reproduced below:

> *"35 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subject to a penalty greater than, or different form, that which might have been inflicted under the law in force at the time of the commission of the offence.*
>
> *(2) No person shall be prosecuted and punished for the same offence more than once.*
>
> *(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.*
>
> *(4) No person accused of any offence shall be compelled to be a witness against himself.*
>
> *(5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.*
>
> *(6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial".*
>
> (Underlines supplied)

4.8 It appears from sub-article (1) of Article 35 that no person in Bangladesh shall be convicted of any offence except for violation of law at the time of commission of such offence, nor he be subjected to penalty or different form of punishment except as

provided by law. Sub-article (2) prohibits prosecution and punishment of a person more than once for the same offence. Sub article (3) guarantees a right to speedy public trial to every person accused of any criminal offence. Sub article (4) guarantees a right in favour of an accused not to be a witness against himself, and, finally, sub article (5) guarantees that no person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. However, sub article (6) provides an exception. According to it, nothing in sub-articles (3) and (5) of Art. 35 shall affect operation of any existing law, which prescribes any punishment or procedure for trial.

4.9 There is no doubt that the Penal Code, Cr. P.C., Prisons Act, Prisoners Act and/or Jail Code are all existing law as defined by Article 152 of our Constitution as they were all in force immediately before the commencement of the Constitution. Thus, such law will get protection of sub-article (6) of Article 35 only to the extent that they prescribe any punishment or procedure for trial. Admittedly, while

Penal Code prescribes punishments, some provisions of Cr.P.C prescribe procedure for trial. However, can it be said that Section 30 of the Prisons Act, or Rule 980 of the Jail Code, prescribes any punishment or procedure for trial? Answer is 'NO'. While appeals may be regarded as continuation of trial, the aforesaid provisions under Section 30 of the Prisons Act, or Rule 980 of the Jail Code, do not prescribe any procedure for such trial. While the word **"procedure"**, (according to 'আইন-শব্দকোষ', by Muhammad Habibur Rahman and Anisuzaman) means the formal method by which the works of Court are conducted (যে আনুষ্ঠানিক পদ্ধতিতে আদালতে কর্ম পরিচালিত হয়), the word "trial" refers to the procedures of trial from Sections 241 to 250 and Sections 260 to 265 of the Code of Criminal Procedure (Cr.P.C.). However, they do not provide anything as to how a death sentenced prisoner is to be treated or to be kept in jail. Therefore, we do not find any iota of substance in the submissions of learned Attorney General that such prisoners will not get any protection under sub articles (3) and (5) of Article 35 of the Constitution.

4.10 Keeping a death sentenced prisoner in an isolated cell has been a much talked about issue under US jurisdiction, particularly when some States in USA have already attained notoriety for imposing death sentences and keeping the death sentenced convicts for more than 30 years in jail. The issue of keeping such death sentenced convicts has repeatedly come up before the Supreme Court of USA in various cases, and the most famous among them is **LACKEY vs. Taxes, 514 US 1045.** In that case, LACKEY raised the issue of violation of 8th Amendment rights of USA Constitution prohibiting cruelty and degrading punishment. [Similar to Article 35(5) of our Constitution]. It was strongly argued in that case that an execution after prolonged confinement was contrary to societies evolving standards of decency and inconsistent with the international norms. However, although the US Supreme Court termed such argument as 'noble', it denied any such relief in favour of LACKEY, particularly because of complicated and sensitive individual State sovereignty aspect prevalent in USA. The LACKEY principle has, time and again, been argued before the

Supreme Court of USA subsequently, but failed to get any appropriate relief because of the aforesaid state sovereignty complications. [For detail, see Erin Simmons, Challenging An Execution After Prolonged Confinement On Death Row (LACKEY revisited), Case Western Reserve Law Review [Vol. 59:4], Mary Marshall, “The Promise of Porter? Porter vs. Clerk and Its Potential Impact On Solitary Confinement Litigation”, Columbia Law Review Forum [161. 120:67] and Robert Johnson, “Solitary Confinement Until Death by State-Sponsored Homicide: An Eight Amendment Assessment of the Modern Execution Process, 73 Wash & Lee L. Rev. 1213 (2016)]. However, it has to be kept in mind that following bad examples of a country like USA (some argue that it has most notorious partisan judiciary) cannot be the practice of an ever evolving democracy like Bangladesh. We want to adopt good practices even from otherwise bad countries.

4.11 Our subcontinent, in particular the Indian Supreme Court, has in the meantime played a leading role in this effort. It has delivered a historic judgment in the

above cited **Sunil Batra Case** by way of 'reading down' the provisions under Section 30 of the Prisons Act, 1894. It held that the term "under sentence of death", as occurring in sub-section (1) thereof, has to be read down narrowly as "under executable sentence of death". Accordingly, it allowed the death sentenced prisoners to enjoy all other facilities like other ordinary prisoners in jail compound, except in exceptional cases. The Indian Supreme Court, in another case, has even gone to the extent of allowing conjugal life of prisoners and their right to progeny. See, for example, **Nond Lal's case, 2022(2)RLW1236 (Raj.), Jasvir Singh and another vs. State of Pubjab, 2015 Cri LJ 2282,** and Special Leave Petition (Criminal) Diary No(s). 21875/2022].

4.12 Our Constitution is one of the best and modern Constitutions in the world as gifted by our Father of the Nation, Bangabandhu Sheikh Mujibur Rahman, in a very short span of time in 1972. Part III of the Constitution, enshrining fundamental rights, has been recognized as enforceable making it obligatory on the High Court Division to enforce them. Article 7B of the

Constitution, as incorporated in 2011 by the 15th Amendment, has already made the Fundamental Principles under Part II and the Fundamental Rights under Part-III as un-amendable basic Articles of the Constitution. This being so, in giving interpretation to any law, we must not only do so by keeping in mind the provisions under Part III, we should also keep our vigilance on the Fundamental Principles of State policy as provided under Part II. It should also be noted that Article 8(2) thereof has mandated that the principles set out in the said part *"shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the State and of its citizens, but shall not be judicially enforceable".* Again, Article 26, sub-article (2), under Part III, mandates that *"The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency be void"*.

4.13 Keeping these mandates of our Constitution in mind, let us now examine the core issue in this writ petition, namely, interpretation of the provisions under Section 30 of the Prisons Act, 1894 and Rule 980 of the Jail Code. For our ready reference, Section 30 of the Prisons Act, 1894 and Rule 980 of the Bangal Jail Code are reproduced below:

Section 30 of the Prisons Act, 1894:

> *"30 (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.*
>
> *(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard".*
>
> (Underlines supplied)

980 of the Bengal Jail Code:

See Section 30(2). Act IX, 1894, Rule 736

"980. Every prisoner sentenced to death shall, from the date of his sentence, and without waiting for the sentence to be confirmed by the High Court, be confined in some safe place, a cell if possible, within the jail, apart from all other prisoners. The cell or room in which a convict condemned to death is confined shall

> *invariably, before he is placed in it, be examined by the Jailer, who shall satisfy himself of its fitness and safety, and shall record the result of the examination in his report book*".
>
> (Underlines supplied)

4.14 Mere layman reading of sub-sections (1) and (2) of Section 30 quoted above reveals that a prisoner under sentence of death shall immediately, upon his arrival in prison, be confined in a cell apart from all other prisoners, and shall be placed under the charge of a guard during day time and night time. In the same way, Rule 980 of the Bengal Jail Code provides that every prisoner sentenced to death shall be confined in some safe place, a cell if possible, within jail apart from all other prisoners and he shall be kept in such cell from the date of his sentence without waiting for the said sentence to be confirmed by the High Court Division. By comparison between the above provisions under Section 30 of the Prisons Act and Rule 980 of the Jail Code, it appears that some words have been inserted in Rule 980 which are clearly absent in the parent law. To be specific, the words ***"from the date of his sentence"*** and the words

"without waiting for the sentence to be confirmed by the High Court" are totally absent in Section 30 of the Prisons Act.

4.15 It may be noted that Bengal Jail Code, as published by the Deputy Controller, Bangladesh Government Press, Dhaka in 1989, does not mention anything about its legal source. However, according to the learned advocate appearing for the respondent No. 4, Jail Code is a compilation of different circulars issued by the Government time to time and the same were complied during British era. We find support of this position in the Jail Code itself (see preface to 5th Edition, 1910 as incorporated in the book published by Government). However, we have noticed a strange revelation in the separate judgment of the then Hon'ble Hon'ble Chief Justice, Mr. Justice Syed Mahmud Hossain, that the Jail Code was framed by the government as Rules under Section 59(5) of the Prisons Act, 1894. [See Ataur Mridah vs State, 73 DLR (AD)-298 (Part-31)].

4.16 Be that as it may, it appears from Rule 980 of the Jail Code that it has a head note on the left border which

says *"see Section 30(2), Act IX, 1894, Rule 736"*. As stated above, although it has made reference to Section 30 of the Prisons Act, it has inserted new words therein which are absent in Section 30. While Section 30 of the Prisons Act does not say anything about date of sentence or necessity to wait for the said sentence to be confirmed by the High Court Division, the question arises whether the Government, by such circulars issued time to time, can incorporate such words in the Jail Code which may have every possibility of giving different meaning and different intents having adverse impact on the lives of the death sentenced prisoners. In this regard, we have also examined the provisions under Rule 736 of the Jail Code, falling under Chapter 20, incorporating provisions therein relating to the treatment of prisoners of different categories. "Clauses (a) to (K)" have been provided therein for maintaining separate solitary confinement cells. While Clause-(a) is meant for the purpose of solitary confinement under Sections 73 and 74 of the Penal Code, Clause-(i) is meant for the confinement of prisoners condemned to death sentence.

4.17 We have categorically narrated above that a death sentenced prisoner is required to wait 15 to 20 years for getting final result up to the Supreme Court, and he may have to wait more if he takes recourse to review petition or Mercy petition etc. However, we have not found any legal authority which authorizes such confinement of a death sentenced prisoner for such a long period awaiting his execution. During this long period of time, he is kept in a cell separately from even the other death sentenced prisoners.

4.18 As part of hearing, both of us visited two jails in Bangladesh: newly constituted Dhaka Central Jail at Keranigonj and Faridpur District Jail, Faridpur, on 16.01.2024 and 27.01.2024 respectively to see the real conditions therein. While we found the condition of condemned cells in Dhaka Jail a bit upgraded, the condition in condemned cells in Faridpur Jail is miserably inhuman. In so far as isolation is concerned, both the jails are almost similar and the same is inhuman, cruel and highly degrading. Mental and Physical impact of such isolated confinement in condemned cells may easily be understood through

common sense. However, we have been supplied with the scientific literatures and research papers on such impact, some of which are given below:

(1) **Project: 39A (2021):**

Project 39A, a research organization inspired by the Article 39-A of the Indian Constitution, conducted extensive research titled 'A Mental Health Perspective of The Death Penalty' and published a report available in the public domain. The research analysis shows that Major Depressive Disorder, Generalized Anxiety Disorder, Substance Use Disorder, Suicidal Ideation, Comorbid Mental Disorder, Cognitive Impairment etc. are high in percentage among those prisoners. **[Ref: Pg-90 of the Publication].** The said research specifically emphasized on the suicidal behaviour of the death row convicts. The relevant portion of the said research is quoted below:

> "Of the 88 death row prisoners we interviewed, 72 prisoners volunteered information on their lifetime history of suicidal behaviors, both ideation and attempts. Out of these 72 prisoners, 63 prisoners volunteered information on suicidal behaviour in prison. Of these 63, 34 prisoners i.e. over 50% had thoughts of dying by suicide in prison and eight prisoners had also attempted suicide in prison." **[Ref: Pg-118 of the Publication].**

(2) **Dhaka University Research titled 'Living under sentence of death (December 2020):**

This research conducted by the Department of law, University of Dhaka, shows that most of the death row convicts are from poor family background and they cannot afford to engage lawyer privately. State defence lawyers are

> mostly of rouse. The economic burdens on the family become unbearable. Family members face wrath of victim's family and local people compelling them to repeatedly shift residences etc.

4.19 Now the debate is: if the death sentence is finally executed after rejection of mercy petition by the Hon'ble President, is the convict practically sentenced to death for the offence(s) committed by him or has he in the meantime been given another sentence of long isolated confinement for which he has not committed any offence? Section 53 of the Penal Code, or any other law, does not provide any such long confinement as a sentence or punishment. Even the relevant provisions imposing death sentences, like Section 302 or 303 of the Penal Code, do not provide any such sentence. However, for all practical purposes, a death sentenced prisoner is in fact punished twice: death sentence for the offence he was charged with and long confinement in isolated cell for no offence. Thus, he becomes recipient of the later punishment only for the failure of the State machineries to provide him speedy trial, which is one of his enforceable fundamental rights. Again, solitary

confinement itself is a punishment under Sections 73 and 74 of the Penal Code, which may be imposed by a Court only, and not by prison authority, IG Prison or the Government. Not only that, the said provisions have also provided that such confinement can only be imposed for only three months in total, and a person cannot be kept in such solitary confinement more than fourteen days at a time and more than seven days in a month. This being so, a death sentenced prisoner is kept in solitary confinement, or condemned cell, for about more than 20 years for no offence having ever been committed by him, and for no sentence imposed upon him by any Court. Therefore, it appears that while the Legislature has even allowed the Court to impose such punishment of solitary confinement only for three months period in whole etc., the State machineries are keeping him for about 20 years, or more, in such solitary confinement, known as ‘condemned cell’, without any reasonable sanction of law. This is a clear violation of his right to life and liberty (Art-32), right to be treated in accordance with law (Art. 31), right to equal protection of law (Art. 27), right to speedy trial [(Art.

35(3)], etc. He is subjected to punishment twice for the same offence [(Art. 35(2)] and subjected to degrading and cruel treatment [Art. 35(5)]. Thus, such treatment directly assaults and violates his fundamental rights guaranteed under Articles 27, 31, 32, 35(2). 35(3) and 35(5) of the Constitution.

4.20 Now, let us examine Rule 736 of the Jail Code. As stated above, the provisions under this Rule facilitate keeping of some prisoners in solitary confinement under certain categories mentioned in Clauses (a) to (k), wherein clause (i) is relevant. It is admitted position that the petitioners and other death sentenced prisoners come under Clause (i) of Rule 736 and Rule 980 of the Jail Code. Now, at first, what is to be done when a purported Rule, namely, Rule 980, goes beyond the very provisions of the Parent Law and/or the Constitution? Can such excess words in Rule 980 sustain? The answer is 'No'. Even if for argument's sake, it is accepted that such notification has been issued by the government in exercise of any delegated power given under the Prisons Act or any other law, government cannot go beyond the

scope given by the Parent Law, as the same will be violative of the well recognized principle of ***'delegatus non potest delegare***' (a delegatee cannot act beyond the power delegated to him). Therefore, we hold that those excess words in Rule 980, namely, "from the date of his sentence" and "without waiting for the sentence to be confirmed by the High Court" cannot remain in the said Jail Code as the same is not consistent with the very provisions under Section 30 of the Prisons Act and they adversely affect the fundamental rights of the prisoners. Again, since such excess words have allowed prison authority to confine a death sentenced prisoner in condemned cell immediately after his arrival in jail upon sentence of death by trial Court or Tribunal, they violate his fundamental rights guaranteed under Part III of the Constitution and as such the same become void vide operation of Art. 26(1) of the Constitution.

4.21 Now, Section 30 of the Prisons Act, in particular the words "under sentence of death" as occurring in sub-section (1) of Section 30. The question is whether the words "under sentence of death" should be regarded

as meaning from the point of time when such sentence of death is imposed by the trial Court or it should be regarded as a sentence of death when it becomes executable finally after exhausting all remedies given by law and the Constitution in favour of a death sentenced prisoner. The words “under sentence of death” do not clearly say that a prisoner will be treated “under sentence of death” from the date of his sentence by the trial Court. They do not also clearly suggest that he will be “under sentence of death” only after it becomes executable finally upon rejection of his mercy petition. Therefore, the said words may be interpreted in both ways. This being so, the interpretation which is beneficial to a prisoner has to be adopted by Court in line with the established rule of interpretation, given that the said words have punitive impact of confinement in condemned cell on the prisoner (See Mahmudul Islam, Interpretation of Statutes and Documents, Mullick Brothers, P-122). This method of interpretation is to be adopted for the purpose of any potential conflict of sec. 30 with the aforementioned

Articles of the Constitution in order to reach a harmonious conclusion.

4.22 It may be noted that the Prisons Act, 1894, being an Act enacted during British era, is still operative in India and Bangladesh. Therefore, the interpretation given by the Indian Supreme Court in the said **Sunil Batra Case** may also be looked into, although we are aware that the decisions of the Indian Supreme Court only have persuasive value. Now, let us see whether the said decision of the Indian Supreme Court is good enough to persuade us to follow it. It appears from the said decision that the author judge therein was Justice D.A. Desai, and the bench was comprised of five Hon'ble Judges of the Indian Supreme Court, including the high profile judge, Justice V.R Krishna Iyer, who gave separate judgment, though concurring with the final conclusion of the author judge. While interpreting Section 30, Justice Desai, for the Court, has referred not only to the relevant provisions of the said Act and the Penal Code, but also to the Indian Law Commission's 42nd report wherein it was categorically recommended that solitary confinement

became out of tune with modern thinking and should not find a place in the Penal Code as a punishment to be ordered by the Criminal Court. In describing the nature of such solitary confinement of a death sentenced prisoner, Indian Supreme Court observed:

> *"Such confinement can nether be cellular confinement nor separate confinement and in any event it cannot be solitary confinement. In our opinion, sub-section (2) of Section 30 does not empower the jail authorities in the garb of confining a prisoner under sentence of death, in a cell apart from all other prisoners, to impose solitary confinement on him. Even jail discipline inhibits solitary confinement as a measure of jail punishment. It completely negatives any suggestion that because a prisoner is under sentence of death therefore, and by reason of that consideration alone, the jail authorities can impose upon him additional and separate punishment of solitary confinement. They have no power to add to the punishment imposed by the Court which additional punishment could have been imposed by the Court itself but has in*

fact been not so imposed. Upon a true construction, sub-section (2) of Section 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death" (see paragraph 220 of the reported case).

4.23 *It further observed that "If Section 30(2) the expression such prisoner shall be confined in a cell apart from all other prisoners" will have to be given some rational meaning to effectuate the purpose behind the provision so as not to attract the vice of solitary confinement", Section 30(2) does not empower the jail authority to keep a condemned prisoner in solitary confinement.* Again, in determining as to who is a prisoner "under sentence of death", Indian Supreme Court held that *"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 indefeasible 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. In a slightly different context in State of Maharashtra v. Sindhi alias Raman, it was said that the trial of an accused person under sentence of death does not conclude with the termination of the proceedings in the Court of Sessions because of the reason that the sentence of death passed by the Sessions Court is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by a competent court" (see paragraph-223 of the reported case). Then, finally, the Supreme Court of India concluded that confining a death sentenced prisoner in a solitary confinement, or cell, tantamount to imposing a punishment for the same offence more than once, which is clear violation of the principle of double jeopardy.

4.24 In delivering above judgment, Indian Supreme Court adopted the well recognized course of interpretation for avoiding a clash between relevant provisions of law and the constitutional provisions by reading down the said provision, and, finally, held that a prisoner

cannot be kept in isolation, or condemned cell, unless and until his sentence of death becomes final, conclusive etc. after exhaustion of all remedies under the law and the Constitution. Elaborating further in his separate judgment, Justice V.R. Krishna Iyer, while agreeing with Justice Desai, observed that such prisoners *"shall be entitled to the amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic or otherwise, and normal clothing and bed. In a sense, they stand better than ordinary prisoners because they are not serving any term of rigorous imprisonment, as such"* (underlines supplied). His Lordship further observed that such prisoners cannot be denied, except on specific grounds warranting such a course such as homosexual tendencies, disease, violent proclivities and the like, the general amenities applicable to ordinary prisoners.

4.25 We have already noted that after **Sunil Batra Case**, Indian Supreme Court has even gone to the extent of allowing conjugal life or conjugal cohabitation and right to progeny to the prisoners in jail. As stated

above, since solitary confinement itself is a separate punishment, if a death sentenced prisoner is kept in solitary confinement without any further offence being committed by him, it will be clear violation of the principle of double jeopardy as well as the right guaranteed under Article 35(5) of the Constitution. It is true that for the sake of security of the prisoner himself, his co-prisoners, jail, and State, some prisoners may be kept separately. However, in general, a prisoner cannot be punished for no offence or he cannot be punished twice for the same offence. Therefore, we are of the view that the above interpretation and findings of the Indian Supreme Court in the **Suni Barta Case** is highly persuasive. In a country like ours, where we practice similar judicial and criminal justice system, we should adopt progressive and eye-opening interpretation of law given by the Supreme Court of India or any other higher Courts in the world. Accordingly, we are of the view that the term “prisoner under death of sentence” as occurring in sub-section (1) of Section 30 of the prisons Act, should be read down as “prisoner under **executable** sentence of death”, and he will reach

such executable stage only after exhaustion of all legal and constitutional remedies by him. Thus, the jail authority (respondent No.4) and the Government must take appropriate measures to amend the purported Rule, namely, Rule 980 of the Jail Code, in line with our above observations and interpretation of Section 30.

Orders of the Court:

4.26 In view of above discussions of law, facts, and interpretation given by us, this Court sums up its findings and orders in the following terms:

(1) The words "every prisoner under sentence of death", as occurring in subsection (1) of Section 30 of the Prisons Act, 1894 (Act No. IX of 1984), shall be read as **"every prisoner under executable sentence of death".**

(2) A death sentenced prisoner shall reach such executable stage of death sentence only after exhaustion of all statutory and constitutional remedies granted in his favour by law, Constitution and Jail Code etc., and only then the jail authority can confine a death sentenced

prisoner in a separate cell apart from other prisoners in view of section 30.

(3) The excess words in Rule 980 of the Jail Code, namely, the words “from the date of his sentence” and “without waiting the sentence to be confirmed by the High Court” are declared to be without lawful authority and are of no legal effect. Jail Authority is directed to immediately amend Rule 980 of the Jail Code and other relevant Rules to that effect.

(4) The death sentenced prisoners in Bangladesh, except in exceptional circumstances, shall be treated like other ordinary prisoners in jail, particularly when they stand on better footing than them as because they are not sentenced to any terms of imprisonment by any Court. Such exceptional circumstances may include homosexual tendencies, diseases, violent behaviors, security of the prisoner himself and others, jail security, State security, security involving offences of terrorism or International war crimes.

(5) The death sentenced prisoners should be given all the facilities available in jail as are given to other prisoners and, only in exceptional cases, he may be kept in isolated cell for limited period. In doing so, the jail authority must give him a limited scope of opportunity to explain as to why he should not be kept in such isolated cell. However, in such case, he would not be entitled to have the assistance of lawyer.

(6) In formulating the new Prisons Act and/or Jail Code, the respondent-government and jail authority should take into account above observations of this Court.

(7) A death sentenced prisoner shall be entitled to file bail applications before the High Court Division and/or Appellate Division of the Supreme Court of Bangladesh pending his/her criminal appeals, and, in which case, the Supreme Court should entertain such bail applications and grant him/her bail in extremely fit case upon ensuring that he will not abuse the privilege of bail.

(8) The jail authority (respondent No. 4) and any other jails in Bangladesh are duty bound to supply information under the Right to Information Act, 2009 as regards the conditions in jail, prisoners, number of prisoners, data on execution of death sentences etc. whenever such information is sought by anyone in accordance with the provisions of the said Act.

(9) The Supreme Court Registry is also duty bound to provide such information, in accordance with the provisions of the said Act, as regards number of disposal of Death Reference cases, criminal appeals filed by the death sentenced prisoners or any other prisoners or death sentences confirmed/retained by the High Court Division and/or the Appellate Division, acquittal or commutation of sentences by the High Court Division and/or the Appellate Division, and such information should also be uploaded, time to time, in the website of the Supreme Court and be printed in the Annual Report published by the Supreme Court every year.

(10) The respondent No.4 and jails concerned (wherein the petitioners and other death sentenced prisoners are kept in isolated condemned cells) are directed to start immediate arrangements for shifting the said prisoners from death cells to the ordinary prisons immediately, and complete such process within 2(two) years.

With the above observations, declarations, directions and orders, the Rule is disposed of.

Communicate this.

.....
(Sheikh Hassan Arif,J)

I agree.

.....
(Md. Bazlur Rahman,J)