



REPORTABLE
IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 145 OF 2017

RISHI MALHOTRA & ANR.PETITIONER(S)

VERSUS

UNION OF INDIARESPONDENT(S)

J U D G M E N T

Mehta, J.

1. Heard.

2. The instant writ petition in form of a public interest litigation under Article 32 of the Constitution of India has been instituted by the petitioner Shri Rishi Malhotra, challenging the constitutional validity of Section 354(5) of the Code of Criminal Procedure, 1973¹ (Corresponding to Section 393(5) of the Bhartiya Nagarika Suraksha Sanhita, 2023²) insofar as it prescribes hanging as the sole method of

¹ For short, "CrPC".

² For short, "BNSS".

execution. The reliefs sought by the petitioner are as follows:

- “a. Declare provisions contained u/s 354(5) Cr.P.C., 1973 to be *ultra vires* the Constitution and especially in contravention of Article 21 of the Constitution being discriminatory and violative of Article 21 of the Constitution and also in contravention of the Constitution Bench Judgment in *Gian Kaur's case (supra)*;
- b. Declare Right to Die by a dignified procedure of death is a Fundamental right as defined under Article 21 of the Constitution of India.”

3. Before proceeding to examine the submissions of the parties and the issue of constitutional validity posed for determination, it would be apposite to briefly notice the background in which the present challenge has been laid. The issue raised in the instant petition cannot be viewed in isolation but must be examined within the broader framework of capital punishment jurisprudence and the historical development of the method of its execution.

Background

4. Among all punishments permitted by law, death penalty stands apart in its severity and finality. When a Court of law, upon due adjudication, imposes a sentence of death for a crime, the State, through its constitutional machinery, is called upon to carry out

a punishment of the gravest nature, one that, once executed, is incapable of being undone. If an error occurs, whether in the process, or the proportionality of punishment, the consequences cannot be undone. It is this final and irreversible character of death penalty that has placed it at the centre of continuing debate in constitutional law, criminal jurisprudence and moral philosophy, both in India and across jurisdictions.

5. The legitimacy of the death penalty has been debated over centuries. Those who argue against it have maintained that the State possesses no moral authority to take a human life; that the punishment does not function as an effective deterrent to crime; and that its irreversibility is unconscionable in any legal system where the possibility of error can never be entirely eliminated. Conversely, those who argue in favour have maintained that certain crimes are of such gravity, and the harm caused to society so profound, that no punishment other than death adequately serves the ends of retribution, deterrence and the protection of society at large.

6. In India, the question of the legality of capital punishment has been examined through the prism of

constitutional scrutiny, beginning with the decision of this Court in **Jagmohan Singh v. State of U.P.**³, where a Constitution Bench affirmed that the death penalty did not violate the guarantees under Articles 14, 19, or 21 of the Constitution of India, provided it was imposed upon conclusion of a lawful trial with robust procedural safeguards. This position was further fortified and nuanced in the seminal decision of **Bachan Singh v. State of Punjab**⁴ wherein a Constitution Bench of this Court while reaffirming the constitutionality of the death sentence, famously institutionalized the “rarest of rare” doctrine, mandating that the capital punishment be reserved only for those cases where the alternative of life imprisonment is unquestionably foreclosed. By virtue of the law laid down in **Bachan Singh** (*supra*), it stands settled that the death penalty is not *per se* unconstitutional. That substantive question stands concluded and is not the subject matter of any further debate.

7. However, the constitutional validity of the sentence does not preclude a scrutiny of the means

³ (1973) 1 SCC 20.

⁴ (1980) 2 SCC 684.

employed to carry it out. While the legality of the punishment is established, the specific process of its enforcement *i.e.* hanging by the neck, remains subject to examination on the touchstone of Article 21 of the Constitution of India. The core issue posed before this Court is whether the only prescribed method of execution in the criminal statute *i.e.*, CrPC/BNSS conforms to the mandate of just, fair, and reasonable.

8. To appreciate the question that is posed, it is necessary to trace, briefly, the history of the method of execution that has been prescribed under Indian law and the manner in which it has come to occupy that position.

9. In the pre-colonial period, the administration of criminal punishment across the country was neither uniform nor governed by any codified legal standard. Different ruling dispensations administered criminal justice in accordance with their own customs and commands, and the methods by which sentences of death were carried out varied widely across regions and rulers. No consistent procedural framework existed governing the manner of execution. The physical suffering of the condemned was, in many

instances, regarded not as incidental to the punishment but as an integral part of it.

10. The shift toward a uniform method of execution began with the codification of criminal law in colonial times. While the Indian Penal Code, 1860, provided the legal authority to impose death penalty, it was the Code of Criminal Procedure, 1861⁵, that first established ‘hanging by the neck’ as the sole method to carry it out.

11. This selection was framed as a humanitarian reform of the era, utilizing the long-drop technique. The method was premised on a clinical calculation of the condemned’s height and weight to ensure a fracture of the cervical vertebrae, purportedly resulting in instantaneous loss of consciousness and life.

12. The prescription of execution by hanging, continued unchanged through the subsequent enactments of the Codes of 1882⁶ and 1898⁷. Even after independence, when the Code of Criminal Procedure, 1973 was enacted as a comprehensive

⁵ See section 53.

⁶ See section 368.

⁷ See section 368.

revision of criminal procedure by the Parliament, the position remained unaltered, and Section 354(5) was reproduced in substance from its predecessor. Notably, the recent transition to the Bharatiya Nagarik Suraksha Sanhita, 2023⁸, which sought to modernize and decolonize India's criminal laws, has once again retained the same prescription on the mode of execution of death penalty. Consequently, the legal mechanism for execution remains unchanged across more than a century and a half of statutory progressions.

13. Execution by hanging, as prescribed under the law, is based on the premise that a carefully calculated drop will fracture or dislocate the cervical vertebrae of the condemned person, severing the spinal cord, leading to rapid loss of consciousness and death. The calculations governing the length of the drop are to take into account the height and weight of the condemned, with the objective of generating sufficient force to cause instantaneous cervical fracture without causing decapitation. The method thus relies on generating sufficient force to

⁸ See section 393(5)

achieve instantaneous cervical dislocation while avoiding excessive force and is aimed to minimise physical suffering.

14. The operation of this method involves a number of variables, including the accuracy of the calculation, the physical condition of the convict, and the manner in which the procedure is carried out. Variations in these factors have been noted to produce differing outcomes. Where the drop is shorter than required, death may occur by asphyxiation rather than cervical dislocation; where it is longer, the force generated may be greater than intended. These possibilities have been noted in studies examining the working of the method.

15. In this context, the Royal Commission on Capital Punishment (1949-53) examined various methods of execution and identified the three minimum requirements that any method of execution must satisfy, *viz.* it should cause death as quickly as possible; it should be as painless as possible and; it should involve the least possible mutilation of the body. The Commission found that hanging, even when properly administered, did not always meet

these standards, and that the margin for error was considerable.

16. Similarly, the Law Commission of India, in its 35th Report on Capital Punishment published in September 1967, examined various modes of executing death sentence. The Commission acknowledged a considerable body of opinion in favour of replacing hanging with a more humane and painless method. In paragraph 1150 of the Report, it observed that the mode of execution should be “certain, humane, quick and decent”. The Commission, however, did not recommend an immediate change, taking the view that the matter should await further advances in scientific knowledge and technology, but its acknowledgment of the problem was clear.

17. These institutional examinations formed part of the broader background against which the constitutionality of the prescribed method of execution under Section 354(5) of the CrPC came to be considered for the first time by a three-Judge Bench of this Court in ***Deena v. Union of India***⁹,

⁹ (1983) 4 SCC 645.

wherein this Court upheld the constitutional validity of hanging as mode of execution. In that instance, the Court relied substantially upon government submissions regarding the precision of the procedure, concluding that hanging, when properly administered, satisfied the requirements of being a quick, simple, and decent method of execution that was free from unnecessary mutilation. For four decades, ***Deena*** (*supra*) has stood as the authoritative judicial dispensation on the issue, bringing a measure of finality to the constitutional debate regarding the mode of execution in India.

18. As per the petitioner, the issue cannot be examined solely on the basis of the position as it stood when ***Deena*** (*supra*) was decided. The intervening decades have witnessed significant developments in scientific knowledge, forensic understanding, and evolving standards of human dignity. These developments have materially altered the factual and normative landscape within which the question must now be assessed.

19. In this context, the Law Commission of India, in its 187th Report published in October 2003, undertook a fresh examination of the issue and

questioned the adequacy of the existing position. Acknowledging the global shift away from hanging, the Commission noted that the method is undoubtedly accompanied by intense physical suffering, pain, and mental agony referencing international safeguards that require the state to inflict the minimum possible suffering even when carrying out a lawful death sentence.

20. The significant constitutional question now before us must thus be viewed through the lens of a contemporary understanding of Article 21 of the Constitution of India. Since ***Deena*** (*supra*), our jurisprudence on the right to life has evolved significantly. A constitution bench of this Court in ***Gian Kaur v. State of Punjab***¹⁰ firmly established that the right to life includes the right to live with human dignity up to the end of natural life, which necessarily encompasses the right to die with dignity. This constitutional protection does not cease to exist at the gallows, it must apply with equal emphasis to prisoners who are on death row.

¹⁰ (1996) 2 SCC 648

21. It is in this evolved constitutional framework that the present challenge must be examined. The issue is not one about the existence of the State's power to impose capital punishment, which stands recognised in law, but the limits within which that power must operate. The exercise of such power is necessarily conditioned by constitutional safeguards. The State, even when authorised to take life, cannot do so in a manner that is arbitrary, excessive, or incompatible with human dignity. The method of execution must therefore satisfy the constitutional requirements that it minimises suffering and preserves, to the greatest extent possible, the inherent dignity of the condemned.

22. It was in this broader constitutional context that the writ petition was first taken up for consideration on 6th October, 2017, when this Court, while issuing notice, observed that constitutional perspectives are not static and that the Constitution of India is a living and evolving instrument. It was noted that a provision which was once upheld as valid may, with the passage of time and in light of developments in science and social thought, require reconsideration. The Court also recorded the

submission of the petitioner that execution by hanging destroys the dignity of the condemned and referred, *inter alia*, to the observations made in the dissenting opinion of Bhagwati, J. in ***Bachan Singh*** (*supra*) regarding the physical and psychological suffering associated with hanging. In that context, this Court observed, *prima facie*, that the legislature may consider whether alternative methods of execution could be devised so that a person who is required by law to face the death sentence does so without unnecessary pain and suffering.

23. In light of these observations and the constitutional questions raised, this Court called upon the Union of India to explore whether more humane and less painful alternatives to execution by hanging could be considered. Pursuant thereto, as noted in the order dated 2nd May, 2023, Shri R. Venkataramani, learned Attorney General, informed the Court that the Government was in the process of considering the constitution of an expert committee to examine the issues raised in the present proceedings.

24. However, no further update has been provided regarding the constitution of any such committee.

Even in the written submissions filed on behalf of the Union of India, there is no indication that any such committee has in fact been constituted.

25. Be that as it may, we have proceeded to hear the writ petition on merits and have taken into consideration the submissions advanced by Shri Rishi Malhotra, petitioner-in-Person; Shri R. Venkataramani, learned Attorney General appearing for the respondent-Union of India; and Ms. Meenakshi Arora, learned senior counsel appearing for the impleader, Project 39A, National Law University, Delhi.

Submissions by the petitioner

26. Shri Rishi Malhotra, petitioner-in-person, submitted that the sole method prescribed under Section 354(5) of the CrPC/Section 393(5) of the BNSS, *i.e.* execution by hanging by the neck until death, is barbaric, inhumane and cruel, and cannot withstand constitutional scrutiny under Articles 14 and 21 of the Constitution of India. He submitted that the provision, as it stands, violates the right to life with dignity guaranteed under Article 21, and that the manner in which hanging is administered

inflicts intense physical pain and suffering upon the condemned person, rendering it violative of constitutional principles.

27. In support of his submissions, the petitioner placed reliance upon the 187th Report of the Law Commission of India on the Mode of Execution of Death Sentence, published in October 2003, wherein the Commission, after a detailed examination of the material before it, categorically observed that hanging is “undoubtedly accompanied by intense physical torture and pain”. He drew the attention of this Court to the description of the process of execution by hanging recorded in the said Report, which sets out in detail the procedure undergone by a condemned prisoner, including being weighed, measured and subjected to physical examination the day prior to execution for the purpose of calculating the length of the drop and the physical consequences that follow the execution itself, including instances where the neck is not broken and death occurs by strangulation, and where the condemned person remains suspended for a period of eight to fourteen minutes before death is pronounced. The petitioner submitted that this description, drawn from official

sources and as observed by the Law Commission of India itself, establishes beyond the pale of doubt that the execution of a sentence of death by hanging involves intense physical and mental suffering and is unscientific as well as wholly inconsistent with the constitutional guarantee of right to die with dignity.

28. The petitioner further submitted that the uncertainties inherent in the method compound its inhumanity. He pointed out that if the drop is too short, the cervical vertebrae may not fracture and death will occur through slow and agonising strangulation. If the drop is too long, the consequence may be decapitation. He submitted that no method of execution whose administration carries such a margin of error, and where possibility of failure in execution involves such extreme levels of suffering, can be regarded as consistent with the requirements of Article 21 of the Constitution of India. He also drew the attention of the Court to the relevant provisions of State Jail Manuals, including Chapter XXXI of the Punjab and Haryana Jail Manual, particularly paragraphs 868 to 873 thereof, which prescribe in detail the steps leading to the execution of a sentence of death and vividly illustrate

the prolonged agony and psychological trauma experienced by a condemned prisoner in the period leading up to the execution of his sentence.

29. Shri Malhotra urged that the impugned provision is also in violation of the resolutions of the United Nations Economic and Social Council, particularly Safeguard No. 9 of the 'ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty', which provides that where capital punishment is inevitable, it shall be carried out in a manner which inflicts the minimum possible suffering. He submitted that execution by hanging, both in its design and in its practical application, does not meet these standards. It was contended that such international norms, though not binding, serve as relevant guiding principles in interpreting the scope and extent of the right to life and dignity as expounded under Article 21 of the Constitution of India.

30. Shri Malhotra further urged that the exclusive prescription of hanging under Section 354(5) CrPC, gives rise to an arbitrary and unconstitutional discrimination. He pointed out that under the Army Act, 1950, the Air Force Act, 1950 and the Navy Act,

1957, the sentence of death may be carried out either by hanging or by being shot to death. The availability of shooting as an alternative method of execution under these enactments, in his submission, demonstrates that laws as prevailing in the country itself recognise the existence of an alternative method of execution, while simultaneously denying that option to persons convicted under the ordinary criminal law. This differential treatment, he submitted, is arbitrary and violates Article 14 of the Constitution of India, as there is no rational basis for permitting a different method of execution for one category of condemned persons while denying it to others.

31. Shri Malhotra thus urged that the time has come for this Court to reconsider the ratio expounded in ***Deena*** (*supra*), in light of the subsequent findings of the Law Commission of India, the evolution of constitutional standards under Article 21 of the Constitution of India, the growing international consensus on the minimum requirements for humane execution, and the documented evidence of the physical and psychological suffering caused by hanging. He contended that a provision rooted in

colonial penal administration, which has never been independently examined by Indian legislators and which continues to prescribe a method of execution that inflicts unnecessary pain and suffering, cannot be permitted to remain on the statute book in its present form. He urged that this Court ought to declare Section 354(5) of the CrPC/393(5) of the BNSS unconstitutional and strike it down.

32. In the alternative, he submitted that should this Court not feel inclined to strike down the provision in its entirety, it may be read down so as to permit the execution of the sentence of death by such other modes which may be less painful, more humane and consistent with the constitutional guarantee of dignity under Article 21 of the Constitution of India, including, but not limited to, execution by lethal injection or by shooting.

Submissions on behalf of the impleader-Project 39A, National Law University, Delhi

33. Ms. Meenakshi Arora, learned senior counsel submitted that while the constitutionality of hanging as a mode of execution was considered by a three-judge Bench of this Court in ***Deena*** (*supra*), the

determination in that case proceeded on a limited evidentiary basis, as no detailed medical or scientific material examining whether execution by hanging is in fact instantaneous and free from pain was placed before the Court. She drew attention to the subsequent decision of this Court in ***Shabnam v. Union of India***¹¹, wherein the principles laid down in ***Deena*** (*supra*) were reiterated, and it was observed that the process of execution ought to bring out immediate unconsciousness quickly resulting into death without involving mutilation. It was submitted that the unimpeachable scientific evidence available now demonstrates that execution by hanging does not even barely meet this standard.

34. Ms. Arora further submitted, that a comprehensive review of scientific and medical literature on judicial hanging, including post-exhumation studies, historical analyses, and anecdotal narratives from officials who had witnessed executions, establish that the method is neither instantaneous nor pain-free. Particular reliance was placed upon a 1992 post-exhumation study of 34

¹¹ (2015) 6 SCC 702.

individuals executed in England between 1882 and 1945, in which the skeletons of the executed persons were examined. The study found that in ninety percent of the cases examined, fracture of vertebrae C2 and C3 was present, while in only three cases was the typical hangman's fracture, a fracture dislocation at the C2-C3 vertebrae was observed. In six cases, death occurred through asphyxiation or strangulation rather than cervical fracture, demonstrating that even in cases where the procedure was administered by trained executioners, the desired outcome was achieved in only a fraction of executions. She submitted that the causes of death in hanging include not only asphyxiation but also apoplexy caused by constriction of the jugular veins, decapitation where the head is severed from the body, and trauma to the spinal cord, none of which can be characterised as quick, painless or consistent with the requirements of a dignified death. She also referred to testimony recorded before the United States Senate in 1967, wherein Warden Clinton Duffy, who had participated in sixty judicial hangings, described executions where prisoners' necks often did not break, prisoners strangled for

several minutes with visible bodily distress and humiliation, and death was pronounced only after prolonged suspension, graphically underscoring the brutal and uncertain nature of the method.

35. Ms. Arora urged that execution by hanging as prescribed under Section 354(5) of the CrPC/Section 393(5) of the BNSS violates Article 21 of the Constitution of India on three distinct grounds. *Firstly*, hanging is not quick, as death by hanging is not instantaneous and the scientific literature establishes that it frequently is not. *Secondly*, the procedures in preparation for hanging including the weighing and measuring of the condemned person, the calculation of the drop, and the entire procedure leading up to the moment of execution inflict tremendous psychological suffering and humiliation to the condemned amounting to degrading treatment. *Thirdly*, the outcomes of hanging are unpredictable and uncontrolled, dependent upon variables that cannot be reliably managed, rendering the provision and the procedure prescribed thereunder manifestly arbitrary. She contended that the provision violates Article 14 of the Constitution of India for the same reason, because a method whose outcomes are

variable and uncontrolled, and whose basis is not grounded in scientific literature or empirical evidence, cannot satisfy the standard of being just, fair and reasonable, and is arbitrary on its face.

36. She further contended, that the Law Commission of India in its 187th Report on the Mode of Execution of Death Sentence published in October 2003 recommended lethal injection as an alternative mode of execution, finding it to be quick, painless and controlled. In order to provide the Court with a complete picture, she also referred to evidence regarding the practical difficulties encountered with lethal injection as administered in the United States. She submitted that, of the fifty states in the United States, twenty-three have abolished the death penalty, while the remaining twenty-seven retain it and authorise execution by lethal injection, although four of those states have paused executions by executive action. She drew our attention to the decision of the United States Supreme Court in **Baze v. Rees**¹², wherein it was held that lethal injection did

¹² 553 U.S. 35 (2008)

not guarantee a painless death to a condemned prisoner.

37. Ms. Arora further urged that the three-drug protocol commonly used for lethal injection, comprising a barbiturate to induce unconsciousness, a paralytic agent to arrest muscle movement, and potassium chloride to stop the heart, has itself been the subject of serious concern in practice. She submitted that the failure of the first drug to render the prisoner fully unconscious, combined with the effect of the paralytic agent in preventing any outward display of suffering, creates a risk of the prisoner experiencing extreme pain while appearing outwardly calm. She referred to the high rate of botched executions documented in the United States, including the historical catalogue compiled in the book *“Gruesome Spectacles: Botched Executions and America’s Death Penalty”*, which records approximately 276 botched executions out of approximately 9,000 executions carried between 1890 and 2010, representing a botched execution rate of approximately three percent. She also referred to specific instances of failed executions, including the February 2024 attempt to execute Thomas

Creech in Idaho, where the execution team tried and failed eight times to insert a functioning intravenous catheter, with the condemned person enduring two hours of such attempts before the execution was called off and he was returned to his cell. She submitted that this evidence is being placed before this Court to demonstrate the complexity of the issue at hand and to urge that lethal injection should not be adopted without scrutiny, and that any suggested alternative method of execution must itself be assessed against constitutional standards/safeguards before being prescribed.

Submissions on behalf of the respondent- Union of India

38. Shri R. Venkataramani learned Attorney General, vehemently and fervently opposed the submissions advanced by the petitioner and by the impleader. At the outset learned Attorney General urged that instant writ petition is not maintainable, as the reliefs sought, being in substance a direction to strike down or judicially substitute a legislatively prescribed mode of execution, amount to an invitation to this Court to redesign the penal framework, which is a function exclusively within the

domain of Parliament. He submitted that no writ can be issued directing Parliament to enact a particular law or adopt a particular legislative policy, and that the separation of powers under the constitutional scheme bars such relief. Reliance was placed upon judgments of this Court in **A.K. Roy v. Union of India**¹³, **Supreme Court Employees' Welfare Association v. Union of India**¹⁴, and **Suresh Seth v. Commissioner, Indore Municipal Corporation**¹⁵, in support of this submission.

39. He further submitted that the petitioner proceeds on broad assertions of a medical, penological and sociological nature without laying a concrete factual foundation necessary for striking down a statutory provision, and that constitutional invalidation cannot rest on generic averments or academic propositions alone.

40. Learned Attorney General further submitted that the constitutional validity of hanging as a mode of execution is no longer *res integra*. This Court in **Deena (supra)** specifically examined and upheld

¹³ (1982) 1 SCC 271.

¹⁴ (1989) 4 SCC 187.

¹⁵ (2005) 13 SCC 287.

validity of Section 354(5) of the CrPC, holding that the prescribed method of hanging, when properly carried out, does not violate the guarantee enshrined in Article 21 of the Constitution of India; that unconsciousness supervenes almost instantaneously; that the method eliminates the possibility of a lingering death and; that it involves no barbarity, torture or degradation of any kind. He drew particular attention to paragraphs 81 to 84 of ***Deena*** (*supra*), wherein this Court recorded that the State had discharged the heavy burden of proving that execution by hanging does not violate Article 21 of the Constitution of India, and that the conclusion was based on reason, supported by expert evidence and the findings of modern medicine.

41. He further submitted that Parliament, in enacting the Bharatiya Nagarik Suraksha Sanhita, 2023, had consciously retained the prescription of hanging under Section 393(5), a legislative reaffirmation that removes any doubt as to the continued policy choice of Parliament. He submitted that this conscious retention by Parliament, with full awareness of the existing debate, is itself a complete answer to the challenge raised in the present petition.

42. Learned Attorney General contended that the plea of violation of Articles 14 and 21 of the Constitution of India is unfounded. With respect to Article 21, he submitted that the procedure established by law for carrying out the sentence of death is firmly established, it takes effect only after trial, sentencing, confirmation by the constitutional Courts, *i.e.*, High Court and Supreme Court in the process of appeal, review, curative petition, and the mercy petition to be considered by Hon'ble the President of India. The question of justness and fairness of a method of execution can arise only where a meaningful comparison between alternative methods is free from doubt and uncertainty. It was submitted that no such structured reliable comparison is available as on date, inasmuch as every known method of execution carries its own uncertainties and risks, and there exists no demonstrated, non-controversial standard by which a choice between the different methods of execution can be constitutionally tested. It was further submitted that Article 21 of the Constitution of India does not require the State to adopt the best possible method of execution, it only requires that the method

should not be cruel, torturous or degrading, and that it be carried out within a just and fair legal framework. He submitted that Article 21 of the Constitution of India does not confer upon a condemned prisoner a right to choose the mode of his death, and that allowing such a choice would generate further litigation, delay, uncertainty and arbitrary outcomes.

43. It was further contended that the argument based on Article 14 of the Constitution of India is equally misconceived. He submitted that Section 354(5) of the CrPC provides a uniform method of execution for all persons sentenced to death, and that uniformity in treatment reduces rather than creates scope for unequal treatment. On the contention that military statutes, namely, the Army Act, 1950, the Air Force Act, 1950 and the Navy Act, 1957, permits execution by shooting in addition to hanging, it was urged that those are specialised enactments applicable to military offenders and enacted in the distinct context of military necessity, and that Parliament's decision not to extend the same provision to civilians tried under the ordinary criminal law does not amount to hostile

discrimination or arbitrary differentiation. He submitted that Parliament is fully aware of the existence of alternate modes of execution and has consciously chosen to prescribe a single uniform mode under the civilian law, and that this conscious policy choice cannot be characterised as arbitrary in the constitutional sense.

44. It was urged by the learned Attorney General that the contention based on the 187th Report of the Law Commission of India is misconceived and cannot sustain the challenge as such reports are only recommendatory in nature and do not carry the force of law. The non-implementation of the recommendations of Law Commission of India is a legislative and policy decision of the executive and is not amenable to powers of judicial review by this Court. He further submitted that the 187th Report, did not recommend the abolition of hanging rather it recommended the addition of lethal injection as an alternative mode, while expressly cautioning against the deletion of the existing statutory prescription. Reliance was placed upon ***Gian Kaur*** (*supra*), to contend that a Law Commission recommendation and the broader debate on desirability are not

sufficient to establish unconstitutionality. Further reliance was placed upon the judgment in ***Union of India v. Deoki Nandan Aggarwal***¹⁶ to contend that Courts cannot rewrite, recast or reframe legislation.

45. Learned Attorney General contended that the reliance placed on the experience of the United States, particularly in relation to botched executions and the use of lethal injection, is misconceived. It was pointed out that the scale and frequency of executions in the two jurisdictions are fundamentally different; while India carried out only eight executions between 2001 and 2023, the United States conducted over one thousand executions during the corresponding period. It was urged that the experience of lethal injection in the United States does not establish it as a humane or reliable alternative. On the contrary, it reveals serious systemic concerns, including difficulties in venous access, shortages of requisite drugs, use of untested protocols, and several documented instances of botched executions. It was pointed out that scholarly material placed on record itself indicates that lethal

¹⁶ 1992 Supp (1) SCC 323.

injection has one of the highest rates of failed executions amongst the known methods.

46. In this backdrop, it was submitted that isolated instances of error or failure in a foreign jurisdiction, operating under vastly different conditions, cannot be treated as a valid benchmark for assessing the constitutionality of an Indian statute. Reliance was also placed on the caution expressed in ***Deena*** (*supra*) against uncritical dependence on foreign material in this domain. It was further contended that no credible material has been placed before this Court to demonstrate even a single instance of a botched execution in India under the existing statutory framework. Any alleged deviation, for the sake of arguments, would at best relate to issues of implementation and cannot form the basis for striking down the statutory provision itself.

47. Finally, learned Attorney General submitted that the question of the mode of execution is a matter of penological policy falling squarely within the domain of Parliament, and that the scope of judicial review does not extend to substituting what this Court may consider to be a preferable policy in place of that adopted by the legislature. Placing reliance

upon judgments of this Court in ***Asif Hameed v. State of J&K***¹⁷, and ***Aravali Golf Club v. Chander Hass***¹⁸, it was urged that judicial power must be exercised with restraint and that Courts cannot dictate or advise the executive in matters of policy so long as constitutional boundaries are not transgressed. It was further contended that if any reconsideration of ***Deena*** (*supra*) is warranted, the appropriate course would be a reference to a larger Bench, and not a judicial rewriting of the statutory provision. He therefore prayed that the instant writ petition be dismissed.

Discussion

48. At the outset, we may note that the constitutional validity of Section 354(5) of the CrPC insofar as it prescribes hanging as the only mode of execution of death sentence has already been examined and settled by a three-Judges Bench of this Court in ***Deena*** (*supra*). Hence, the scope of interference by a Bench of two-Judges on the very same issue is extremely limited.

¹⁷ 1989 Supp (2) SCC 364.

¹⁸ (2008) 1 SCC 683.

49. Principle of *Stare Decisis* mandates that a bench of lesser number of Judges should not depart from the ratio of a decision rendered by a larger bench, which has withstood the test of time for more than four decades. Unless it is demonstrated that the view so taken in the earlier decision has been rendered unconstitutional owing to some significant constitutional development, legislative amendment or cogent scientific and empirical evidence, there would hardly be any justification for a Bench of two-Judges to take a different view.

50. There is no dispute that in ***Deena*** (*supra*), the entire scope and ambit of hanging as the mode of execution of a death sentence was exhaustively considered with reference to foreign precedents, expert opinions and other scientific materials then available before the Court.

51. ***Deena*** (*supra*) has further been considered and approved by a Constitution Bench of this Court in ***Shashi Nayar (Smt) v. Union of India***¹⁹. Hence, the scope of interference by this Court becomes even more restricted.

¹⁹ (1992) 1 SCC 96.

52. Even while issuing notice in the present writ petition, this Court relied upon the dissenting observations made by Justice Bhagwati in **Bachan Singh** (*supra*), however, the fact regarding the ratio of **Deena** (*supra*) having been approved by a Constitution Bench in **Shashi Nayar** (*supra*) has not been touched in the order issuing notice.

53. Much emphasis was laid by the petitioner, Shri Rishi Malhotra that hanging as a mode of execution is physically painful and physiological traumatic to the condemned prisoner. However, such argument was not supported by any unimpeachable scientific or empirical evidence. Shri Malhotra advanced a contention that intravenous lethal injection is a more scientific, humane and painless method for execution of a death penalty.

54. Ms. Meenakshi Arora, representing the impleader, advanced a contrary submission by placing material before this Court highlighting the uncertainty and inconsistencies associated with execution by lethal injection. The material relied upon by the impleader serves to underscore the inherent complexities and practical difficulties associated with lethal injection and reinforces the

necessity of subjecting any proposed alternative method of execution to rigorous constitutional scrutiny before its adoption. Consequently, there is no concrete scientific material on record to satisfy the Court that execution by lethal injection is demonstrably superior or more humane method of carrying out a sentence of death.

55. Another fervent argument of Shri Malhotra was with reference to the alternative mode of execution of death sentence provided under the military statutes *viz.* Army Act, 1950, Air Force Act, 1950, Navy Act, 1957, wherein, death by shooting is recognized as an alternate mode of execution.

56. We find the said argument to be irrelevant and unconvincing because the statutes in which shooting is provided as a mode of execution operate in a distinct field and govern a separate class of persons subject to military law. These instances cannot be relied upon to test the constitutional validity of the provisions governing the execution of a sentence of death imposed upon civilians under the ordinary criminal law.

57. More importantly, the three-Judges Bench in ***Deena*** (*supra*) specifically analysed and evaluated

the comparative merits of different methods of execution of death sentence. After examining electrocution, lethal gas, shooting and lethal injection as modes of execution, the Court concluded that none of these methods possessed any distinct or demonstrable advantage over hanging. In this regard, we may gainfully refer to the following paragraphs of

Deena (supra) :-

“71. Though it is generally believed that death by electrocution is entirely painless, a distinguished French scientist, L.G.V. Rota, disputes this contention. Labelling this method of executing the death sentence as a form of torture. Rota contends that a condemned victim may be alive for several minutes after the current has passed through his body without a physician being certain whether death has actually occurred or not. He adds that some persons have greater physiological resistance to the electric current than others, and that, no matter how weak the person, death cannot supervene instantly. Another attack on the pain of death in electrocution was made by Nicola Tesla, the electrical wizard [See New Horizons in Criminology by Harry Barnes & Negley Teeters (3rd Edn., 1966, pp. 308-09)] . The opposite view is expressed by Robert G. Elliott in ‘Agent of Death’ (New York: Dutton, 1940). Robert Elliott, one-time executioner for several eastern States, who officiated at 387 executions maintains that electrocution is painless.

72. Power seldom fails in countries like America, U.S.S.R., and Japan. Even then, the failure of electrical energy supplied by commercial undertakings has been considered in America as an impediment in the use of the electric chair. With

frequent failures of electrical power in our country, the electric chair will become an instrument of torture. One can well imagine the consequences of the use of the electric chair in the city of Calcutta or, for the matter of that, in the capital city of Delhi. For technical reasons, even the Supreme Court complex is not spared from frequent load-shedding during working hours. Lawyers, litigants and Judges have now trained themselves to suffer the inconvenience arising from failure of electricity. But, it would be most unfair to expect a prisoner condemned to death to get into the electric chair twice or thrice, for the reason that the electric current failed during the process of electrocution. It is not our intention to blame anyone for the power crisis because it would seem that it is partly due to natural causes and is not man-made. But facts are facts and facts must be faced.

73. Execution by lethal gas is discussed by the Royal Commission in paras 719 to 722 of its Report. The Commission says in para 719 that they did not inspect any lethal gas chamber during their visit to America, but they were supplied with written evidence about execution by lethal gas. They also had the advantage of hearing evidence from one Mr Philip Allen, the then Deputy Chairman of the Prison Commission and of receiving a report from the English neurologist, Dr Macdonald Critchley, both of whom had inspected the lethal chamber at St. Quentin Prison, California, of which the famous Clinton Duffy was a warden. In para 720 of the Report, the Royal Commission says: "The lethal chamber is very elaborate in comparison with the apparatus needed for other methods of execution. It is expensive to install and requires a complicated series of operations to produce the gas and to dispose of it afterwards." The description of the gas-chamber method given by the Royal Commission is like this:

“The chamber is required to be hermetically sealed to prevent leakage of cyanide gas, the doors leading to the chamber are required to be connected with an electrically controlled panel, the prisoner's arms, legs and abdomen are tied to the chair with leather straps, a pound of sodium cyanide pellets is placed in a trap in the seat of the chair and three pints of sulphuric acid and six pints of water mixed in a lead container are placed in a position to receive the cyanide pellets. A rubber hose is connected to the head of a stethoscope which is strapped to the prisoner's chest. The entire clothing of the prisoner is removed except for shorts. Finally, a leather mask covers the prisoner's face. After the prisoner is pronounced dead, Ammonia gas is forced into the chamber until the indicators within the chamber show that all cyanide gas has been neutralised. The ammonia gas is then removed by a specially constructed exhaust fan.”

Para 721 of the Royal Commission's Report shows that the length of time taken by this method of execution is about 45 minutes. In para 722 the Commission says that when this method was first employed, it was thought that the gas had a suffocating effect which would cause acute distress if not actual pain, before the prisoner became unconscious. According to the Commission, it seems to be now generally agreed that unconsciousness ensues very rapidly in the gas-chamber method.

74. Clinton Duffy, warden of San Quentin Prison, California, says that the operation of the gas-chamber execution includes “funnels, rubber gloves, graduates, towels, soap, pliers, scissors, fuses and a mop: in addition, sodium cyanide eggs, sulphuric acid, distilled water, and ammonia” [From his series of articles, “San Quentin Is My Home”, Saturday Evening Post, March 25-May 13,

1950. This series was later published in book form as *The San Quentin Story* (New York) : Doubleday, 1950] .

75. Coming to the method of shooting by a firing squad, we have already extracted an opinion which shows that there are chances of bungling in that method. But a more serious objection to which this method is open is that it is the favourite pastime of military regimes which trample upon human rights with impunity. They shoot their citizens for sport. Shooting is an uncivilised method of extinguishing life and it is enough to say in order to reject it that the particular method is most recklessly and wantonly used for liquidating opposition and smothering dissent in countries which do not respect the rule of law. Lastly, murders by shooting are becoming a serious menace to law and order in our country. Shooting by the State in order to kill for executing the order of a Court of law will unwittingly confer respectability on the 'shoot to kill' tactics which are alarmingly growing in proportion.

76. What remains now to consider is the system of lethal injection. The Royal Commission has discussed that method in paras 735 to 749 of its Report. Lethal injection is by and large an untried method. But that is not its most serious defect. The injection is required to be administered intravenously, which is a delicate and skilled operation. The Prison Medical Officers who were interviewed by the Royal Commission doubted whether the system of lethal injection was more humane than hanging (see para 739 of the Report). The British Medical Association told the Commission that no medical practitioner should be asked to take part in bringing about the death of a convicted murderer and that the Association would be most strongly opposed to any proposal to introduce a method of execution which would require the services of a medical practitioner, either in carrying out the actual process of killing or in

instructing others in the technique of that process. The Commission expressed its conclusion in para 749 by saying that it could not recommend that, in the present circumstances, lethal injection should be substituted for hanging since they were not satisfied that executions carried out by the administration of lethal injections would bring about death more quickly, painlessly and decently in all cases. The Commission, however, recommended, unanimously and emphatically, that the question should be periodically examined, specially in the light of the progress made in the science of anaesthetics.

77. We may lastly refer to the affidavit filed by one Dr N.P. Singh who was allowed to intervene on behalf of the National Association of Critical Care Medicine (India), New Delhi. He says in his affidavit that society has come to realise that death by hanging is not a merciful and pleasant way of putting a patient to a terminal end: "As members of the medical profession and the Association, we feel that a patient may be put to sleep by any sleep-inducing injection (barbiturates) and subsequently, the above mentioned electrocution and gas-chamber methods may be applied as the patient's sense would have been dulled by the drug injection." This system certainly has the merit of naivete and novelty but, on the face of it, the system is impracticable and would appear to involve complications and torture to an uncommon degree. We may in this behalf draw attention to an article "The Death penalty: Moral Argument and Capricious Practice" by Andrew Rutherford, a senior Lecturer in Law at the Southampton University, which appeared in The Listener of July 7, 1983, published by the British Broadcasting Corporation. In that article, the writer refers to an incident to the effect that in 1982 December, a prisoner was put to death in Texas by means of an injection of sodium pentothol. The incident led the American Medical Association to declare: "The use

of a lethal injection as a means of terminating the life of a convict is not the practice of medicine.” The writer proceeds to say that there is not likely to be any great enthusiasm for the method of electrocution as well, since in April 1983, it took three 30-second shots of 1900 volts before a man in Alabama was pronounced dead.

78. It is clear from this narrative that neither electrocution, nor lethal gas, nor shooting, nor even the lethal injection has any distinct or demonstrable advantage over the system of hanging. Therefore, it is impossible to record the conclusion with any degree of certainty that the method of hanging should be replaced by any of these methods.

80. There is a responsible body of scientific and legal opinion which we have discussed, which holds the view that hanging by rope is not a cruel mode of executing the death sentence. That system is in operation in large parts of the civilised world. That was the only method of executing the death sentence which was known to the Constituent Assembly and yet it did not express any disapproval of that method, though it touched upon the question of death sentence while dealing with the President’s power of pardon under Article 72(1)(c) of the Constitution.

81. Having given our most anxious consideration to the central point of inquiry, we have come to the conclusion that, on the basis of the material to which we have referred extensively, the State has discharged the heavy burden which lies upon it to prove that the method of hanging prescribed by Section 354(5) of the Code of Criminal Procedure does not violate the guarantee contained in Article 21 of the Constitution. **The material before us shows that the system of hanging which is now in vogue consists of a mechanism which is easy to assemble. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily**

sharpen the poignancy of the prisoner's apprehension. The chances of an accident during the course of hanging can safely be excluded. The method is a quick and certain means of executing the extreme penalty of law. It eliminates the possibility of a lingering death. Unconsciousness supervenes almost instantaneously after the process is set in motion and the death of the prisoner follows as a result of the dislocation of the cervical vertebrae. The system of hanging, as now used, avoids to the full extent the chances of strangulation which results on account of too short a drop or of decapitation which results on account of too long a drop. The system is consistent with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation or brutality of any kind."

(Emphasis supplied)

58. After a threadbare analysis of the scientific material and a wholesome consideration of the mechanism of the system of hanging, the three-Judges Bench in **Deena** (*supra*) held that the preliminary procedures are simple and quick; the chances of accident during hanging is minimal and; satisfies the constitutional obligation of the State under Article 21 to ensure that the sentence is carried out with decency, dignity and without unnecessary brutality.

59. Neither the petitioner nor the impleader has placed on record any material capable of casting

doubt upon the view so expressed by the three-Judges Bench in the afore-quoted paragraphs of ***Deena*** (*supra*).

60. Taking a holistic view of the matter, we are of the considered view that the petitioner has failed to place any material before this Court which would justify doubting the correctness of view taken in ***Deena*** (*supra*) or to demonstrate that the aforesaid view has lost its efficacy or stands diluted by subsequent constitutional, scientific or empirical developments. Consequently, we do not find any compelling reason which would persuade this Court to refer the correctness of three-Judges Bench decision in ***Deena*** (*supra*) to a larger Bench.

61. So far as the argument advanced by the petitioner that the Law Commission in its 187th report submitted in the year 2003, has observed that execution by hanging is accompanied by intense torture and pain, we may simply note that the observations made in the Law Commission Report are simply recommendatory in nature. It may reasonably be presumed that the legislators and the policy makers must have considered the 187th report of the Law Commission in its entirety and have

thought fit not to amend the mode of execution of death sentence in the newly drafted BNSS which replaces the CrPC.

62. We also find merit in the submission advanced by learned Attorney General that the petitioner has failed to demonstrate, by any credible material, even a single instance of a botched execution in India under the existing statutory framework. On the contrary, the material placed on record by the impleader itself demonstrates that in the United States of America, where lethal injection has been adopted in several States as a mode of execution of death sentence, there have been numerous botched executions. The available material, therefore, does not establish that lethal injection has any added advantage over hanging as a mode of execution of a death sentence. Hence, the argument advanced by the petitioner that lethal injection is a better and more humane mode of execution of the death sentence is totally unconvincing.

Conclusion

63. In wake of the discussion made hereinabove, we are not persuaded that a case has been made out for referring the decision of the three-Judges Bench in

Deena (*supra*) to a larger Bench for reconsideration of the constitutional validity of Section 354(5) of the CrPC/Section 393(5) of the BNSS.

64. Before parting, we clarify that the dismissal of the present writ petition must not be understood as foreclosing future constitutional scrutiny, should compelling scientific, medical or empirical evidence emerge demonstrating that the factual and scientific basis on which the decision in ***Deena*** (*supra*) proceeded has been materially displaced by subsequent developments. Constitutional interpretation is organic and must remain responsive, both to the evolution of constitutional doctrine and to advances in scientific knowledge.

65. We also observe that nothing contained in this judgment shall preclude the Union Government, should it consider it appropriate, from undertaking a comprehensive review of the existing method of execution through an expert body comprising specialists in law, forensic medicine, neuroscience, penology and allied disciplines, with a view to examine whether any alternative method of execution better serves the constitutional objective of minimising unnecessary pain while preserving the

dignity of the condemned prisoner. Any such exercise would lie squarely within the domain of the Executive and the Legislature and may be undertaken as a matter of policy, in light of future scientific or technological developments.

66. The writ petition is dismissed with the above observations.

67. Pending application(s), if any, shall also stand disposed of.

.....**J.**
(VIKRAM NATH)

.....**J.**
(SANDEEP MEHTA)

NEW DELHI;
AUGUST 18, 2026.