

ITEM NO.56

COURT NO.1

SECTION PIL-W

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

Writ Petition(s) (Criminal) No(s). 145/2017

RISHI MALHOTRA

Petitioner(s)

VERSUS

UNION OF INDIA

Respondent(s)

(FOR ADMISSION and IA No.97011/2017-PERMISSION TO APPEAR AND ARGUE  
IN PERSON)

Date : 06-10-2017 This petition was called on for hearing today.

CORAM :

HON'BLE THE CHIEF JUSTICE  
HON'BLE MR. JUSTICE A.M. KHANWILKAR  
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD

For Petitioner(s)

Mr. Rishi Malhotra, In-person

For Respondent(s)

UPON hearing the counsel the Court made the following  
O R D E R

Permission to appear and argue in person is granted.

Heard Mr. Rishi Malhotra, petitioner-in-person.

The petitioner has preferred this petition under Article 32 of the Constitution of India. The petitioner has called in question the constitutional validity of Section 354(5) of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C"). Section 354(5) reads as follows:-

"When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead."

It is contended by Mr. Rishi Malhotra that he does not intend to challenge the imposition of death penalty as the same has been put to rest by a Constitution Bench judgment in Bachan Singh vs. State of Punjab (1982) 3 SCC 24.

Be it noted, the constitutional validity of Section 354(5) has been upheld by a three-judge Bench of this Court in Deena alias Deen Dayal and Others vs. Union of India and Others (1983) 4 SCC 645. It is well settled in law that view of constitutional perspective does not remain static. The Constitution of India being an organic, living and a compassionate Constitution recognises the sanctity of progress with efflux of time. The provision that once held to be valid, with passage of time may become invalid, more so, when there is dynamic progress in science as well as social thinking.

It is submitted by Mr. Malhotra that when a man is hanged, his dignity is destroyed. Mr. Malhotra further submits that a man must have dignity even in his death and when dignity at the time of death is lost, living the life with dignity is dainted. He has drawn our attention to the dissenting opinion of Bhagwati, J. (as the learned Chief Justice then was) in Bachan Singh vs. State of Punjab (supra). Paragraphs 29 and 30 of the said opinion reads as under:

"29. The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the

sentence of death is barbaric and inhuman as entailing physical pain and agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in *Ichikawa v. Japan*, Vide : David Pannick on "Judicial Review of Death Penalty, page 73 the Japanese Supreme Court held that execution by hanging does not correspond to 'cruel punishment' inhibited by [Article 36](#) of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in the view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of [Article 36](#), one thing is clear that hanging is undoubtedly accompanied by intense physical torture and pain. Warden Duffy of San Quentin, a high security prison in the United States of America, describes the hanging process with brutal frankness in lurid details :

"The day before an execution the prisoner goes through a harrowing experience of being weighed, measured for length of drop to assure breaking of the neck, the size of the neck, body measurement et cetera. When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face and that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on, and at almost all executions one or more faint or have to be helped out of the witness room. The prisoner remains dangling from the end of the rope for from 8 to 14 minutes before the doctor, who has climbed up a small ladder and listens to his heart beat with a stethoscope, pronounces him dead. A prison guard stands at the feet of the hanged person and holds the body steady, because during the first few minutes there is usually considerable struggling in an effort to breathe.

If the drop is too short, there will be a slow and agonising death by strangulation. On the other hand, if the drop is too long, the head will be torn off. In England centuries of practice have produced a

detailed chart relating a man's weight and physical condition to the proper length of drop, but even there mistakes have been made. In 1927, a surgeon who witnessed a double execution wrote :

The bodies were cut down after fifteen minutes and placed in an antechamber, when I was horrified to hear one of the supposed corpses give a gasp and find him making respiratory efforts, evidently a prelude to revival. The two bodies were quickly suspended again for a quarter of an hour longer...Dislocation of the neck is the ideal aimed at, but, out of all my post-mortem findings, that has proved rather an exception, which in the majority of instances the cause of death was strangulation and asphyxia.

These passages clearly establish beyond doubt that the execution of sentence of death by hanging does involve intense physical pain and suffering, though it may be regarded by some as more humane than electrocution or application of lethal gas.

30. If this be the true mental and physical effect of death sentence on the condemned prisoner and if it causes such mental anguish, psychological strain and physical agony and suffering, it is difficult to see how it can be regarded as anything but cruel and inhuman. The only answer which can be given for justifying this infliction of mental and physical pain and suffering is that the condemned prisoner having killed a human, being does not merit any sympathy and must suffer this punishment because he 'deserves' it. No mercy can be shown to one who did not show any mercy to others. But, as I shall presently point out, this justificatory reason cannot commend itself to any civilised society because it is based on the theory of retribution or retaliation and at the bottom of it lies the desire of the society to avenge itself against the wrong doer. That is not a permissible penological goal."

Verma, J. (as the learned Chief Justice then was) in Gian Kaur vs. State of Punjab (1996) 2 SCC 648 has opined:

"24. Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is

not a benefit to the patient of a terminal illness being unrelated to the principle of "sanctity of life" or the "right to live with dignity" is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of "right to life" therein includes the "right to die". The "right to life" including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the "right to die" with dignity at the end of life is not to be confused or equated with the "right to die" an unnatural death curtailing the natural span of life."

The aforesaid was stated. The Constitution Bench did not concur with the interpretation of Article 21 of the Constitution made in P. Rathinam vs. Union of India and Another (1994) 3 SCC 394.

What is significant, as Mr. Malhotra would submit, the expression of the view and the perception of the Constitution Bench as regards the termination of life. In the said case, the Court was concerned with the process of certain natural death yet that throws light on peaceful and painless death. It is contended by him that a convict whose life has to end because of the conviction and the sentence he should not be compelled to suffer the pain of hanging. He has referred to the 187<sup>th</sup> report of the Law Commission. Though we do not intend to advert to the same at present, yet it may be observed, prima facie, that legislature can think of some other mode by which a convict who, in law, has to face the death sentence should die without pain. It has been said for centuries that nothing can be equated with painless death. And that is,

possibly, the dignity in death.

Issue notice fixing a returnable date within three weeks. A copy of the notice be served to the Central Agency so that Attorney General for India can assist the Court on behalf of the Union of India.

(OM PARKASH SHARMA)  
AR CUM PS

(H. S. PARASHER)  
ASSISTANT REGISTRAR