Before : A. L. Bahri and V. K. Bali, JJ.

SOWAR RAM SINGH,—*Petitioner.*

versus

UNION OF INDIA AND OTHERS,—*Respondents.*

Civil Writ Petition No. 5635 *of* 1991

January 1, 1992.

Indian Penal Code—S. 302—*Army Act,* 1950 (46-1950)—*S.* 125 *and* 164(2)—*Army Rules,* 1954—*R.* 22—*Code of Criminal Procedure (II of* 1974) *S.* 354(3) *as amended—Constitution of India*—1950—*Art.* 226—*Murder trial by General Courts Martial—Sepoy sentenced to death for murdering two officers of the Army—Necessity of recording reasons for awarding death sentence under amended S.* 354(3) *of Criminal Procedure Code—Principles laid down in S.* 354(3) *have to be applied to trial before General Courts Martial in the matter of awarding sentence of death—Non recording of reasons by G.C.M.—Order of sentence cannot be sustained—Plea of insanity—Court not going into it for lack of evidence—Mitigation of crime—Overall assessment of case made by High Court—Order of sentence modified and sentence of death converted into imprisonment for life.*

(Para 3, 8, 9, 12 & 13)

Held, that the original record produced shows that Rule 22 of the Army Rules was fully complied with and that the Brigadier who is Officer Commanding of a Brigade, a competent Officer under section 125 of the Army Act, in fact passed an order that the petitioner be tried by the G.C.M.

(Para 3)

Held, that Section 302, of the Indian Penal Code cannot be declared to be *ultra vires* as applicable to the army personnel before the G.C.M. There is no question of arbitrariness or discrimination when an army personnel is exclusively tried by the G.C.M. for the offence of murder under section 302, Indian Penal Code. A different procedure is prescribed to be followed by the G.C.M. in the rules framed under the Army Act. Though section 354(3) is contained in the Code of Criminal Procedure but the matter dealt therewith is not a procedural matter, but is a basic principle of criminology which is to be kept in view while trying an accused under section 302, Indian Penal Code. The provision of section 354(3), Cr.P.C., are to be read into the provisions of section 302, Indian Penal Code. That being the prosition, even the G.C.M. was required to take into consideration the provision of section 354(3) of the Cr.P.C. or the principle enunciated therein in the matter of awarding sentence to the accused under section 302 of the Indian Penal Code.

(Para 8)

Held, that the provision of section 302 of the Indian Penal Code are *intra vires* of the provision of the Constitution as to be applied to the army personnel to be tried by the G.C.M. and the principles

laid down in section 354(3) of the Cr.P.C. are also to be applied to the trials before the G.C.M. in the matter of awarding sentence for offence committed under section 302 of the Indian Penal Code by army personnel.

(Para 9)

Held, that the address prepared by the Judge Advocate General for the members of the G.C.M. has been perused in the present case. There is no indication therein that the G.C.M. was advised on the basis of the provision of section 354(3) of the Cr.P.C. or the principle of penology contained therein. The attention of the G.C.M. was thus not adverted to the basic principles of penology in the matter of determining sentence for commission of offence under section 302 of the Indian Penal Code and thus the order of sentence delivered by the G.C.M. on the petitioner cannot be sustained in law.

(Para 12)

Held, that if the extra-judicial confession had been voluntarily recorded and the petitioner himself had started writing his name and particulars, there was no reason why he could not complete the same. Evidence of extra-judicial confession, as is in the present case to the extent of motive is concerned, cannot be relied upon in the absence of any corroboration. The motive suggested in these extra-judicial confessions is only to the effect that one of the deceased had given punishment of frog-jumping to the petitioner which was resented or that the aforesaid officer sent for the petitioner while he was lying naked. The aforesaid motive, even if proved, is not considered sufficient for committing the murder of two officers. It may be that on account of mental imbalance the accused committed the crime and thus this would not be a case of rare of the rarest where death penalty should be awarded.

(Para 13)

Held, that the contention of counsel for the respondent that army is a disciplined force and if a junior officer commits murder of his superior whom he is supposed to guard, the extreme penalty of death was rightly imposed. This contention again cannot be accepted. If the basic principles of penology in the matter of determining sentence are to be taken into consideration, not only that the nature of the crime but the antecedents of the criminal are also to be taken into consideration apart from other facts and circumstances such as motive for the crime. Taking into consideration overall assessment of the case we are of the opinion that imposition of death sentence was not called for in the facts and circumtsances of the present case. Hence, the order of sentence passed by the G.C.M. is modified and the sentence of death is converted into imprisonment for life.

(Para 13 & 14)

Writ Petition under Article 226 of the Constitution of India praying that this Hon'ble Court may be pleased to send for the record of this case, and after perusal be pleased to :—

(a) issue a writ, order or direction quashing the trial of the petitioner by court martial and the resultant finding and

sentence including the confirmation thereof on the ground that the trial of the petitioner is without jurisdiction on account of violations of the provisions of Section 125 of the Army Act;

(b) *issue a writ, order or direction declaring the provisions authorising the trial of the offence by court martial which is punishable with penalty of death, being violative of Articles 21, 19 and 14 of the Constitution on account of the absence of safeguards specifically and consciously provided by the legislature;*

(c) *issue a writ, order or direction quashing the sentence of death awarded to the petitioner in view of its unconstitutionality so far as the same has been awarded to the petitioner by the court martial on account of the fact that the discretion in awarding the same had been exercised by the person without there being any consideration available before them and without giving any reasons in this regard which is now held to be mandatory.*

(d) *dispense with service of advance notices on the respondents;*

(e) *exempt filing of certified copies of annexures;*

(f) *award cost of the petition in favour of the petitioner;*

It is further prayed tnat during the pendency of this petition, execution of death penalty may kindly be stayed.

R. S. Randhawa, Advocate with R. S. Bajaj and Gurvinder Singh Gill, Advocate, *for the petitioner.*

Giani Harinder Singh, Standing Counsel for UOI with Joginder Sharma, Advocate and G. S. Virdi, Advocate, *for the Respondents.*

JUDGMENT

A. L. Bahri, J.

(1) Sowar Ram Singh, a Sepoy in the Army, challenges in this writ petition, filed under Articles 226 of the Constitution, order passed by General Court Martial convicting and sentencing him on two counts; to death and subsequent orders confirming the aforesaid order on his statutory representations made.

As per allegations, the petitioner is alleged to have killed two officers of the Army; Capt. Sanjib Kumar Nayak and Capt. Kuldip

Thakur on May 28, 1987 with his service rifle. The petitioner was arrested and subsequently tried on charges framed on September 8, 1987 Annexure P.1 under Section 302 of the Indian Penal Code. *Vide* Annexure P.2. the General Court Martial (for short called 'the GCM') recorded finding that the petitioner was guilty of the charges aforesaid. *Vide* order Annexure P.3 dated April 26, 1988, sentence was announced to the petitioner that he should suffer death by hanging by his neck till he is dead. This order was subject to confirmation. Subsequently, the death sentence was confirmed as communicated,—*vide* order Annexure P.4. dated January 30, 1990. Copy of the order is Annexure P.4/A dated July 24, 1989. A petition filed under section 164 (2) of the Army Act was rejected by the Central Government,—*vide* order communicated on December 20, 1990. Annexure P.5.

(2) The following questions have been raised on behalf of the petitioner :—

(1) Provisions of Rule 22 of the Army Rules, 1954 were not complied with. Hence the trial conducted against the petitioner by the GCM is vitiated.

(2) The Competent Authority did not exercise discretion as required under Section 125 of the Army Act to try the petitioner before the GCM. The entire trial of the petitioner by the GCM in the absence of such an order by the Competent Authority was without jurisdiction. The conviction and sentence recorded by the GCM is liable to be quashed.

(3) The provisions of Section 302 of the Indian Penal Code providing death penalty are *ultra vires* the provisions of the Constitution (Articles 14, 19 and 21). This argument has been addressed particularly in the case of the accused, who are to be tried by the GCM, as the provisions of the Criminal Procedure Code are not applicable to the trials before the GCM. The amendment introduced in the Criminal Procedure Code in Section 354 (3) now provides for recording of reasons for awarding death sentence whereas earlier reasons were required to be recorded where death sentence was not to be awarded.

(4) Even if the provisions of Code of Criminal Procedure as such are not applicable to the trials before the GCM

the principles enunciated therein are to be kept in view in the case of awarding death sentence on the basis of law laid down by the Apex Court in *Bachan Singh* v. *State of Punjab,* A.I.R. 1980 Supreme Court 898. The law laid down by the Supreme Court is binding on all the courts including the GCM.

(5) A specific plea was raised calling upon the Army Authorities to produce the material relating to the disease of insanity which the petitioner had suffered. No such material was produced during the trial and it was after conclusion of the trial that an enquiry was held and the petitioner was referred to the Board of Doctors for examination. It was at that stage that statements of two doctors were recorded to the effect that the petitioner was fit at the stage of the trial. The petitioner suffered attacks of insanity in 1983 and on that account the petitioner was down-graded from 'A' category to 'BEE' category. Thereafter though the petitioner was required to be examined periodically, no such examination took place and the opinion of the doctors who appeared as court-witnesses that such a person suffering from insanity could suffer attacks subsequently, has been ignored. This argument has been addressed in two-folds; firstly that at the time of commission of crime the petitioner was in fact suffering from insanity and thus he did not commit any offence and secondly, even at the stage of trial the petitioner was suffering from insanity and could not be tried.

(6) Even though the accused is not required to prove his defence to the hilt, however, if his plea is considered plausible the same should be accepted and at least considered in the matter of awarding sentence. The plea of insanity taken in the circumstances of the case should be considered as one of the factors mitigating the offence and it would not be a case of rare of the rarest where death sentence should have been awarded.

(3) As far as the first two points are concerned, though in the written statement filed on behalf of the official respondents the facts alleged in the petition were not disputed specifically, however, the original record produced shows that Rule 22 of the Army Rules

was fully complied with and that the Brigadier who is Officer Commanding of a Brigade, a Competent Officer under section 125 of the Army Act, in fact passed an order that the petitioner be tried by the GCM. Thus, these two points do not need any further detailed discussion. It is not considered necessary to refer to the decision of the Delhi High Court in *R. S. Bhagat* v. *Union of India* (1), in detail to the effect that an order under section 125 of the Act was required to be passed in exercise of judicial discretion.

(4) The question of vires of Section 302 of the Indian Penal Code was subject matter of discussion by the Apex Court in *Jagmohan Singh* v. *State of Uttar Pradesh* (2), in which it has been held that the aforesaid provision is *intra vires*. In *Rajendra Prasad* v. *State of U.P.* (3), the Supreme Court made some observation on the decision in *Jagmohan Singh's* case (supra).

(5) Subsequently, after amendment of Section 354 (3) of the Code of Criminal Procedure the matter was again considered by the Supreme Court in *Bachan Singh's case* (supra) and the provision of Section 302, Indian Penal Code were held to be *intra vires*. An additional ground was also taken into consideration that after enforcement of Section 354 (3) of the Code of Criminal Procedure the Court is required to record reasons if death sentence is required to be imposed. Otherwise ordinarily life imprisonment is to be imposed on the person convicted under section 302 of the Indian Penal Code. It may be observed that prior to enforcement of Section 354 (3) of the Code of Criminal Procedure, penalty of death under section 302, Indian Penal Code, was the rule and if life imprisonment was required to be given, the Courts were required to record reasons. It would be useful to refer to some passages from the judgment of the Supreme Court in *Bachan Singh's* case (supra). Two questions were posed for determination by the Supreme Court :—

(i) Whether death penalty provided for the offence of murder in Section 302, Penal Code, is unconstitutional ?

(ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Section 354(3) of the Code of Criminal Procedure, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided, untrammelled discretion

(1) A.I.R. 1982 Delhi 191.
(2) (1973)2 S.C.R. 541.
(3) (1979)3 S.C.R. 646.

and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.

In para 141 the Supreme Court answered question No. 1 in negative.

(6) In para 132 of the judgment it was observed as under :—

"It is sufficient to say that the very fact that persons of reasons, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioner's argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware as we shall presently show they were of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent Reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-73 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code, is unreasonable and not in the public interest."

(7) The second question was also answered in the negative. Section 354 (3) of the Code of Criminal Procedure was held constitutionally valid. The following circumstances were held to be relevant, deserving great weight in the determination of sentence:—

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

(8) Subsequently, again the matter was considered by the Supreme Court in *Allauddin Mian and others Sharif Mian and another* v. *State of Bihar* (4). The ratio of the decision in *Bachan Singh's* case (supra) was approved and it was not considered appropriate to refer the case for re-consideration before a larger Bench. Learned counsel for the petitioner, after referring to Section 5 of the Code of Criminal Procedure (for short 'Cr.P.C.') has argued that the provisions contained in Cr.P.C. are not applicable to the trial of army personnel before the GCM. According to the counsel the provisions contained in Section 354 (3) of the Cr.P.C. would not be applicable to the GCM and there is no similar provision in the

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(4) 1989 3, 5 Court Cases 5.

Army Act or the Rules framed thereunder to be taken into consideration while trying an army personnel for the offence of murder. It is in this light that it has been argued that provisions of Section 302 of the Indian Penal Code should be held to be *ultra vires* as on trial by the GCM the petitioner was deprived of the beneficial provision of section 354 (3) of the Cr.P.C. This agrument also covers point No. 4 urged. We have given due consideration to this aspect of the matter and are of the firm view that section 302 of the Indian Penal Code cannot to be declared to be *ultra vires* as applicable to the army personnel before the GCM. The Supreme Court, as already observed above, has held that section 302, Indian Penal Code, is *intra vires* the Constitution. There is no question of arbitrariness or discrimination when an army personnel is exclusively tried by the GCM for the offence of murder under section 302, Indian Penal Code. A different procedure is prescribed to be followed by the GCM in the rules framed under the Army Act. Though section 354 (3) is contained in the Code of Criminal Procedure but the matter dealt therewith is not a procedural matter, but is a basic principle of criminology which is to be kept in view while trying an accused under section 302, Indian Penal Code. The provision of section 354 (3), Cr.P.C., are to be read into the provisions of section 302, Indian Penal Code, as has been observed by the Supreme Court in *Bachan Singh's* case, referred to above. That being the position, even the GCM was required to take into consideration the provision of section 354 (3) of the Cr.P.C. or the principle enunciated therein in the matter of awarding sentence to the accused under section 302 of the Indian Penal Code. Apart from that the Supreme Court having declared the law in the matter of awarding sentence of an accused under section 302 of the Indian Penal Code keeping in view the provisions of Section 354 (3) of the Cr.P.C., the same is applicable to all the Courts in the country including the GCM. This view further finds support from the judgment of Jammu and Kashmir High Court in *Ranbir Singh* v. *General Court Martial and another* (5). We fully agree with the observations as made in para 19 of the judgment which are reproduced below :—

> "It cannot be disputed that the law declared by the Supreme Court is binding on all courts within the territory of India under Art. 141 of the Constitution. However, in order to find out whether there has been any illegality, rationality or perversity in the instant case we are required to peep through the procedure adopted and find

(5) 1991 Crl. L.J. 2850.

out as to whether the Court Martial was properly advised regarding the points of law with respect to the awarding of the death sentence. Rule 105 of the Army Rules deals with the powers and duties of the Judge Advocate who is required to be careful in maintaining an entirely impartial position during the trial before the court martial. The Judge Advocate is also under an obligation to provide his opinion both to the prosecutor and to the accused and any question of law relating to the charge or trial whether he is in or out of court. He is responsible for informing the court of any infirmity or irregularity in the proceedings. Whether consulted or not, he is required to inform the convening officer and the court of any infirmity or defect in the charge or the constitution of the Court and shall give his advice on any matter before the Court. At the conclusion of the case he is to sum up the evidence and give his opinion upon the legal bearings of the case before the court proceeds to deliberate upon its finding. The detailed summing up address of the Judge Advocate in the instant case, Ex. U. attached with the proceedings of the GCM shows that he has advised the presiding officer of the Court about the facts and circumstances of the case but failed in his duties to guide the court properly regarding the sentence provided for the offence of murder in view of the judgments of the Supreme Court which were binding and were law in the country."

(9) In view of the discussion as above, it is held that the provision of section 302 of the Indian Penal Code are *intra vires* of the provision of the Constitution as to be applied to the army personnel to be tried by the GCM and the principles laid down in section 354 (3) of the Cr.P.C. are also to be applied to the trials before the GCM in the matter of awarding sentence for offence committed under section 302 of the Indian Penal Code by army personnel.

(10) Points Nos. 5 and 6 relate to merits of the case. The question of insanity of the petitioner affecting the nature of the offence committed or vitiating the trial on that account are to be separately dealt with. As far as the question of evidence vitiating the trial on that account is concerned, it was after conclusion of the prosecution and the defence evidence that attention of the GCM was drawn to the plausible defence of insanity having been taken that the petitioner was referred to Medical Board for check-up. The statements of the two doctors were thus recorded who

medically examined the petitioner and opined that the petitioner was not suffering from insanity during the trial. The evidence is of Major P. Sarkar CW 1 and Dr. Ravinder Mohan Sharma CW 2. Apart from the above, the proceedings of the trial further show that the petitioner used to be medically examined in the morning on the dates of hearing and found fit. This aspect thus does not need any further discussion. During the trial the accused was not suffering from any mental ailment and the trial is not vitiated.

(11) With respect to the plea of insanity taken by the accused in his statement recorded after close of the prosecution evidence, Colonel M. C. Kohli DW 1 was produced. From perusal of his statement and the evidence of two doctors referred to above, it cannot be said with certainty that the petitioner was suffering from insanity as such on the date, the offence was committed. Broad facts which have come from the evidence aforesaid are that in 1983 the petitioner had suffered some type of illness and had fainted (fit). On that account he was hospitalised for few months and was also downgraded from "A" category to 'BEE' category. Subsequently there was no medical examination of the petitioner conducted. From the evidence of Col. M. C. Kohli DW1 it transpired that at times the petitioner was not appearing to be absolutely normal which could be on account of domestic problems. This was also one of the reasons recorded in the history-sheet of the illness given when the petitioner was hospitalised. It is in this state of evidence that the learned counsel for the petitioner rightly did not challenge the conviction of the petitioner but argued that the condition of the petitioner as it was could be taken into consideration in the matter of awarding sentence i.e. it might be a case of mental imbalance at the time of commission of offence which should be taken into consideration as a valid ground for mitigating the offence requiring a lesser sentence. Different matters deserving consideration in the matter of determination of sentence have already been reproduced from the case of *Bachan Singh's* case and particular reference may be made to point No. 7. It is in this context that reference may also be made to other judicial pronouncements where the death sentence was converted into life imprisonment. These cases have been relied upon by counsel for the petitioner. The Supreme Court in *Namu Ram Bora* v. *The State of Assam and Nagaland* (6), converted death sentence into life imprisonment of the accused who had committed the murder of his own wife and two daughters in certain

(6) A.I.R. 1975 S.C. 762.

stage of imbalance of mind there being no particular motive and that the act was not pre-planned. The accused had taken the plea in his statement recorded under section 342 of the Cr.P.C. (old) that he was suffering from mental disorder after a dog-bite. Holding that his claim may be correct or not, the Supreme Court thought that the triple murder was committed as a result of some mental imbalance. *In Srirangan* v. *State of Tamil Nadu,* (7) the death sentence was converted into life imprisonment in the case of triple murder on the ground that the accused was young and plea of insanity was also taken. Final reference may be made again to the decision of Jammu and Kashmir High Court in *Ranbir Singh's* case (supra) where the death sentence was commuted to life imprisonment in the case of an army personnel who was found guilty under section 302 of the Indian Penal Code by the GCM.

(12) The address prepared by the Judge Advocate General for the members of the GCM has been perused in the present case. There is no indication therein that the GCM was advised on the basis of the provision of section 354 (3) of the Cr.P.C. or the principle of penology contained therein. The attention of the GCM was thus not adverted to the basic principles of penology in the matter of determining sentence for commission of offence under section 302 of the Indian Penal Code and thus the order of sentence delivered by the GCM on the petitioner cannot be sustained in law.

(13) The prosecution in order to establish the charge framed under section 302, Indian Penal Code, relied upon the direct evidence of one of the eye-witnesses as well as extra-judicial confession recorded by two army personnel; PW 18 Major K. S. Jaswal and Lt. K. J. S. Cheema (P.W. 10). Since there was direct evidence of commission of crime, the conviction of the petitioner was rightly recorded by the GCM under section 302 of the Indian Penal Code and the same has thus not been questioned during arguments. With respect to the evidence of extra-judicial confession it has been argued that the same could not be taken on its face value. Immediately after the occurrence the petitioner was taken into custody by the military authorities and throughout remained therein. In such circumstances the extra-judicial confession recorded could not be considered as voluntary, moreso when the accused had no chance to meet his relative during all this period muchless any other independent person. There is force in this contention. No doubt the

(7) A.I.R. 1978 S.C. 274.

two officers who recorded the extra-judicial confession were higher in rank than the petitioner and should be classified as independent witnesses, however, there is doubt in respect of recording of the second extra-judicial confession as sometimes the accused himself wrote part of it and the remaining portion was written by the officer concerned. It is not clear from the record as to why it was so done. A vague suggestion was put forth that at times the accused himself wanted to write something and he was permitted to do so. The argument of the counsel for the petitioner deserves weight that if the extra-judicial confession had been voluntarily recorded and the petitioner himself had started writing his name and particulars, there was no reason why he could not complete the same. Evidence of extra-judicial confession, as is in the present case to the extent of motive is concerned, cannot be relied upon in the absence of any corroboration. The motive suggested in these extra-judicial confessions is only to the effect that one of the deceased had given punishment of frog-jumping to the petitioner which was resented or that the aforesaid officer sent for the petitioner while he was lying naked. The aforesaid motive, even if proved, is not considered sufficient for committing the murder of two officers. It may be that on account of mental imbalance the accused committed the crime and thus this would not be a case of rare of the rarest where death penalty should be awarded. The contention of counsel for the respondent that army is a disciplined force and if a junior officer commits murder of his superiors whom he is supposed to guard, the extreme penalty of death was rightly imposed. This contention again cannot be accepted. If the basic principles of penalogy in the matter of determining sentence are to be taken into consideration, not only that the nature of the crime but the antecedents of the criminal are also to be taken into consideration apart from other facts and circumstances such as motive for the crime. Taking into consideration overall assessment of the case we are of the opinion that imposition of death sentence was not called for in the facts and circumstances of the present case.

For the reasons recorded above, this writ petition is allowed. The order of sentence passed by the GCM Annexure P.3, is modified and the sentence of death is converted into imprisonment for life.

R.N.R.