

Dawdling on Clemency: A Ground for Commuting Death Penalty in India

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Abstract

The constitutional framework in India provides that a convict after being awarded the death penalty, may, after exhausting certain judicial remedies, approach the President or the Governor of a State, to exercise their power of clemency to grant pardons and reprieves. The courts in India have chosen to rule in favour of the convicted persons whose mercy petitions have been rejected by the President by commuting their death sentences, on the ground that there has been a delay in rejection of their clemency petition. This paper argues that the courts cannot intervene solely on the ground of unexplained delay by the intervention must be based on some additional 'supervening circumstances'.

Keywords: Death penalty, inordinate delay, supervening circumstances, clemency, mercy petition.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

- Justice Potter Stewart of the US Supreme Court in *Furman vs Georgia*¹

Indian Criminal Law: 'Life Imprisonment, is the Rule'

As in other jurisdictions, the criminal law in India attempts a balance between the 'social interests' and 'individual interests'.² Consequently, the legislature must walk the tightrope of ensuring respect for human rights and freedoms while criminalising unacceptable human conduct.³ In India, the Indian Penal Code, 1860⁴ (IPC) operates currently as the source of primary and substantive criminal law. Death penalty as a punishment for certain grave offences, is retained in India under the IPC and some other statutes. However, life imprisonment is also provided as an alternative means of punishment. Under the Indian criminal law, "life imprisonment is the rule and death penalty the exception."⁵ Under the Indian Code of Criminal Procedure, 1973 (Cr.P.C.), while awarding death penalty, 'specific reasons' have to be mentioned in the judgment. However, on account of the lack of statutory provisions or

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¹ *Furman vs Georgia* 408 US 238 (1972).

² K.I. Vibhute, *PSA Pillai's Criminal Law* (Lexis Nexis 2014) Ch. 1.

³ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2009) Ch. 3.

⁴ Act 45 of 1860. It came into force on Jan. 2, 1862. It was drafted by Thomas Babington Macaulay and others- John Macpherson Macleod, George William Anderson and F Millett.

⁵ K.I. Vibhute, 'Choice Between 'Death' and 'Life' for Convicts: Supreme Court of India's Vacillation Sans Norms', 59 JILI (2017) 221, 221.

guidelines, “the death sentence jurisprudence has become ‘judge-centric’ rather than ‘principle-centric’.”⁶

Death Penalty: Legislative Framework

The Supreme Court of India in *Bachan Singh v. State of Punjab*⁷, while relying on the 35th Report of the Law Commission of India⁸, upheld the constitutional validity of the death penalty only when applied as an exceptional penalty in the *rarest of rare* cases. A position which was reiterated by the court in a few other cases.⁹ However, there is not a single offence under the IPC that is subjected to mandatory death sentence. There various provisions under the Indian Penal Code, 1860 which provide for death penalty as a punishment are:

Aggravated Murder: Murder is punishable by death under Section 302, IPC.

Kidnapping not resulting in Death: Section 364A, IPC punishes the offence of kidnapping or detaining of an individual with death, if the kidnapper threatens to kill or harm the victim, in cases where there is a possibility of death or harm to the victim by the conduct of the kidnapper, or if the victim is actually harmed. Further, kidnapping for ransom in which the victim is killed is punishable by death penalty.¹⁰

Murder in the course of committing an Armed Robbery: Under Section 396, IPC, if any member of a group commits murder in the course of committing an armed robbery, death penalty can be awarded to all members of the group.

Rape not Resulting in Death: Section 376A, IPC, incorporated under the Criminal Law (Amendment) Act, 2013, provides for the death penalty, where a person, who in the course of a sexual assault inflicts injury that causes the victim to die or to be left in a “persistent vegetative state”. Repeat offenders of gang rape are also punishable by death.¹¹

Treason: Treason has always been considered to be one of the gravest offences justifying the imposition of death penalty. Under Section 121, IPC, waging or attempting to wage war against the government, and under Section 132, IPC, assisting officers, soldiers, or members of the Navy, Army, or Air Forces in committing mutiny, are punishable by death penalty.

Criminal Conspiracy and Attempt to Murder: Being a party to a criminal conspiracy to commit a capital offence is punishable by death under Section 120B, IPC. Further, attempt to murder by those sentenced to life imprisonment is punishable by death in case the attempt results in harm to the victim.¹²

Assisting children or disabled to commit suicide: Assisting individuals who are under the age of 18, mentally ill, mentally disabled, or intoxicated, in committing suicide is punishable by death penalty under Section 305, IPC.

⁶ *Ibid.*

⁷ *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684.

⁸ Law Commission of India, ‘Mode of Execution of Death Sentence and Incidental Matters’ (Report No. 187, October 2003) <<http://lawcommissionofindia.nic.in/reports/187th%20report.pdf>> accessed 26 Dec. 2020.

⁹ *Machhi Singh v. State of Punjab*, (1983) 3 SCC 470.

¹⁰ Indian Penal Code, 1960, section 364A.

¹¹ Criminal Law (Amendment) Act, 2013, section 9. The horrific and brutal gang-rape and murder of a 23-year-old woman in Delhi, India, in December 2012, resulted in country wide protests, mooting for harsher punishments for rape. Consequently, the Criminal Law (Amendment) Act, 2013 was enacted which incorporated the new Section 376D, IPC, where punishment for gang rape is rigorous imprisonment of 20 years which may extend to life imprisonment, which is imprisonment for the remainder of natural life of that person.

¹² Indian Penal Code, 1960, section 307.

Besides the IPC, there are various other laws and statutes in India, which also prescribe the death penalty, including, the Unlawful Activities (Prevention) Act, 1967 (sections 10 & 16)¹³; organized crimes under various State Acts of Maharashtra, Karnataka, Andhra Pradesh and Gujarat¹⁴; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (section 3(2)(i)) etc.

These offences/provisions vest discretion in the courts to opt either of the two sentences, death or life imprisonment. The court is, however, required to record 'special reasons' for imposing death sentence, in preference to the sentence of life imprisonment, and to get it confirmed from the high court to which it is subordinate.¹⁵

Death Row Cases: The Executive Power of Clemency

The President of India and the Governor of a State are vested with the constitutional power to pardon or commute sentence, including death sentence, of any convict.¹⁶ This power of clemency bestowed by the Constitution on the President and the Governor of a State is exclusive and absolute. It cannot be curtailed by any statutory provisions of the CrPC (sections 432, 433, 433A), the Prison Acts or rules. However, this power of the President or Governor is to be exercised *reasonably and on the advice of the respective council of ministers*.¹⁷ Accordingly, "the manner of the exercise of the power and the order rejecting mercy petition of a convict can be challenged, *inter alia*, on the ground that the President/Governor has not applied his mind or not considered all the relevant materials or considered irrelevant materials, influenced by some political or extraneous considerations, or exercised his powers arbitrarily."¹⁸ However, there is limited judicial review on the exercise of the constitutional power¹⁹ as the judiciary only intervenes in cases where the exercise of power "lacks due care and diligence or has become whimsical."²⁰ Excessive and unwarranted delay in disposal of mercy petition by the President or Governor and the resultant delay in execution of death sentence becomes a relevant factor in commuting death sentence to life imprisonment.²¹

¹³ See generally Shruti Bedi, *Indian Counter Terrorism Law* (Lexis Nexis 2016). The Unlawful Activities (Prevention) Act, 1967 punishes the offences of unlawful activities and terrorism.

¹⁴ Maharashtra Control of Organised Crime Act 1999, section 3(1)(i); Karnataka Control of Organised Crime Act 2000, section 3(1)(i); Andhra Pradesh Control of Organised Crime Act 2001, section 3(1)(i); Gujarat Control of Terrorism and Organised Crime Act, 2015, section 3(1)(i).

¹⁵ Vibhute (2014), *supra*.

¹⁶ The Constitution of India 1950, arts. 72 and 161.

¹⁷ See *Maru Ram v. Union of India*, (1981) 1 SCC 107; *State (NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121; *Ramraj @ Nabho @ Bhinu v. State of Chhattisgarh*, (2010) 1 SCC 573; *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1. [Emphasis mine].

¹⁸ Vibhute (2017), *supra*.

¹⁹ See *Epuru Sudhakar v. Government of Andhra Pradesh*, (2006) 8 SCC 161; *Narayan Dutt v. State of Punjab*, (2011) 4 SCC 353.

²⁰ *Shatrughan Chauhan* (2014), *supra*.

²¹ See *Vivian Rodrick v. State of West Bengal*, (1971) 1 SCC 468; *State of Uttar Pradesh v. Paras Nath Singh*, AIR 1973 SC 1973; *N. Sreeramulu v. State of Uttar Pradesh*, (1974) 3 SCC 314; *S. Parthasarathi v. State of Andhra Pradesh*, (1974) 3 SCC 376; *Ragubir Singh v. State of Haryana*, (1975) 3 SCC 37; *Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443; *Chawala v. State of Haryana*, (1974) 4 SCC 579; *Joseph Peter v. Goa Daman and Diu*, (1977) 3 SCC 280; *State of Uttar Pradesh v. Sugher Singh*, (1978) 1 SCC 178; *State of Uttar Pradesh v. Lalla Singh*, (1978) 1 SCC 142; *Sadhu Singh v. State of Uttar Pradesh*, (1978) 4 SCC 428; *Bhagwan Bux Singh v. State of Uttar Pradesh*, (1978) 1 SCC 214; *Rajendra Prasad v. State of Uttar Pradesh*, (1979) 3 SCC 646; *State of Uttar Pradesh v. Sahai*, (1981) 3 SCC 635; *T.V. Vatheeswaran v. State of Tamil Nadu*, 1984 Supp SCC 648; *Javed Ahmed v. State of Maharashtra*, (1985) 1 SCC 275; *Triveniben v. State of Gujarat*, (1986) 4 SCC 574. But see, *Rishideo v. State of Uttar Pradesh*, AIR 1955 SC 331; *Bharawnd Mepadna v. State of Bombay*, AIR 1960 SC 289; *Nachiar Singh v. State of Punjab*,

While the matter is pending before the courts for a final decision, the executive process for the commutation of a death sentence can be initiated.²² Where the Supreme Court finally upholds the death sentence or dismisses the special leave petition, it is the duty of the Superintendent of the jail to inform the convicted prisoner of the same.²³ Thereafter, the convict is allowed a period of seven days to submit a mercy petition to the Governor (in case of a State), or the President (in case of a Union Territory).²⁴ In case the mercy petition is rejected by the Governor, it is forwarded to the Secretary, Ministry of Home Affairs ('MHA'), Government of India.²⁵

The President after examining the case on its merits²⁶, gives his decision, which is non-justiciable, even if no reason is given.²⁷ The power and the procedure to exercise this power are carried out at the discretion of the executive. The Court has refused to spell out any guidelines for the exercise of this power as it has held the power under Article 72 to be of the "widest amplitude".²⁸

Delay in Execution of Death Penalty: Violating Human Dignity

Under Article 21²⁹ of the Indian Constitution, the procedure established by law, depriving life or personal liberty of a person, has to be fair and just. It cannot be fanciful, capricious, oppressive, or arbitrary.³⁰ Human dignity, available to all persons in India³¹, has been accorded an extremely high value under article 21, read with articles 14 and 19. This obligates the state not to incarcerate except under law which is fair, just and reasonable in its procedural essence.³² Accordingly, the question arises as to whether death-row convicts have the right to be treated as human beings till they are put to gallows. Do they cease to be human beings' *sans* human

(1975) 3 SCC 266; *Maghar Singh v. State of Punjab*, (1975) 4 SCC 234; *Lajar Mashi v. State of Uttar Pradesh*, (1976) 1 SCC 806; *State of Maharashtra v. Champalal*, (1981) 3 SCC 610; *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253; *Shatrughan Chauhan v. Union of India*, supra; *Ajay Kumar Pal v. Union of India*, (2014) 13 SCALE 762.

Delayed execution of death sentence is presumed to be dehumanising in nature [*Shatrughan Chauhan v. Union of India*, supra; *V Sriharan @ Murugan v. Union of India*, (2014) 4 SCC 242].

Delay in execution of death sentence, not caused at the instance of the convict himself, renders the process of execution of death sentence arbitrary, whimsical, capricious and, therefore, becomes inexecutable. See K.I. Vibhute, 'Delay in execution of death sentence as an extenuating factor and the Supreme Court of India: Jurisprudence and jurists' prudence' (1993) 35 *Journal of the Indian Law Institute* 122. In addition to the cases discussed in the cited paper also see, *Jagdish v. State of Madhya Pradesh*, (2009) 9 SCC 495; *Mahendra Nath Das v. Union of India*, (2013) 6 SCC 253; *Shatrughan Chauhan* supra; *Ajay Kumar Pal v. Union of India*, (2014) 13 SCALE 762.

²² *In re Maddela Yerra Channugadu*, AIR 1954 Mad 911.

²³ *Devender Pal Singh Bhullar v. State (NCT of Delhi)*, (2013) 6 SCC 195, [23].

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Kehar Singh v. Union of India*, (1989) 1 SCC 20, [11].

²⁷ *G. Krishta Goud v. State of A.P.*, (1976) 1 SCC 157; *Maru Ram v. Union of India*, (1981) 1 SCC 107.

²⁸ *Kehar Singh v. State (Delhi Administration)*, (1988) 3 SCC 609, [11].

²⁹ Constitution of India, 1950, Art. 21 - Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

³⁰ See *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Charan Lai Sahu v. Union of India*, (1990) 1 SCC 613.

³¹ Shruti Bedi & Sebastien Lafrance, 'The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada' in S. Khurshid, L. Malik & Y.P. Singh (eds.) *The Supreme Court and the Constitution* (Wolters Kluwer 2020) 67.

³² *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360.

dignity during incarceration and are thereby justifiably denied freedoms or rights of humanity, or human dignity?³³

Inordinate delay in the execution of the death penalty has often been a major cause of concern especially in the well-known cases such as that of Mumbai terror (26/11) attack convict Ajmal Kasab³⁴, Parliament blast convict Afzal Guru³⁵, and the recent 2012 Delhi gang-rape case³⁶. The procedure under the Indian law usually results in a considerable lapse of time between the imposition of death sentence by a sessions court and the final acceptance or rejection of the mercy petition by the President/Governor. This is on account of the requisite confirmation of death sentence by the high court, permissible appeals therefrom to the Supreme Court and thereafter mercy petition by the convict to the President/Governor. During this period, the sentence of death vividly hangs on head of the convict as he undergoes the horrific agony and anxiety.

In *T.V. Vatheeswaran v. State of Tamil Nadu*³⁷ a Supreme Court division bench of O. Chinnappa Reddy and R.B. Misra JJ. was asked to examine the question as to whether delay in the execution of death sentence offends the constitutional guarantee recognised in article 21 of the Constitution and thereby entitles a person under death sentence to claim its replacement by the sentence of life imprisonment. The court while relying on the minority opinion of Lord Scarman and Lord Brightman of the Privy Council, in *Noel Riley v. A.G. of Jamaica*³⁸, opined:

It is of course true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual are vividly described in the evidence of the effect of the delay...

While awaiting the outcome of the mercy petition, the prisoner on death row is subjected to a “lingering death”, which is something more than the mere extinguishment of life.”³⁹ Prolonged detention, awaiting execution of death sentence, has a dehumanising impact on the prisoner.⁴⁰ The “brooding horror of hanging”⁴¹ tortures the prisoner, daily. Resultantly, the “dehumanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way”.⁴² This

³³ K.I. Vibhute, ‘Right to Human Dignity of Convict under Shadow of Death and Freedoms Behind the Bars in India: A Reflective Perception’ (2016) 58 JILI 15, 23.

³⁴ Sahil Makkar, ‘Ajmal Kasab, lone surviving 26/11 terrorist, hanged’ (*Mint* 2012) <<https://www.livemint.com/Politics/36o0Bof48lPfJawdp08lQl/Ajmal-Kasab-lone-surviving-2611-terrorist-hanged.html>> accessed 26 Dec. 2020.

³⁵ BJP, ‘Afzal Guru should have been executed much earlier’ (*The Economic Times* 2013) <<https://economictimes.indiatimes.com/news/politics-and-nation/afzal-guru-should-have-been-executed-much-earlier-bjp/articleshow/18415041.cms?from=mdr>> accessed 27 Dec. 2020.

³⁶ Maneesh Chibber, ‘Why it’s wrong to question ‘delay’ in hanging of convicts in 2012 Delhi gangrape-murder case’ (*The Print* 2020) <<https://theprint.in/opinion/why-its-wrong-to-question-delay-in-hanging-of-convicts-in-2012-delhi-gangrape-murder-case/352823/>> accessed 27 Dec. 2020.

³⁷ *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68.

³⁸ *Noel Riley v. A.G. of Jamaica*, (1982) 3 W.L.R. 557 (569-70) (P.C.).

³⁹ S.B. Sinha, ‘To Kill Or Not To Kill: The Unending Conundrum’ (2012) 24(1) *National Law School of India Review*, 24.

⁴⁰ *Ibid.*

⁴¹ *Ediga Anamma v. State of Andhra Pradesh*, (1974) 4 SCC 443.

⁴² *Vatheeswaran* (1983), *supra*.

in turn offends the constitutional guarantee under Article 21 of the Indian Constitution, that no person shall be deprived of his life or personal liberty except according to procedure established by law.⁴³

Vatheeswaran referred to three cases⁴⁴ in which delay in execution of death sentence for two to three and half years was held adequate by the Supreme Court to replace the sentences of death by imprisonment for life, and resultantly held that the delay exceeding two years in the execution of the sentence of death is sufficient to quash the sentence of death and to substitute it by imprisonment for life. This case “sets a premise that carrying out a death sentence per se is different from its execution after an inordinate delay.”⁴⁵ While the former is a sentence authorised by law, the latter is not.

The law pertaining to death-row convicts currently flows from the Supreme Court’s decisions in *Shatrughan Chauhan v. Union of India*⁴⁶ and *Epuru Sudhakar v. Government of AP*⁴⁷. While *Shatrughan Chauhan* lays down guidelines to protect the right to life and personal liberty of death-row prisoners, as enshrined under Article 21 of the Constitution, *Epuru Sudhakar* provides the Supreme Court with limited powers to review mercy petitions rejected by the President.⁴⁸

“The legal basis for treating inordinate or undue delay in disposal of mercy petition by the President/Governor as a ground for commuting the death sentence to life imprisonment is that the pain-mental, physical and emotional, caused by inordinate delay in disposal of his petition goes against the spirit of article 21 of the Constitution, which inheres a right in every prisoner till his last breath and puts the higher judiciary under the constitutional obligation to protect fundamental right to life and personal liberty of a person even when the noose is being tied on his neck.”⁴⁹ The voice of justice and fair play under Article 21 stands like a “sentinel over human misery, degradation and oppression”. This “reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence.”⁵⁰

Delay as a Ground for Commutation: Judicial Review of Clemency

A few cases must be analysed to deal with the question of delay as a ground for commutation of death penalty. Two decisions of *Devender Pal Singh Bhullar v. State (NCT of Delhi)*⁵¹ and *Mahendra Nath Das v. Union of India*⁵² are delivered by Justice G.S. Singhvi in a division bench which accordingly reflects a consistency in the reasoning.

The petitioner in *Bhullar*, had been held responsible for the death of the Senior Superintendent of Police of Chandigarh, through the use of remote-controlled bombs. Nine persons, had been killed in the attack on the then President of the Youth Congress, by employing forty kilograms of RDX. The petitioner was held guilty under Sections 419, 420, 468, and 471, IPC; Sections

⁴³ Ibid.

⁴⁴ *Eidga Anamma* (1974), supra; *Bhagwan Bux* (1978), supra; and *Sadhu Singh* (1978), supra.

⁴⁵ Vibhute (1993), supra.

⁴⁶ *Shatrughan Chauhan* (2014), supra.

⁴⁷ *Epuru Sudhakar* (2006), supra.

⁴⁸ Tanaya Thakur & Amit Kumar, ‘Delay in Execution of Death Penalty: Need for a balance’ (*Bar and Bench* 2020) <<https://www.barandbench.com/columns/delay-in-execution-of-death-penalty-need-for-a-balance>> accessed 27 Dec. 2020.

⁴⁹ *Sher Singh v. State of Punjab*, (1983) 2 SCC 344; *Triveniben v. State of Gujarat*, (1986) 4 SCC 574. Also see Vibhute (2016), supra, 32.

⁵⁰ *Sher Singh* (1983), supra, [20].

⁵¹ *Bhullar* (2013), supra.

⁵² *M.N. Das* (2013), supra, [3-6].

2, 3 and 4, Terrorist and Disruptive Activities Act, 1987 (TADA); and Section 12 of the Passports Act, 1967. The review petition had been dismissed by the Supreme Court.

The petitioner in *M.N. Das*, was undergoing his sentence of life imprisonment for the murder of one Rajen Das, and while he was out on bail, he killed another person. He was then sentenced to death by the Sessions Court which was subsequently confirmed by the High Court. On appeal the Supreme Court noted the aggravating circumstances of the manner of murder, which were, blows to the body of the victim with a sword, amputating his hand and beheading him, that too when he had already been sentenced to life imprisonment. These factors left the Court with no choice but to impose the death penalty. Delivered 20 days after *Bhullar*, *M.N. Das* also grappled with the delay of the executive in responding to the petitioners' clemency petitions.

After these two matters, the Chief Justice of India constituted a larger bench in *Shatrughan Chauhan*⁵³, to deal with the question of delay as a ground for commutation of the death penalty. This case dealt with twelve different writ petitions. While eleven of the twelve writs petitions dealt with pleas for commutation of death sentences, one petition was a solitary plea by the People's Union for Democratic Rights with a prayer to set guidelines for dealing with similar mercy petitions. There was one plea for commutation solely on the ground of mental illness, one on grounds of delay in hearing the clemency petition as well as mental illness, one on grounds of delay and solitary confinement, while the others were solely on the basis of delay by the executive in deciding the mercy petitions.

The contentions in the *Bhullar* case were significantly based on the understanding of 'due process' under the Indian Constitution. Articles 14, 19 and 21 of the Indian Constitution formulate the tripartite 'golden triangle' test, that every executive and legislative decision must pass, after the *Maneka Gandhi v. Union of India*⁵⁴ decision. This test ensures that the State action is just, fair and reasonable, and is in consonance with the standards of liberty, dignity and freedom guaranteed under Part III of the Constitution. Resultantly, the inordinate delay in the executive's decision to reject the petitioner's mercy petition offended these established principles. In the present matter, the inhumane and degrading treatment of the petitioner on account of the delay, had left the petitioner mentally ill. Moreover, the petitioner had prayed for commutation on sympathetic grounds as circumstances had drastically changed from the time the offence was committed. In *M.N. Das*. It was argued that a delay of twelve years was sufficient reason for the court to exercise its powers under Article 136 and to commute the death penalty.

The Terror Exception

In *Devender Pal Singh Bhullar*, the Supreme Court was faced with the question as to whether terrorists, who habitually commit grave crimes, deserve such a constitutional protection against undue delayed rejection of their mercy petition by the President/Governor and whether it is obligatory on part the constitutional courts to consider it as a supervening circumstance for commuting their death sentence to life imprisonment. The court ruled that terrorists convicted under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (and other similar statutes) do not deserve any sympathy and the question of considering the delayed rejection of their mercy petition as a supervening factor, therefore, does not arise. Justice Singhvi speaking for the court held,

67. We are also of the view that the rule enunciated in *Sher Singh case* [(1983) 2 SCC 344], *Triveniben case* [(1989) 1 SCC 678] and some other judgments that long delay may be one of the grounds for commutation of the sentence of death into life

⁵³ *Shatrughan Chauhan* (2014), supra.

⁵⁴ *Maneka Gandhi* (1978), supra.

imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes... It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights.

The *Triveniben*⁵⁵ rule, is by far the most definitive judicial dictum on 'delay' matters, although judicial pronouncements subsequently have deviated from this position. The rule, simply put, is that delay must be seen in light of all circumstances to constitute a ground for commutation of the death sentence. *Bhullar* carved out an exception to the *Triveniben* rule, which can be referred to as the 'terror exception'. It was felt that though the *Triveniben* rule, reflected the correct position of law, it did not apply to offences where conviction was under the Terrorist and Disruptive Activities (Prevention) Act, 1987 or related statutes, reason being that in cases of terrorist activities there was a higher threshold of culpability than other offences.⁵⁶ Further, the Court placed an additional burden on the petitioner to show that the physical or mental illness due to detention was of such a degree that it rendered the death sentence as cruel, inhumane and degrading, and therefore, non-executable.⁵⁷

Thereafter, in *M.N. Das*, the existence of the rule that an inordinate delay will, give rise to a cause of action, was acknowledged but it was clarified that the same must be coupled with other circumstances mandating commutation. The court held that the delay of twelve years, coupled with the rejection of clemency petition by the President being *ultra vires*, jointly constituted grounds for vacating the death sentence.

However, subsequently, in *Shatrughan Chauhan*, a three-judge bench of the Supreme Court, of CJI, P. Sathasivam, Ranjan Gogoi and Shiva Kirti Singh JJ dealt with the *Bhullar* "terror exception". The court felt that the *Bhullar* dictum is *per incuriam*, erroneous, and there is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. It held:

78. Taking guidance from the above principles and in the light of the ratio enunciated in *Triveniben*, we are of the view that unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument of Mr Luthra, learned ASG that a distinction can be drawn between IPC and non-IPC offences since the nature of the offence is a relevant factor is liable to be rejected at the outset. In view of our conclusion, we are unable to share the views expressed in *Devender Pal Singh Bhullar*.

Resultantly, the convict's family filed a curative petition in *Navneet Kaur v. State (NCT of Delhi)* before the Supreme Court on February 19, 2014.⁵⁸ The Court ordered a medical

⁵⁵ *Triveniben* (1989), supra.

⁵⁶ *Bhullar* (2013), supra, [8]. Terrorist offences have a demonstrative effect which has the tendency of dividing large sections of society and also induces the youth to join mindless militant campaigns in the name of religion or other objectives that can result in the death of many.

⁵⁷ *Bhullar* (2013), supra, [46].

⁵⁸ *Navneet Kaur v. State (NCT of Delhi)*, (2014) 7 SCC 264.

examination of Bhullar's health to determine his mental condition. After perusal of the medical report and in light of the dictum in *Shatrughan Chauhan*, the convict's death sentence was commuted to life imprisonment. Additionally, on the same basis the Supreme Court commuted the death sentences of Rajiv Gandhi's assassins on account of delay.⁵⁹

Shatrughan Chauhan, listed certain guidelines for the uniform implementation of the existing procedure. Under the larger umbrella of Article 21, the Court held that solitary confinement prior to the rejection of a mercy petition is unconstitutional; legal aid should be provided as a matter of right and the rejection of a mercy petition should be intimated to the nearest Legal Aid Clinic, the prisoner and his family members; the self-imposed guidelines of the Union Government should be implemented uniformly without delay; a minimum of fourteen days' notice should be given to the convict before execution; regular mental health evaluation of death row convicts should be undertaken; all documents pertaining to the case should be made available to the convict; facilitation of meeting between the convict and family prior to execution should be ensured; and there should be compulsory post-mortem after execution.⁶⁰

Delay and 'Supervening Circumstances': Grounds for Commutation

The question of delay as a ground for commutation of death sentences has arisen in numerous cases. However, on account of the conflicting decisions in *Vatheeswaran*, *Sher Singh v. State of Punjab*⁶¹ and *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*⁶², the Supreme Court felt that the issue ought to be referred to a constitution bench.⁶³ Consequently, the court's earlier final order in *Triveniben* has been the main source of law on the issue of delay as a ground for commutation of the death penalty:

Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in light of all circumstances of the case to decide whether the execution of the sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran* [...] stands overruled.⁶⁴

Triveniben might have been misconstrued to suggest that a delay in the disposal of a clemency petition automatically compels courts to commute the death sentence. However, this is not true as the above *ratio* of the judgment clarifies the position detailing the requisite elements of the power of the courts:

- i) the court may examine the nature of the delay;
- ii) the court may examine the circumstances that ensued after the imposition of the death sentence;
- iii) the court may not reopen the question of the guilt of the accused;
- iv) no fixed period can be prescribed to define the term 'delay';

⁵⁹ *Union of India v. V. Sriharan*, (2014) 11 SCC 1.

⁶⁰ *Shatrughan Chauhan* (2014), supra, [240].

⁶¹ *Sher Singh* (1983), supra.

⁶² *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra*, (1985) 1 SCC 275

⁶³ V.N. Shukla, *Constitution of India* (M.P. Singh eds., 4th edn., 2008) 406.

⁶⁴ *Triveniben* (1989), supra, [23].

v) the court must entertain the question of delay in light of all circumstances of the case.⁶⁵

Apart from delay, *Shatrughan Chauhan* considered four other ‘supervening circumstances’ as possible grounds for commutation: the convict was suffering from insanity, schizophrenia or mental illness; the judgments relied on by the Trial Court/High Court for coming to its sentencing decision being declared *per incuriam*; the convict was being kept in solitary confinement; and lapses in procedure.⁶⁶

Further in the recent case of *Union of India v. Dharam Pal*⁶⁷ the same issue of additional supervening circumstances had arisen. The respondent in this case had been convicted for the offence of rape and while he was out on bail, he killed five members of the family of the victim for which he was awarded the death sentence. His mercy petition was dismissed by the Governor and subsequently by the President after an unexplained and inordinate delay of 13 years and 5 months in deciding the mercy petition. The attending ‘supervening circumstances’ were that there was failure to produce the relevant documents regarding the respondent before the President for deciding the mercy petition⁶⁸, and that the respondent has undergone 18 years of illegal solitary confinement. The court after due consideration to the totality of facts and circumstances, allowed the commutation of the death sentence to life imprisonment.

Consequently, the principle is that although delay can give rise to a cause of action but it can never be the sole factor to commute death sentences. Delay must necessarily have resulted in consequential, fundamental change of circumstances or ‘supervening circumstances’ during the period of consideration of the clemency petition by the executive. Further, the courts should also take into account any signs of reform expressed by the convict or whether he shows any such potential to be reformed.⁶⁹

Conclusion

Conclusively it is significant to understand the outcome of the above discussion wherein the courts have endeavoured to stress on the importance of timely disposal of the mercy petitions by the executive. The power of clemency must be exercised with reasonableness and judiciously and within a reasonable frame of time. The power to grant pardon rests with the executive and it is ultimately the exercise of the power in a just manner, that will determine public approval.

This is not to say that delay will always lead to commutation of the death sentence. The power to commute death sentence is not a codified power but, it is in the exercise of the supervening powers of the court to do complete justice under Art. 142. Consequently, looking at only the impact of delay on the prisoner ‘alone’, is not in the interests of justice. The courts have to be aware of their role and functionality under the Indian Constitution and take care not to overstep the designated areas assigned to them. In their zeal to play a humanitarian role, they cannot usurp the power and role of other organs.⁷⁰

⁶⁵ Zubin Dash & Shashank Singh, ‘A Case Against Delay as a Ground for Commutation of Death Sentences’ (2014) 7 NUJS L. Rev. 321, 341.

⁶⁶ *Shatrughan Chauhan* (2014), supra, [24, 78].

⁶⁷ *Union of India v. Dharam Pal*, (2019) 15 SCC 388

⁶⁸ He had earlier been acquitted for the offence of rape which was not brought to the notice of the President.

⁶⁹ *Dharam Pal* (2019), supra, [20].

⁷⁰ To understand the limits of the exercise of the power of judicial review, see Shruti Bedi, ‘The Power of Judicial Review: Judicial Chutzpah or Judicial Desideratum’ in S. Khurshid, S. Luthra, L. Malik & S. Bedi *Judicial Review: Process, Powers and Problems* (Cambridge University Press, 2020) 285-288.

Delay *simpliciter* cannot be the sole factor in the commutation of the death sentence. It definitely represents a special category of cases deserving due consideration. However, it must be treated with due caution keeping in mind the *Triveniben* ruling.⁷¹

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