IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF SEPTEMBER, 2021

PRESENT

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

AND

THE HON'BLE MR. JUSTICE PRADEEP SINGH YERUR

WRIT PETITION NO.53944 OF 2016 (GM-RES)

BETWEEN:

B.A.UMESH
S/O.AJJAPPA REDDY
AGED ABOUT 45 YEARS
CTP NO.307, PRESENTLY
INCARCERATED IN BELGAUM
CENTRAL PRISON, BELGAUM
KARNATAKA - 591 108.

...PETITIONER

(BY DR.YUG MOHIT CHOUDHARY, ADVOCAE FOR
SRI JAGADEESHA B.N., ADVOCATE)

AND:

1. THE UNION OF INDIA
(REPRESENTED BY THE SECRETARY
TO THE MINISTRY OF HOME AFFAIRS)
JAISALMER HOUSE, 26
MANSINGH ROAD
NEW DELHI - 110 011.

2. THE STATE OF KARNATAKA
(REPRESENTED BY THE SECRETARY
TO THE MINISTRY OF HOME AFFAIRS)
VIDHANA SOUDHA

DR. B.R. AMBEDKAR VEEDI
BENGALURU – 560 001.

3. THE INSPECTOR GENERAL OF PRISONS
GOVERNMENT OF KARNATAKA
NO.4, SHESHADRI ROAD
BENGALURU – 560 009.

4. THE SUPERINTENDENT OF PRISON
CENTRAL PRISON BELGAM
HINDALAGA, BELGAUM
KARNATAKA - 591 108.

...RESPONDENTS

(BY SRI M.B. NARGUND, A.S.G. A/W
SMT.ANUPAMA HEGDE, C.G.C FOR R-1;
SRI G.V.SHASHI KUMAR, A.G.A FOR R-2 TO R-4)

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THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF CONSTITUTION OF INDIA PRAYING TO DIRECT THE RESPONDENTS TO PRODUCE MERCY FILES PERTAINING TO THE PETITIONER, ALL THE RELEVANT PAPERS AND CORRESPONDENCE PERTAINING TO THE PETITIONER'S MERCY PETITION AND COMMUTE THE DEATH SENTENCE OF PETITIONER TO IMPRISONMENT OF LIFE AND ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED ON 23.08.2021, COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, ***PRADEEP SINGH YERUR. J.***, MADE THE FOLLOWING:

O R D E R

The writ petitioner, a death row convict, has presented this writ petition under Articles 226 and 227 of the Constitution of India, challenging the executabiiity of his death sentence, pursuant to rejection of his mercy petition filed before His Excellency, the President of India and sought for the following reliefs:

> *"(A) Issue appropriate writs, orders or directions directing the Respondents to produce mercy files pertaining to the Petitioner, all the relevant papers and correspondence pertaining to the Petitioner's mercy petition, for the perusal of the Court since the Petitioner has been able to show a grave, and unexceptionable delay in such processes as undertaken by the Respondents.*
>
> *(B) Issue appropriate writs, orders or directions directing production of medical file of the Petitioner from prison from the date of his arrest.*
>
> *(C) Issue appropriate writs, orders or directions and in particular a writ of Declaration, declaring that the execution of the sentence of death on the Petitioner (as*

communicated through letter dated 15.5.2013 – F.No.14/1/2011-Judicial Cell, Annexure N hereto) pursuant to the rejection of his mercy petition by the office of the Hon'ble President of India is unconstitutional and bad in law.

(D) Issue appropriate writs, orders or directions commuting the death sentence of the Petitioner to imprisonment for life.

(E) Declare that the decision of the office of the Hon'ble President of India rejecting the mercy petition filed by the Petitioner is illegal, void and unenforceable;

(F) Declare that the decision of the office of the Hon'ble Governor of Karnataka rejecting the mercy petition filed by the Petitioner is illegal, void and unenforceable;

(G) Quash and set aside the order of President of India rejecting the mercy petition filed by the Petitioner;

(H) Quash and set aside the order of the Governor of Karnataka rejecting the mercy petition filed by the Petitioner;

(I) Grant inspection of the documents mentioned in (A) and (B) to the Petitioner

(J) Issue any such other writs, orders and directions as this Hon'ble Court deems fit in the

facts and circumstances of the case in the interest of justice and equity.

(K) and/or pass such other further Order/ Orders as your Lordships may deem fit or proper."

BRIEF FACT MATRIX OF THE CASE:

2. On 28.02.1998, Crime No.108/1998 came to be registered by Peenya Police for the offences punishable under Sections 376, 302 and 392 of the Indian Penal Code against the petitioner. On 02.03.1998, the petitioner was arrested in connection with Crime No.108/1998. Upon completion of investigation, a charge sheet came to be filed on 25.04.1998. On 26.10.2006, the Sessions Judge (VII Fast Track Court, Bengaluru) convicted the petitioner for the offences punishable under Sections 376, 302 and 392 IPC. On 27.10.2006, the Sessions Court passed a sentence of death against the petitioner. On 04.10.2007, the Division Bench of this Hon'ble Court confirmed the conviction order in Criminal Appeal No.2408/2006 and Criminal Reference No.3/2006. Since there was a difference of opinion as regards quantum of sentence,

matter was referred to a third Hon'ble Judge. On 18.02.2009, Justice S.R.Bannurmath supported the imposition of death sentence. On 01.02.2011, the Hon'ble Apex Court of India dismissed the petitioner's Criminal Appeal Nos.285-286/2011 and upheld the sentence of death penalty passed on petitioner.

2.1 On 08.02.2011, the petitioner's mother filed a mercy petition before His Excellency, the President of India, which came to be ultimately rejected on 12.05.2013. Parallelly, on 01.03.2011, petitioner filed a review against the judgment passed in Criminal Appeal Nos.285-286/2011 in Review Petition Nos.135-136/2011. On 09.03.2011, the petitioner filed a Writ Petition [WP(Crl.)No.52/2011] under Article 32 of the Constitution of India, praying for open court hearing in death sentence review petitions. In the said writ petition, an interim order of stay on execution of death sentence came to be passed till 18.03.2011, which continued till disposal of the petition on 02.09.2014. The prayer for an open court hearing in death penalty review petitions as prayed for in WP

No.52/2011 (which was connected with main petition [WP (Crl.)No.77/2014]) was allowed. Consequently, the petitioner got Review Petition Nos.135-136/2011 reopened. The said review petition was dismissed by the Hon'ble Apex Court on 03.10.2016. Pursuant to dismissal of his review petition before the Hon'ble Apex Court, the petitioner has approached this Hon'ble Court by filing W.P.No.53944/2016 on 03.10.2016 with a prayer for commutation of death sentence into life imprisonment.

3. We have heard Dr.Yug Mohit Chaudhary, learned counsel appearing on behalf of Sri Jagadeesha B.N. for petitioner and Sri M.B.Nargund, learned Additional Solicitor General of India along with Smt.Anupama Hegde, learned Central Government Counsel on behalf of respondent No.1 and Sri G.V.Shashikumar, learned Additional Government Advocate appearing on behalf of respondent Nos.2 to 4.

4. It is the vehement contention of Dr.Yug Mohit Chaudhary, learned counsel appearing for petitioner that his arguments are principally based on four main aspects,

namely, (1) Violation of Article 21 of the Constitution of India; (2) Delay in adjudicating the mercy petition; (3) Petitioner being put in solitary confinement and (4) Scope of judicial review.

ON VIOLATION OF ARTICLE 21 OF THE CONSTITUTION OF INDIA:

5. Learned counsel on the above aspects elaborately contends that there is a serious violation of Article 21 of the Constitution of India and the inherent fundamental rights is provided under the Constitution of India for its citizen as long as he lives. These rights are relevant and shall be applicable at all stages of judicial process commencing from trial, conviction, sentence and execution of the sentence. If any such right is violated then the citizen, petitioner herein, cannot be committed to death. He further contends that merely because the death sentence has been judicially confirmed and attained finality, it does not mean that in each and every case it can be allowed to be executed regardless of what has transpired since the confirmation of the death sentence. To buttress his arguments he relies on the case of ***SHER***

SINGH AND OTHERS vs. STATE OF PUNJAB reported in ***(1983) 2 SCC 344***.

ON DELAY IN ADJUDICATING THE MERCY PETITION:

6. Learned counsel further contends that there has been an excessive and unexplained delay of two years three months and seven days, that is 827 days, in adjudicating the mercy petition thereby causing unnecessary and avoidable pain, suffering, mental torment which is in violation of Article 21 of Constitution of India. He further contends that due to the inordinate delay by now the petitioner is a vegetable than a person and hanging vegetable is not a death penalty. He also contends that "as between funeral fire and mental worry it is the later which is more devastating for the funeral fire burns only the dead body and mental worry burns the living ones." He further contends that as per the Golden Rule Standard, the mercy petitions ought to be decided within a period of 90 days, whereas in the present case on hand, the delay is more than nine times the required standard

time within which the mercy petition ought to have been disposed of.

7. Learned counsel further contends that the delay was entirely avoidable and unexplained. On account of such delay, if the sentence were now to be executed, the petitioner would be made to suffer a double punishment – extended period of imprisonment and losing his precious life. He further contends that no part of the delay can be attributed to the petitioner, as the entire responsibility for the delay is on part of the respondent - Government. Learned counsel has given a chart of chunks of delay in his brief synopsis which is mentioned hereinbelow in a table:

Date		**Delay**
From 3.3.11 to 07.05.12	Central Govt. forwards mercy petition for consideration of Guv. – Cabinet recommendation sent to Guv.	1 year 2 months 5 days (432 days)
From 06.06.12 to 30.8.12	Mercy Petition rejected by Guv – Forwarding of Mercy Petition to MHA	2 months and 25days (85 days)
18.9.12 to 26.11.12	CG. seeks information from	3 months and 9 days

	State Govt. to certain documents – Supply of documents by SG to CG	
26.11.12 to 15.5.13	From receipt of documents to ultimate rejection of mercy petition	4 months 20 days
Total time	**2 years 3 months**	

ON PETITIONER BEING PUT IN SOLITARY CONFINEMENT:

8. Learned counsel contends that the petitioner has been kept in solitary confinement, contrary to Section 73 of the IPC, since imposition of death sentence by Sessions Court on 27.10.2006. He further contends that petitioner is kept in solitary confinement for more than ten years, which is against the expressed dicta of the Hon'ble Apex Court in the case of ***SUNIL BATRA vs. DELHI ADMINISTRATION*** reported in ***(1978) 4 SCC 494*** and in the case of ***SHATRUGHAN CHAUHAN AND OTHERS vs UNION OF INDIA*** reported in ***(2014) 3 SCC 1***. He further contends that in catena of decisions, the Hon'ble Apex Court has consistently held that the prisoner can be

shifted to solitary confinement once His Excellency, the Governor and His Excellency, the President of India dismiss his mercy petition. He further contends that in the present case the petitioner has been kept in statutory segregation in a 'High Security Cell', segregation, in effect and substance, amounts to solitary confinement. Mere change in form and description of nature of segregation cannot absolve the illegality committed by respondents-authorities. He further contends that the counter submitted by the respondents amounts to an admission of keeping the petitioner in solitary confinement.

9. Learned counsel further contends that petitioner's claim of being kept in solitary confinement is evidenced by the fact of letter dated 06.11.2011 addressed by Medical Officer, Prison Hospital, Belgaum to Chief Superintendent, Central Prison Belgaum, wherein, it was said that the petitioner has been kept in solitary confinement since 29.10.2006. This letter further states that complete record of petitioner's mental illness and his treatment is maintained in the prison. This vital and crucial information

was never communicated to His Excellency, the Governor and His Excellency, the President of India. He further contends that no records have been produced by the Government of Karnataka to show that the petitioner is not kept in solitary confinement or prove contrary the version put-forth and established by the petitioner based on records.

ON SCOPE OF JUDICIAL REVIEW:

10. It is contended by learned counsel that the consideration of mercy petition by the office of the President of India is vitiated since the executive authorities have not brought all relevant facts to the notice of His Excellency, the Governor or His Excellency, the President of India. He further contends that the judicial review of the orders under Articles 72 and 161 of the Constitution of India as reiterated in the case of ***SHATRUGHAN CHAUHAN*** stated *supra*, are permissible on the following grounds:

> *"a) If the Governor had been found to have exercised the power himself without being advised by the Government,*

b) If the Governor transgressed his jurisdiction exercising the said power,

c) If the Governor had passed the order without applying his mind,

d) The order of the Governor was mala fide, or

e) The order of the Governor was passed on extraneous considerations"

11. Learned counsel further contends that the ministry of Home Affairs, Government of India has laid down criterias while considering the mercy petition, which states (1) The Home Ministry before recommending any action on a petition should consider the sociological aspects of the cases; (2) Besides the legal aspect, the Ministry should examine humanist and compassionate grounds in each case; these grounds include the age of convict, his physical and mental condition. He further contends that these criteria have been included in the judgment of the Hon'ble Apex Court in the case of ***SHATRUGHAN CHAUHAN*** stated *supra*, wherein the Hon'ble Apex Court has laid down 7 point guidelines to be considered while dealing with mercy petition. The

guidelines mentioned below have not been considered in the present case on hand:

> *"i. Personality of the convict (such as age, sex or mental deficiency).*
> *ii. Has the appellate court express doubt on the reliability of evidence but has nevertheless decided on conviction?*
> *iii. Is it alleged that fresh evidence is obtainable, mainly with a view to seeing whether a fresh inquiry is justified?*
> *iv. Has the Court, on appeal, enhanced the sentence?*
> *v. Is there any difference of opinion in the Bench of High Court judges necessitating reference to a third judge?*
> *vi. Was the evidence duly considered in fixing responsibility, if it was a gang murder case?*
> *vii. Were there long delays in the investigation and the trial?"*

12. Learned counsel further contends apart from conveniently ignoring the guidelines laid down by the Hon'ble Apex Court, the executive authorities have failed to consider the petitioner's mental condition, wherein even

according to the Doctor of the State Government the petitioner has been diagnosed with depression and psychosis and that he has been undergoing medical treatment whereby anti-depressant and anti-psychotic drugs have been prescribed to the petitioner, which was grossly ignored and not taken into consideration. He further contends that the authorities have also ignored the fact that due to the mental illness, the petitioner was unable to file the mercy petition by himself which was also not communicated to His Excellency, the Governor and His Excellency, the President of India.

13. Learned counsel further contends that this aspect of mental illness of the petitioner has been certified by the Doctor who is treating the petitioner and that he is in solitary confinement since 29.10.2006 was also withheld from disclosure, which has caused miscarriage of justice to the petitioner.

14. He further contends that in view of non-consideration of aforesaid four grounds stated above and

the rules and regulations framed by Ministry of Home Affairs and the guidelines laid down by the Hon'ble Apex Court in the case of ***SHATRUGHAN CHAUHAN*** stated *supra*, it is clearly apparent on the face of the records that there is a clear violation of Article 21 of the Constitution of India causing miscarriage of justice to the petitioner herein. On the basis of these submissions, he prays to allow the petition.

15. Learned counsel relies on the following judgments in support of his case:

(1) ***SHATRUGHAN CHAUCHAN AND ANR v UNION OF INDIA AND ORS*** reported in ***(2014) 3 SCC 1;***

(2) ***SHER SINGH AND ORS v. STATE OF PUNJAB*** reported in ***(1983) 2 SCC 344;***

(3) ***T.V.VATHEESWARAN v. STATE OF TAMIL NADU*** reported in ***(1983) 2 SCC 68;***

(4) ***MADHU MEHTA v. UNION OF INDIA AND ORS.,*** reported in ***(1989) 4 SCC 62;***

(5) ***MAHENDRA NATH DAS v. UNION OF INDIA*** reported in ***(2013) 6 SCC 253;***

(6) ***AJAY KUMAR PAL v. UNION OF INDIA*** reported in ***(2013) 6 SCC 253;***

(7) ***STATE OF WEST BENGAL AND ORS v. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS, WEST BENGAL AND ORS.*** reported in ***(2010) 3 SCC 571;***

(8) ***DARYAO AND ORS v. STATE OF U.P AND ORS,*** reported in ***AIR 1961 SC 1457;***

(9) ***P.N.KUMAR AND ANR v. MUNICIPAL CORPORATION OF DELHI,*** reported in ***(1987) 4 SCC 609;***

(10) ***SHIVAJI JAISING BABAR v. STATE OF MAHARASHTRA*** reported in ***(1991) 4 SCC 375;***

(11) ***BHAGWAN PATILBA PALWE v. STATE OF MAHARASrHTRA*** reported in ***1989 MH.J.L.1001 (BOMBAY HC);***

(12) ***KHEM CHAND v. STATE*** reported in ***1990 CRI. L.J/ 2314 (DELHI HC);***

(13) ***SAWAI SINGH v. STATE OF RAJASTHAN*** reported in ***(1988) (1) WLN 649 (RAJASTHAN HC);***

(14) ***PUDR v. UNION OF INDIA*** reported in ***(2015) CRI LJ 4141 (ALLAHABAD HC);***

(15) ***ASIAN CENTRE FOR HUMAN RIGHTS v. UNION OF INDIA AND ORS., W.P.(CRL)NO.147/2014 (SC);***

(16) ***SMT.RENUKA v. UNION OF INDIA, W.P.(CRL) NO.3103 OF 2014 (BOMBAY HC);***

(17) ***SONU SARDAR v. UNION OF INDIA & ANR. W.P.(CRL.)NO.441 OF 2015 (DELHI HC);***

(18) ***HOLIRAM BORDOLOI v. UNION OF INDIA & ORS., WRIT PETITION NO.5/2014 (GAUHATI HC);***

(19) ***PUDR v. UNION OF INDIA, PIL NO.57810 OF 2014 (ALLHABAD HC);***

(20) ***SAIBANNA v. UNION OF INDIA & ORS., WP.NO.3297/2013 (KARNATAKA HC);***

CASES DECIDED BY THE HON'BLE APEX COURT ARISING OUT OF DELAYED DISPOSAL OF MERCY PETITIONS AS RELIED UPON BY THE PETITIONER:

(21) ***K.P.MOHAMMED v. STATE OF KERALA*** reported in ***1984 Supp(1) SCC 684;***

(22) ***JAVED AHMED ABDUL HAMID PAWALA v. STATE OF MAHARASHTRA*** reported in ***(1985)1 SCC 275;***

(23) ***DAYA SINGH v. UNION OF INDIA*** reported in ***(1991)3 SCC 61;***

(24) ***SHIVAJI JAYSINGH BABAR v. STATE OF MAHARASHTRA*** reported in ***(1991)4 SCC 375;***

(25) ***MADHU MEHTA v. UNION OF INDIA*** reported in ***(1989) SCC (CRI) 705;***

(26) ***MAHENDRA NATH DAS v. UNION OF INDIA*** reported in ***(2013) 6 SCC 253;***

(27) ***SHATRUGHAN CHAUHAN v. UNION OF INDIA*** reported in ***(2014)3 SCC 1***

BATCH MATTERS INVOLVING THE FOLLOWING CASES:

a. ***SURESH & ANR. v. UOI AND OTHERS, WRIT PETITION (CRL) 132 OF 2013;***

b. ***SHAMIK NARAIN v. UOI AND OTHERS, WRIT PETITION (CRL) 34 OF 2013;***

c. ***PRAVEEN KUMAR v. UOI AND OTHERS, W.P. (CRI) 187 OF 2013;***

d. ***GURMEET SINGH v. UOI AND OTHERS, W.P. (CRI) 193 OF 2013;***

e. ***SONIA KUMAR & ANR. V. UOI AND OTHERS, W.P.(CRI) 188 OF 2013;***

f. ***PUDR v. UOI AND OTHERS, W.P. (CRI) 192 OF 2013;***

g. ***JAFAR ALI v. UOI AND OTHERS, W.P.(CRI) 190 OF 2013;***

h. ***MAGAN LAL v. UOI AND OTHERS, WRIT PETITION (CRL) NO.191 OF 2013;***

i. ***SHIVU v. UOI AND OTHER, WP (CRI) NO.139 OF 2013 & JADESWAMY v. UOI AND OTHERS, WP.(CRI) NO.141 OF 2013;***

(28) ***V.SRIHARAN @ MURUGAN v. UNION OF INDIA AND Ors.*** reported in ***(2014)4 SCC 242;***

(29) ***NAVEEN KAUR v. STATE OF NCT OF DELHI AND ANR.*** reported in ***(2014)7 SCC 264;***

(30) ***AJAY PAL v. UNION OF INDIA AND ANOTHER*** reported in ***(2015)2 SCC 478;***

(31) ***STATE OF W.B. v. CPDR*** reported in ***(2010)3 SCC 571;***

(32) ***P.N.KUMAR v. MCD*** reported in ***(1987)4 SCC 609;***

(33) ***JAGDISH v. STATE OF M.P.*** reported in ***(2009) 9 SCC 495;***

(34) ***RAJENDRA PRASAD v. STATE OF UTTAR PRADESH*** reported in ***(1979)3 SCC 646;***

(35) ***VIVIAN RODRICK v. STATEOF W.B.*** reported in ***1971(1) SCC 468;***

(36) ***MUNAWAR HARUN SHAH v. STATE OF MAHARASHTRA*** reported in ***(1983)3 SCC 354;***

(37) ***TRIVENIBEN Vs. STATE OF GUJRATH*** reported in ***(1988)4 SCC 574;***

(38) ***TRIVENIBEN Vs. STATE OF GUJRATH*** reported in ***(1989)1 SCC 678;***

(39) ***MAJOR R.S. BUDHWAR v. UNION OF INDIA*** reported in ***(1996)9 SCC 502;***

(40) ***GURUSWAMY NAICKER v. THE STATE OF TAMIL NADU*** reported in ***1984 L.W. (CRL.) 214;***

(41) ***HAJA MOIDEEN v. GOVERNMENT OF INDIA AND ORS.,*** reported in ***1991 CRI LJ 1325;***

(42) ***MITHU v. STATE OF PUNJAB*** reported in ***(1983)2 SCC 277;***

(43) ***RANJIT SINGH ALIAS RODA v. U.T.CHANDIGARH*** reported in ***(1984)1 SCC 31;***

(44) ***HARU GHOSH v. STATE OF W.B.*** reported in ***(2009) 15 SCC 551;***

(45) ***KRISHAN v. STATE OF HARYANA*** reported in ***(2000)10 SCC 451;***

(46) ***BISHNU DEO SHAW v. STATE OF W.B.*** reported in ***(1979)3 SCC 714;***

(47) ***RANJIT SINGH v. U.T. OF CHANDIGARH*** reported in ***(1991)4 SCC 304;***

(48) ***DALBIR SINGH v. STATE OF PUNJAB*** reported in ***(1979)3 SCC 745;***

(49) ***SWAMI SHRADHANAND (2) v. STATE OF KARNATAKA*** reported in ***(2008) 13 SCC 767;***

(50) ***SUBHASH CHANDER v. KRISHAN LAL*** reported in ***(2001)4 SCC 458;***

(51) ***MULLA v. STATE OF U.P.*** reported in ***(2010)3 SCC 508;***

(52) ***SHRI BHAGWAN v. STATE OF RAJASTHAN*** reported in ***(2001)6 SCC 296;***

(53) ***SEBASTIAN v. STATE OF KERALA*** reported in ***(2010)1 SCC 58;***

(54) ***BACHAN SINGH v. STATE OF PUNJAB*** reported in ***(1980)2 SCC 684;***

(55) ***RAVJI ALIAS RAMCHANDRA v. STATE OF RAJASTHAN*** reported in ***(1996)2 SCC 175;***

(56) ***ALOKE NATH DUTTA v. STATE OF WEST BENGAL*** reported in ***(2007)12 SCC 230;***

(57) ***SANTOSH KUMAR SATISHBHUSHAN BARIYAR v. STATE OF MAHARASHTRA*** reported in ***(2009)6 SCC 498;***

(58) ***DILIP PREMNARAYAN TIWARI v. STATE OF MAHARASHTRA*** reported in ***(2010)1 SCC 775;***

(59) ***RAJESH KUMAR v. STATE OF NCT DELHI*** reported in ***(2011)13 SCC 706;***

(60) ***SANGEET v. STATE OF HARYANA*** [Judgment dated 20.11.2012];

(61) ***NAWAB SINGH v. STATE OF UTTAR PRADESH*** reported in ***AIR 1954 SC 276;***

(62) ***SHANKER v. STATE OF U.P.*** reported in ***(1975)3 SCC 851;***

(63) ***HARBANS SINGH v. STATE OF UTTAR PRADESH*** reported in ***(1982)2 SCC 101;***

(64) ***K.M.NANAVATI v. THE STATE OF BOMBAY*** reported in ***1960 1 SCR 497;***

(65) ***MARU RAM v. UNION OF INDIA*** reported in ***AIR 1980 SC 2147;***

(66) ***KEHAR SINGH AND ANOTHER v. UNION OF INDIA*** reported in ***(1989)1 SCC 204;***

(67) ***STATE OF PUNJAB v. JOGINDER SINGH*** reported in ***(1990)2 SCC 661;***

(68) ***ASHOK KUMAR ALIAS GOLU v. UNION OF INDIA*** reported in ***(1991)3 SCC 498;***

(69) ***SWARAN SINGH v. STATE OF U.P. AND OTHERS*** reported in ***(1998)4 SCC 75;***

(70) ***SATPAL AND ANOTHER v. STATE OF HARYANA*** reported in ***(2000)5 SCC 170;***

(71) ***STATE (GOVT OF NCT OF DELHI) v. PREMRAJ*** reported in ***(2003)7 SCC 121;***

(72) ***EPRU SUDHAKAR AND ANOTHER v. GOVT. OF A.P.*** reported in ***(2006)8 SCC 161;***

(73) ***STATE OF HARYANA AND OTHERS v. JAGDISH*** reported in ***(2010)4 SCC 216;***

(74) ***B.P.SINGHAL v. UNION OF INDIA*** reported in ***(2010)4 SCC 216;***

(75) ***DHANANJAY CHATTERJEE v. STATE OF W.B.*** reported in ***(2004)9 SCC 751;***

(76) ***RAM DEO CHAUHAN v. BANI KANTA DAS*** reported in ***(2010) 14 SCC 209;***

(77) ***NARAYAN DUTT AND OTHERS v. STATE OF PUNJAB*** reported in ***(2011)4 SCC 353;***

16. Per contra, Sri M.B.Nargund, learned Additional Solicitor General of India vehemently contends that the present petition preferred by the death row convict is devoid of merits, not tenable in law, is tainted with suppression of material facts and hence, the same is liable to be dismissed. He further contends that the four grounds raised by learned counsel for petitioner seeking for indulgence of this Court to commute the death sentence to life sentence does not merit consideration and the same deserves to be dismissed. He further contends that at the cost of repetition, the petitioner was sentenced to death by Sessions Judge, VII Fast Track Court, Bengaluru by

judgment dated 26.10.2006 after full-fledged trial for the offences punishable under Sections 302, 376 and 392 of IPC. On 04.10.2007, the Division Bench of this Hon'ble Court confirmed the conviction order in Criminal Appeal No. 2408/2006 and Criminal Reference No. 3/2006. Since there was a difference of opinion as regards quantum of sentence, matter was referred to a third Hon'ble Judge. On 18.02.2009, Justice S.R.Bannurmath supported the imposition of death sentence. Petitioner challenged the same before the Hon'ble Apex Court and vide a detailed order dated 01.02.2011, the Hon'ble Apex Court dismissed the appeal in Crl.A.Nos.285-286/2011. Aggrieved by the same, the petitioner filed a Review Petition in R.P.(Crl.) Nos.135-136/2011 which also came to be rejected vide order dated 07.09.2011 whereby the death sentence awarded to the accused stood affirmed.

17. Learned counsel further contends that when the above stated Review Petition was pending before the Hon'ble Apex Court, mother of the petitioner Smt.B.Gowramma, filed a clemency petition dated

08.02.2011 before the His Excellency, the President of India for Presidential pardon under Article 72 of the Constitution of India to her son, petitioner herein, which was received by President's Secretary on 17.02.2011. He further contends that as per the procedure prescribed by Ministry of Home Affairs, it is only after the appeals to the Courts are exhausted and the remedies obtained from judicial process are finally culminated, the mercy petition has to be considered by His Excellency, the Governor of that State under Article 161 of the Constitution of India before His Excellency, the President of India could consider the same under Article 72 of the Constitution of India. He further contends that it is pre-requisite that His Excellency, the Governor considers the mercy petition before it is submitted to His Excellency, the President of India. As once the petition is considered and decided under Article 72 of the Constitution of India, His Excellency, the Governor will not be able to exercise his powers.

18. Learned counsel further contends that this aspect of the legal issue is not in dispute. In view of the

above legal principle, the petition filed by the mother of the petitioner seeking for Presidential pardon was forwarded to Principle Secretary, Home Department, Government of Karnataka by respondent No.1 vide letter dated 03.03.2011 for consideration of the mercy petition of the petitioner by His Excellency, the Governor of Karnataka as the said remedy was not exhausted under Article 161 of the Constitution of India. He further contends that the said mercy petition was placed before the Cabinet after the Review Petition came to be rejected by the Hon'ble Apex Court vide order dated 07.09.2011. The decision was taken in the cabinet meeting for rejection of the mercy petition on 07.05.2012 and the same came to be recommended to His Excellency, the Governor of Karnataka. Pursuant to which, the His Excellency, the Governor rejected the said mercy petition by order dated 06.06.2012.

19. This rejection order was forwarded to respondent No.1 on 30.08.2012 by the Government of Karnataka for consideration of His Excellency, the

President of India under Article 72 of the Constitution of India. Thereafter, on 18.09.2012, respondent No.1 sought for certain clarification from Government of Karnataka pertaining to the medical health report, details of criminal record and other aspects of the condemned Prisoner, the petitioner herein. Thereafter, respondent No.2 – State forwarded the required documents vide letter dated 26.12.2012, immediately thereafter respondent No.1 placed the mercy petition for consideration of His Excellency, the President of India along with its comments and recommendations. By order dated 12.05.2013, His Excellency, the President of India rejected the mercy petition. He assertively contends that the mercy petition of the petitioner was disposed of within five months by His Excellency, the President of India. Hence, the question of inordinate delay of more than two years three months and seven days i.e. 827 days as contended by the petitioner is a fallacy and would not hold any water.

20. Learned counsel further contends that the third point of argument of the petitioner that the petitioner was

put in solitary confinement for more than ten years or more, is also incorrect and the same is not tenable. He further contends that pursuant to the request made by respondent No.1 to respondent No.2, the entire medical report along with health status of the petitioner was sent by the Medical Officer attached to the Prison Hospital. This health status report of the Medical Officer clearly states that the petitioner was kept in High Security Cell of the Prison. Though initially it was the diagnosis of the Doctor that he was suffering from Prison psychosis and was put on anti-psychiatric treatment and later having recovered on 05.12.2009, the anti-psychiatric treatment was withdrawn as per the consulting Psychiatrist opinion. He further contends that the petitioner was not having any psychiatric symptoms and he was mentally and physically normal.

21. Learned counsel further contends that the contention of the petitioner that he was suffering from mental illness would not stand the test of scrutiny for the simple reason that the mother of the petitioner in her

mercy petition dated 08.02.2011 has not stated that the petitioner was kept in solitary confinement. It is only on the basis of the faux pas committed by the Medical Officer who has wrongly used the words 'solitary confinement' instead of stating that the petitioner was kept in High Security Cell of the Prison was kept in statutory segregation for safety purpose. It was also not the case of the mother of petitioner in her mercy petition that clemency is to be granted on the ground of mental illness of the petitioner. Hence, it cannot be gainsaid by the petitioner that he was either suffering from mental illness or he was put in solitary confinement. Hence, this contention also would fall flat without any legs to stand.

22. Learned counsel further contends that His Excellency, the Governor has considered all the necessary materials and documents and rejected the mercy petition. Thereafter, His Excellency, the President of India while rejecting the mercy petition on 12.05.2013 held that the petitioner – accused committed a crime in a most sordid, brutal, deprived, callous and heartless manner. The mercy

petition having been rejected by both His Excellency, the Governor of Karnataka and His Excellency, the President of India, the same does not call for judicial review by this Court and hence, the petition deserves to be rejected.

23. Learned counsel relies on the following citations in support of his case:

(1) ***TRIVENIBEN Vs. ST. OF GUJRATH*** reported in ***(1989)1 SCC 678;***

(2) ***JUMMAN KHAN Vs. ST. OF U.P.*** reported in ***(1991)1 SCC 752;***

(3) ***GURMEET SINGH Vs. ST. OF U.P.*** reported in ***(2005)12 SCC 107;***

(4) ***EPURU SUDHAKARA Vs. GOVR. OF AP & ORS.*** reported in ***(2006)8 SCC 161;***

(5) ***NAVNEET KOUR Vs. STATE (NCT OF DELHI) & ORS.*** reported in ***(2014)7 SCC 264;***

(6) ***MUKHESH KUMAR Vs. UOI & ORS.*** reported in ***AIR 2020 SC 694;***

(7) ***VINAY SHARMA Vs. UNION OF INDIA*** reported in ***(2020)4 SCC 391;***

(8) ***JAGADISH Vs. UNION OF INDIA*** reported in ***(2020)4 SCC 156;***

(9) ***AKSHAY KUMAR Vs. UOI*** reported in ***AIR 2020 SC 1494;***

(10) ***SHATRUGHAN CHAUHAN & ANR. Vs. UOI & ORS.*** reported in ***(2014)3 SCC 1;***

(11) ***SHER SINGH Vs. ST. OF PUNJAB*** reported in ***(1983)2 SCC 344;***

24. Sri G.V.Shashikumar, learned Additional Government Advocate appearing on behalf of respondent Nos.2 to 4 concurs with the factual aspects canvassed by the learned counsel for respondent No.1 and also opposes and rejects the arguments canvassed by the learned counsel for petitioner on the four principal grounds urged. He further refutes that there has been any delay in considering the mercy petition by His Excellency, the Governor or His Excellency, the President of India. He contends that the rationale behind delay operating as a supervening circumstance is that the petitioner has to bear the anguish of '*alternating hope and despair*' and the agony of uncertainty on an everyday basis, the consequences of which can have dehumanizing effects on the mental health and physical body of a death row

convict. It is this dehumanizing effect which has been held to be a violation of a person's rights under Article 21 of the Constitution of India. But in the present case, the petitioner could not have harbored such anguish or uncertainty as he was protected, although temporarily, by virtue of the stay order obtained in WP.(Crl) No.52/2011. In that sense, there is no delay occasioned by the act of State. The delay however, has to be seen in the background of the parallel proceedings that the petitioner was prosecuting. Therefore, any such delay that is caused or occasioned by the act of the petitioner himself through any of the proceedings cannot said to be the delay caused by the State as the petitioner cannot take advantage of his own wrong.

25. Learned AGA further contends that the issue of solitary confinement vehemently canvassed by the petitioner is an illusionary theory created by the petitioner only for the purpose of creation of a ground which actually was never in existence. Petitioner also took the advantage of the faux pas created by the Medical Officer, who had

misused the word 'solitary confinement' instead of 'High Security Cell', which cannot be taken to his advantage by the petitioner. He further contends that the very act of the petitioner himself would dispel the theory of solitary confinement as the petitioner used Library facility from State Central Library, Belgavi Central Prison Division, Belagavi for the period from 25.01.2016 to 20.10.2016 along with the readers signature books for the period from 04.12.2010 to 02.08.2014. Petitioner has also used the canteen facility for the period from 02.11.2006 to 02.11.2016. He further contends that it cannot be disputed by the petitioner that there were visitors visiting the petitioner for the period from 11.11.2006 to 14.10.2016, which is evidenced by the entries made in the visitors book.

26. Learned AGA further contends in addition to the arguments canvassed by learned counsel for respondent No.1 with regard to the claim of mental illness canvassed by the petitioner that petitioner himself had written several letters to the Jail Authority for securing

certain documents. He further contends that the petitioner was in the habit of reading books from the Library which is not disputed by the petitioner. He further contends that from 2011 till the filing of the present writ petition, the petitioner has been prosecuting claims before the Hon'ble Apex Court; has filed certain petitions before this Court, which would prove that the petitioner is in the sound state of mental health and is fully aware of all his actions. He further contends that the petitioner has sent and received money orders. Therefore, it cannot be said that the petitioner was suffering from mental illness. On the basis of these submissions, he prays for dismissal of the writ petition.

27. In reply to the submission of the learned counsel for the respondents, learned counsel appearing on behalf of petitioner contends the respondents cannot avoid the question of inordinate delay by simply relying on the fact that the petitioner had the benefit of stay order in WP (Crl) No.52/2011 from 09.03.2011. According to the respondents, the mere fact that because of stay was

obtained, it would neutralize the claims of delay, sparing them the burden to explain the delay. If this argument were to be allowed, it would wipe out the entire delay jurisprudence that has been carefully evolved in Indian scenario.

28. Learned counsel further contends that there was a stay operating in favour of the petitioner even before 09.03.2011, that is, when the mercy petition came to be filed on 08.02.2011. There is an automatic stay that comes into operation when a mercy petition is filed by virtue of Rule 2 of the Rules framed by the Central Government. Courts have not hesitated from commuting death penalty to life imprisonment when there has been excessive delay notwithstanding the fact that there was an automatic stay. Hence, mere fact that there is a parallel stay order in W.P. (Crl.) No.52/2011 does not erase the agonizing uncertainty that the petitioner has suffered as regards the question of what would be the outcome of the mercy petition.

29. Learned counsel further contends that the fundamental basis of delay jurisprudence has nothing to do with the operation of a stay order. It is premised on the dehumanizing effect that prolonged delay would have on the mental and physical integrity of the convict.

30. Having heard the learned Advocates for the parties and perused the records including the original records produced by both State and Central Government i.e., respondent Nos.1 and 2 to 4. The following points arise for our consideration:

> *"(i) Whether there is a delay in disposal of mercy petition?*
>
> *(ii) Whether there is violation petitioner's rights under Article 21 of the Constitution of India?*
>
> *(iii) Whether there has been violation with regard to non-sending of relevant materials, thereby vital and crucial materials were kept out of consideration of mercy petition?*
>
> *(iv) Whether the petitioner was kept in solitary confinement?"*

RE. POINT NOS.1 TO 3:

31. In the present case, the petitioner is aggrieved by the rejection of his mercy petition under Article 72 of the Constitution of India by His Excellency, the President of India. The petitioner has challenged the said rejection on several grounds as stated above. The aspect of power to grant pardons, reprieves and to suspend the sentence and to commute the death sentence to life imprisonment, is provided to His Excellency, the President of India under Article 72 of the Constitution of India. The Hon'ble Apex Court has consistently held that this executive orders under Articles 72 and 161 of the Constitution of India is subject to limited judicial review.

32. The Hon'ble Apex Court in the case of ***SHATRUGHAN CHAUHAN*** stated *supra* in para-25 has held as follows:

> **"***25. A perusal of the above case law makes it clear that the President or Governor is not bound to hear a petition for mercy before taking a decision on the petition. The manner of exercise of the power under the said Article*

is primarily a matter of discretion and ordinarily the court would not interfere with the decision on merit. However, the court retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion."

33. On the basis of erudite submissions of the learned counsel, it would be right to say that the proposition of delay, if it is inordinate and not attributable to the convict, can render execution unlawful as it constitutes a 'cruel and inhuman' punishment. It is too late in the day to argue that whatever the length of the delay, a sentence of death if lawfully imposed, cannot be set aside merely on grounds of delay. But before one could proceed to examine the appropriate 'period of delay' which may render an execution illegal, the 'types' of delay which can be accounted for in computation of delay needs to be ascertained. Broadly speaking, there are three types of delay that could occur during a prisoner's time on death row, as described by the Privy Council in ***PRATT AND MORGAN V. JAMAICA AND PRATT V. ATTORNEY***

GENERAL FOR JAMAICA reported in ***[1994] 2 AC 1; [1993] 3 WLR 995; [1993] 4 All ER 769***:

1. Delay entirely due to the fault of the prisoner namely, escape from custody, multiple mercy petitions;
2. Delay caused by a prisoner's legitimate appeals; and
3. Delay caused by the state.

34. In ***PRATT AND MORGAN'S*** case stated *supra*, the Privy Council found it relatively easy to deal with the first and third type of delay. With reference to the first type, it was held that the delay inappropriately caused by the prisoner could not be taken notice of, since it would amount to taking advantage of one's own wrong. Again, as regards the third type, the prisoner could not be made to suffer for delay solely attributable to the state and therefore, delay caused by state was to be accounted for in the ultimate analysis. The real challenge was in respect of the second type of delay. The Privy Council had to decide if the prisoner could take benefit of the delay that had ensued in the legitimate prosecution of his appeals. That is, while computing total delay and examining if it

constituted excessive delay, could the delay attributable to the legitimate prosecution of appeals be considered in addition to delays attributable to the State? It was held therein that the burden to conclude appeals fell on the State and the delay occasioned in prosecution of such appeals cannot be simply ignored. The following paragraph makes the position of law clear :

> *"In their Lordships' view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it . . . The death row phenomenon must not become established as a part of our jurisprudence."*

35. Yet, the position of law, in India, on this aspect does not coincide with the position adopted by the Privy Council in ***PRATT & MORGAN'S*** case stated *supra*. In ***TRIVENIBEN'S*** case stated *supra*, a 5 judge bench of the Hon'ble Apex Court of India has discussed the law on the types of delay that may be considered while deciding the issue of 'excessive delay' in disposal of mercy petition. It observed :

> *"17. After the matter is finally decided judicially, it is open to the person to approach the President or the Governor, as the case may be, with a mercy petition. Some-times person or at his instance or at the instance of some of his relatives, mercy petition and review petitions are filed repeatedly causing undue delay in execution of the sentence. It was therefore contended that when such delay is caused at the instance of the person himself he shall not be entitled to gain any benefit out of such delay. It is no doubt true that sometimes such petitions are filed but a legitimate remedy if available in law, a person is entitled to seek it and it would therefore be proper that if there has been undue and prolonged delay that*

alone will be a matter attracting the jurisdiction of this Court, to consider the question of the execution of the sentence. While considering the question of delay after the final verdict is pronounced, the time spent on petitions for review-and repeated mercy petitions at the instance of the convicted person himself however shall not be considered. The only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive."

36. Hence, it becomes sufficiently clear that Indian jurisprudence on examination of 'excessive delay' claims is relatively less liberal than the position of law as it obtains in Europe and the Common Wealth. The Courts in India are constrained to limit the delay computation to delays occasioned on account of faults attributable to the State only. It excludes the 'systemic delays' in prosecution of mandatory and discretionary appeals that are so characteristic of the Indian judicial system; it also ignores time if any spent on prosecution of a review petition, however legitimate the claim for review may be. Yet

another principle that flows from decision in ***TRIVENIBEN'S*** case stated *supra* is that the Court will examine the nature of delay caused and circumstances that ensues only after the sentence was finally confirmed by the judicial process.

37. The filing of a mercy petition is an action of 'last resort'. This is not to suggest that the mercy petition could not be considered prior to exhaustion of all available judicial remedies. In ***K.M.NANAVATI'S*** case stated *supra*, the Hon'ble Apex Court has declared the law that the clemency powers can be exercised at any stage, that is, even prior to termination of judicial proceedings. Be that as it may, as a matter of practice, a prayer for mercy is sought for when all other judicially available remedies have been extinguished.

38. In the peculiar facts of the case, there is a gap of around 22 days between filing of mercy petition (08.02.2011) and the filing of a review petition (01.03.2011). Although the review petition had been

dismissed in chambers on 07.08.2011, in lieu of Article 32 of the Constitution of India, proceedings initiated separately [WP(Crl)No.52/2011] with a prayer for open court hearing of death penalty review proceedings, the review petition was revived and ultimately rejected on 03.10.2016. The time period between filing of mercy petition on 08.02.2011 and filing of this writ petition challenging the order rejecting the mercy petition on 17.10.2016 can be divided in the following way as illustrated in table below:

Sl. No.	**Period**	**Purpose**	**Delay to be included or excluded?**
1.	From 8.02.2011 to 12.05.2013	Time taken for disposal of mercy petition	Included
2.	From 01.03.2011 to 7.09.2011	Time taken for disposal of RP No. 135/136 of 2011	Excluded as it not attributable to State
3.	From 09.03.2011 to 2.09.2014	Time taken for disposal of WP (Crl) 52 of 2011 where	Excluded as it is not attributable to State

		prayer for open court hearing in death penalty review proceedings was sought	
4.	From 02.09.2014 till 2016	No action taken on revival of RP 135/136 of 2011	Excluded as it is not delay attributable to the State.
5.	From 2016 to 3.10.2016	Time taken for disposal of Reopened RP 135/136 of 2011	Excluded as it not delay attributable to the State

39. It is not the case of the petitioner that the period of delay as reflected in Sl.Nos.2,3,4,5 has to be included while examining if there has been excessive delay. The petitioner's claim for delay inclusion is limited to delay attributable to the State in consideration of the mercy petition. Yet, the complexity emerges from the fact that there is a certain period of overlap between time

spent in consideration of mercy petition and time taken for disposal of [WP(Crl) No.52/2011]. While the former is accountable delay, the latter needs to be excluded from the delay computation analysis, according to the law laid down in ***TRIVENIBEN'S*** case stated *supra*. There has been no authoritative precedent brought to our notice on harmonizing the conflict. Although there have been cases where prosecution of review petitions have coincided with disposal of mercy petitions, the overlap has been minimal and it has always been the case that the mercy petition has been disposed of much later compared to review petition. Conversely, in this case, the peculiarity lies in the fact that the review proceeding, though was initially prosecuted around the same period with a gap of 22 days as the mercy petition, on account of its subsequent revival through invocation of separate writ proceedings [WP (Crl.) 52/2011], has been finally dismissed approximately 3 years later than the dismissal of the mercy petition.

40. We have already noticed above, as was held in ***NANAVATI'S*** case stated *supra*, that there is no bar in

invoking the mercy jurisdiction of the Executive prior to the termination of judicial proceedings. In ***NANAVATI'S*** case stated *supra*, KM Nanavati, a naval officer, was tried on the charge of murdering his wife. He was placed on trial by a jury before the Sessions judge, Greater Bombay in which the jury returned a verdict of not guilty by a majority. But the Sessions judge disagreed with the jury verdict and referred the matter to the High Court of Bombay, which convicted Nanavati under Section 302 IPC and sentenced him to life imprisonment. On the same day when the High Court pronounced the sentence, His Excellency, the Governor of Maharashtra passed an order under Article 161 of the Constitution of India and suspended the sentence passed by the High Court of Bombay until an appeal was filed before the Hon'ble Apex Court. Although the Hon'ble Apex Court was confronted with an altogether different conflict from the one we find ourselves in this case, the power of the executive to grant pardon in exercise of its mercy jurisdiction was held to be

an independent jurisdiction, exercisable even during the pendency of the case. It was held therein:

> *"There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this Court in exercise of what is ordinarily called " mercy jurisdiction ". Such a pardon after the accused person has been convicted by' the Court has the effect of completely absolving him from all Punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such 'mercy jurisdiction'.*

41. Now, let us take up a hypothetical situation where a convict sentenced to death by the Sessions Court would have immediately invoked the mercy jurisdiction of the executive. Let us say, the Executive would have taken 10 years to dispose of his petition while the final confirmation of the sentence by the Hon'ble Apex Court may have taken much longer, around 12 years. Can it then be said that delay in disposal of the mercy petition, even though it is admittedly, inordinate and excessive, would

constitute a violation of the due process rights of the convict? If we were bound by the law as laid down in ***T.V.VATHEESWARAN'S*** case stated *supra*, then the answer would be in the affirmative. But that law is no more good law. We are bound by the principles laid down by the Constitution Bench in ***TRIVENIBEN'S*** case stated *supra* which has been approved in ***SHATRUGAN CHAUHAN'S*** case stated *supra*. Since the delays pending termination of judicial proceeding have to be ignored and excluded from the final computation, naturally, if there is a conflicting overlap between includable delay and excludable delay, the former will stand eclipsed and cannot be taken notice of. We would extend this principle by way of analogy to the facts of the present case. Since there was an overlap between judicial proceedings [WP (Crl) No.52/2011] and disposal of the mercy petition, the delay claimed by the petitioner, howsoever inordinate would disappear into the background and cannot be taken notice of.

42. As we have held that the delay attributable to the State would stand eclipsed and cannot be taken notice of, the question of inquiring into whether delay in considering mercy petition to be excessive and unconstitutional would be in the normal course fade away. In such an event, the detailed life cycle of mercy petition would pale into insignificance.

43. The petitioner has claimed a delay of 827 days which is attributable to the State/Executive, that is, between the time of filing of mercy petition (08.02.2011) and disposal of mercy petition (12.05.2013). Respondent No.1 has admitted delay of 4 months 20 days (approximately 140 days), the rest, it has tried to explain and sought for just exclusions. The chunks of delay, totaling to 827 days, sought to be included by the petitioner is captured in the form of a table below :

From 3.3.11 to 07.05.12	Central Govt. forwards mercy petition for consideration of Guv. – Cabinet recommendation sent to Guv.	1 year 2 months 5 days (432 days)
From 06.06.12	Mercy Petition rejected by Guv – Forwarding of Mercy	2 months and 25days

to 30.8.12	Petition to MHA	(85 days)
18.9.12 to 26.11.12	CG. seeks information from State Govwrt to certain documents – Supply of documents by SG to CG	3 months and 9 days
26.11.12 to 15.5.13	From receipt of documents to ultimate rejection of mercy petition	4 months 20 days
Total time	**2 years 3 months**	

44. At the very outset, without even considering the explanation provided by the respondents, it needs to be seen that the petitioner, while computing delay in forwarding the mercy petition from Central Government to State Government (Serial No. 1) has included the time period between 3.03.2011 and 07.08.2011, which overlaps with the time period spent in disposing of the review petition (in chambers). As per the law laid down in ***TRIVENIBEN'S*** case stated *supra*, the time period spent in prosecuting review petition is to be excluded from delay computation. Hence, the period of time spent between 03.03.2011 and 07.08.2011 has to be excluded. Accordingly, 5 months ought to be ignored from the petitioner's total claim of 2 years 3 months for this reason.

That would now leave the respondents to explain delay of remaining 1 year 8 months. The respondents have provided an additional list of dates to explain the movement of the mercy petition files from the time of its filing to its ultimate rejection. The tabular column below set outs the dates in a coherent manner :

08.02.2011	Petitioner's mother files a mercy petition before President
17.02.2011	Mercy Petition received in the Presidential Secretariat
03.03.11	Mercy Petition forwarded to Principal Secretary, Home Department, Government of Karnataka
1.3.11-07.09.11	Excluded since review petition was being prosecuted in this period.
14.05.2012	State Cabinet takes decision to reject the mercy petition and recommends to the Governor accordingly
06.06.2012	Hon' Governor rejects the mercy petition
30.08.2012	Translated documents along with order rejecting mercy petition is forwarded to the office of the MHA for consideration of the President
18.09.2012	Letter sent by MHA, GOI to Principal Secy.,

	Home Dept.,GoK asking for certain additional documents
26.12.12	GoK forwards details sought for by the MHA
12.05.13	His Excellency, the President rejects the mercy petition

45. Before we proceed to decide, if any just exclusions are to be made from the total time of 1 year 8 months spent in consideration of mercy petition, it would be necessary to understand the procedural rules that have been framed by the Ministry of Home Affairs with regard to handling of mercy petition. The said rules have been referred to in ***SHATRUGAN CHAUHAN'S*** case stated *supra*. For ease of reference, the relevant rules have been captured in a tabular column:

Rule 1	Rule I enables a convict under sentence of death to submit a petition for mercy within seven days after and exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Hon'ble Apex Court of his appeal or of his application for special leave to appeal to the Hon'ble Apex Court.
Rule 2	Rule II prescribes procedure for submission of

	petitions. As per this Rule, such petitions shall be addressed to, in the case of States, to the Governor of the State at the first instance and thereafter to the President of India and in the case of Union Territories directly to the President of India. As soon as mercy petition is received, the execution of sentence shall in all cases be postponed pending receipt of orders on the same.
Rule 3	Rule III states that the petition shall in the first instance, in the case of States, be sent to the State concerned for consideration and orders of the Governor. If after consideration it is rejected, it shall be forwarded to the Secretary to the Government of India, Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be withheld and intimation to that effect shall be sent to the petitioner.
Rule 4	Rule IV mandates that if the convict submits petition after the period prescribed by Rule II, the Superintendent of Jail shall, at once, forward it to the State Government and at the same time telegraph the substance of it requesting orders whether execution should be postponed stating that pending reply sentence will not be carried out.
Rule 5	Rule V states that in all cases in which a petition

	for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lt. Governor/Chief Commissioner/ Administrator or the Government of the State concerned, as the case may be, shall forward such petition, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition
Rule 6	Rule VI mandates that upon receipt of the orders of the President, an acknowledgement shall be sent to the Secretary to the Government of India, Ministry of Home Affairs, immediately in the manner prescribed. In the case of Assam and Andaman and Nicobar Islands, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph in all other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be.

Rule 8 (a)	Rule VIII(a) enables the convict that if there is a change of circumstance or if any new material is available in respect of rejection of his earlier mercy petition, he is free to make fresh application to the President for reconsideration of the earlier order.

46. For the purpose of the present case, Rule 5 would be relevant. It makes it clear that if any communication is to be directed between the State Government and Central Government or vice versa, it shall be done *'as expeditiously as possible'*. Hence, the Government has set a high standard for itself given the seriousness of the issue at hand. When the detailed list of dates provided by the respondents is subjected to this 'high standard', it can be seen that there has been avoidable delay on more than one occasion. To illustrate, even though the entire record was received at the Secretariat, Government of Karnataka on 03.03.2011, the decision was ultimately taken nearly 1 year 2 months later by the State Cabinet. Though it may be said that translation of documents from Kannada to English may

have taken sometime, the transmission of the documents from Karnataka to Delhi ought to have been expedited. The Executive has consumed nearly 3 months for translation and transmission purposes, which could have been much lesser if the need was shown. Further, the State Government has taken a little over 3 months to transfer certain records requested by the Central Government, which cannot said to be in compliance with the high standard required of them. Overall, it can be broadly said that there has been avoidable delay of nearly a year and a half, more so on part of the State Executive than the Central Executive.

47. In the backdrop of the aforementioned facts, we need to determine if the length of delay (approximately 1 year 5 months) is sufficient enough to violate the constitutional protection offered under Article 21 of the Constitution of India, the question of delay in execution of death sentence as a sufficient ground or reason for commuting death sentence to life imprisonment has

undergone considerable jurisprudential development over a period of time.

48. In ***T.V.VATHEESWARAN'S*** case stated *supra* the Hon'ble Apex Court was dealing with an appeal arising from the Judgment of the High Court confirming the death sentence, which had been ordered by the Court of first instance 8 years prior. The Court took note of the circumstances that the prisoner was made to suffer solitary confinement for 8 years. After referring to judicial authorities towards delay in different jurisdictions abroad, the Court proceeded to fix a limit of two years from passing of the sentence of death as permissible delay. If there was any delay beyond a period of two years, whatever the cause, it was held to be in violation of the prisoner's fundamental rights guaranteed under Article 21 of the Constitution of India. The relevant para is extracted below:

> "*We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some*

other cause for which the accused himself may be responsible, it would not alter the dehumanising character of the delay…….

21. ..... Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death. We therefore accept the special leave petition, allow the appeal as also the Writ Petition and quash the sentence of death. In the place of the sentence of death, we substitute the sentence of imprisonment for life."

49. In ***SHER SINGH'S*** case stated *supra,* the facts were that the death sentence had already stood confirmed by dismissal of appeal and review petition therefrom by the Hon'ble Apex Court. Relying on the observations in ***T.V.VATHEESWARAN'S*** case stated *supra,* it was contended that delay in execution beyond the two year period as fixed therein, is a ground for commutation of

death sentence in a petition under Article 32 of the Constitution of India. Though the Court was broadly in agreement with observations in ***T.V.VATHEESWARAN'S*** case stated *supra,* it did not agree with the statement to the effect *".... that delay exceeding two years in the execution of sentence of death should be considered sufficient to entitle the person under sentence to death to invoke Article 21 and demand the questioning of the sentence of death*." It was further held that delay, per se, is not sufficient to ask for commutation and delay must be seen in the background of other factors/circumstances. The Court said :

> *"Apart from the fact that the rule of two years run in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Hon'ble Apex Court and before the executive authorities. We are of the opinion that no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence, the sentence must be substituted by the sentence of life imprisonment. There are several other*

> *factors which must be taken into account while considering the question as to whether the death sentence should be vacated. A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who does not want to live."*

50. In ***TRIVENIBEN'S*** case stated *supra*, a Constitution bench of the Hon'ble Apex Court was called upon to resolve the conflict between *Vateeshwaran* and *Sher Singh* on the question of whether delay of 2 years in execution of death sentence after the judgment of trial court is sufficient for commutation of death sentence. It was concluded that "*No fixed period of delay could be held to make the sentence of death inexecutable .....".* The scope and ambit of exercise of jurisdiction in such cases was delineated thus in para 22:

> *"22. ..... the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial*

verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict also cannot be considered for coming to the conclusion

whether the sentence could be altered on that ground also."

51. In ***SHATRUGHAN CHAUHAN's*** case stated *supra*, after considering law on the point as regards delay in execution of the death sentence and the resultant effect, as also the scope and ambit of exercise of power, it was observed in paras 38, 41 and 42 as under:-

"38. In view of the above, we hold that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.

41. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time limit can

be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. This court, in Triveniben (supra), further held that in doing so, if it is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.

42. Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in

our Constitution as well as various Universal Declarations and directions issued by the United Nations."

52. In ***T.V.VATHEESWARAN'S*** case stated *supra*, the Hon'ble Apex Court had laid down two important principles – first, that any form of delay, whatever the cause, ought to be accounted for and secondly, that the delay of 2 years would be calculated from the passing of sentence of death by Court of first instance. That is, even delays that have ensued prior to final confirmation of judicial process would be factored into. Both of these principles have been subsequently overturned in the cases of ***TRIVENIBEN*** and ***SHATRUGAN CHAUHAN*** stated *supra.* The law as it stands today does not take notice of delays prior to final termination of the judicial process. It is only delay (attributable to the executive) in disposal of mercy petition which can be taken into account. Further, there is no standard benchmark on the appropriate length of delay which entitles a convict to seek reduction of penalty from death sentence to life imprisonment. It is not possible for the Courts to set an outer time limit for quick

exercise of executive power of pardon when the Constitution itself does not place any such limits.

53. Each case is decided on its own facts and circumstances. In ***AJAY KUMAR PAL'S*** case stated *supra*, on which the petitioner has placed heavy reliance, delay of 3 years 10 months was considered to be inordinate delay. But the Court seems to have been persuaded to commute the death penalty based on combined effect of 'delay' and 'solitary confinement' and not delay alone. The relevant paragraph is extracted for easy reference:

> *"10. The combined effect of the inordinate delay in disposal of Mercy Petition and the solitary confinement for such a long period, in our considered view has caused deprivation of the most cherished right. A case is definitely made out under Article 32 of the Constitution of India and this Court deems it proper to reach out and grant solace to the petitioner for the ends of justice. We, therefore, commute the sentence and substitute the sentence of life imprisonment in place of death sentence awarded to the petitioner. The writ petition thus stands allowed."*

54. Even otherwise, the facts in the case of ***AJAY KUMAR PAL*** stated *supra* are distinguishable. Death sentence was first passed on 9.04.2007 by the Trial Court. It attained finality on 16.03.2010 with dismissal of appeals by Apex Court. No review proceedings had been initiated. There was no overlap between delays attributable to the executive and other kind of delays. In that background, the Court held that 3 years 10 months delay was long enough to constitute a violation of the convict's fundamental right to life and personal liberty.

55. In the facts of the present case before us, it would be noticed that the judicial process came to an end only on 03.10.2016 when the petitioner's case, Review Petition Nos.135-136/2011, was dismissed by the Hon'ble Apex Court. Even if we were to decide that the sentence of death was finally confirmed on 01.02.2011 when the Hon'ble Apex Court dismissed the appeal filed by petitioner in Criminal Appeal Nos.285-286/2011, still, the delay of 1 year 5 months after making necessary exclusions cannot be said to be excessive or inordinate. It cannot be

forgotten that there were two stays that were operating simultaneously during the pendency of disposal of the mercy petition.

56. Learned counsel appearing for the petitioner has eloquently argued with strong emphasis that the respondents cannot shy away from explaining the delay by simply claiming that the petitioner had the benefit of stay order since 09.03.2011 till 03.10.2016. Even without the benefit of a stay order in WP.(Crl) No.52/2011, the petitioner enjoyed the stay by operation of law when he filed the mercy petition on 08.02.2011. But we are not able to countenance this argument, though it appears to be attractive on first blush. The parallel stay order that had been obtained in WP.(Crl.)No.52/2011 was not similar to the stay order that was triggered by operation of law when the mercy petition was filed on 08.02.2011. The stay order continued beyond disposal of the mercy petition. It did not extend only till disposal of the mercy petition. In that sense, it provided a sense of 'real' security of life which the general stay order could not have provided, since the

validity of the latter extended only till the time of disposal of the mercy petition. The insecurities of petitioner with regard to life and death cannot be compared to a situation where all judicial remedies having been exhausted, the mercy petition was filed as a last resort. In this case, there was potential for petitioner's life to have been saved in the Review Petition Nos.135-136/2011 as well.

57. For these reasons, we are constrained to hold notwithstanding the fact that delay attributable to executive in this case is eclipsed by the other non-accountable delays that the delay of 1 year 5 months (approx.) cannot said to be excessive or inordinate, when it is seen in the background on the facts and circumstances of the present case.

RE. POINT NO.4:

58. Another grievance that has been addressed by the learned counsel for petitioner before us is that the petitioner has been placed in solitary confinement since 29.10.2006 contrary to the law laid down by the Hon'ble Apex Court in the case of ***SUNIL BATRA*** stated *supra.* It

is the further case of the petitioner that he was kept in a single cell with no other occupants; that the petitioner was let out only once a day for about 30-60 minutes in the yard outside the cell; that he was not allowed to have his meals with other prisoners and was served his meals in his place of confinement; and lastly, that he was unable to see either the sky or the sun from inside his cell. To support his contention, the petitioner has relied on the letter addressed by the Medical officer to the Superintendent of Prisons dated 06.11.2011 in which the Medical Officer has claimed that 'the aforesaid prisoner is kept in solitary confinement since his admission to this prison on 29-10-2006' and further that the petitioner was suffering from 'psychosis with depression'.

59. This contention of the petitioner that the petitioner having been kept in solitary confinement is denied as false by respondents. On the contrary, it is the contention of the respondents that the petitioner was lodged in a 'High Security Cell', located in Central Jail, Belgaum. The petitioner was given a complete access to

library for reading books; he was permitted to access relatives and Advocates. It is the further case of respondents that the Medical Officer had no competence to comment or determine the nature of the confinement and merely by the use of words such as 'solitary confinement' in the records of the Medical Officer cannot be considered for the benefit of the petitioner. It is only the Jail Superintendent who is the competent person to factually decide on the nature of confinement.

60. Black's Law Dictionary defines solitary confinement as follows :

> *"In a general sense, the separate confinement of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailor, in a stricter sense, the complete isolation of a prisoner from all human society and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction"*

61. In ***SUNIL BATRA'S*** case stated *supra*, the Hon'ble Apex Court has elaborately dealt with the issue of solitary confinement. It has held:

> *"91. Confinement inside a prison does not necessarily import cellular isolation. Segregation of one person all alone in a single cell is solitary confinement. That is a separate punishment which the Court alone can impose. It would be a subversion of this statutory provision (section 73 and 74 I.P.C.) to impart a meaning to section (1)(2) of the Prisons Act whereby a disciplinary variant of solitary confinement can be clamped down on a prisoner, although no court has awarded such a punishment, by a mere construction, which clothes an executive officer, who happens to be the governor of the jail, with harsh judicial powers to be exercised by punitive restrictions and unaccountable to anyone. the power being discretionary and disciplinary.*
>
> *92. Indeed, in a jail, cells are ordinarily occupied by more than one inmate and community life inside dormitories and cells is common. Therefore, "to be confined in a cell" does not compel us to the conclusion that the confinement should be in a solitary cell."*

62. The distinguishing features of 'solitary confinement' has been commented on and crafted in the shape of a twin test as follows in paragraph 107 of ***SUNIL BATRA'S*** case stated *supra*:

> *"The hard core of such confinement is (a) seclusion of the prisoner, (b) from sight of other prisoners, and (c) from communication with other prisoners. To see a fellow being is a solace to the soul. Communication with one's own kind is a balm to the balm to the aching spirit. Denial of both with complete segregation superimposed, is the journey to insanity. To test whether a certain type of segregation is, in Indian terms, solitary confinement, we have merely to verify whether interdict on sight and communication with other prisoners is imposed. It is no use providing view of or conversation with jail visitors, jail officers or stray relations. The crux of the matter is communication with other prisoners in full view. Bad fellows in misery have heartloads to unload and real conversation between them has a healing effect. Now that we have an Indian conceptualisation of solitary confinement in the Prison Manual itself, lexical exercises, decisional erudition from other*

> *countries and legomachic niceties with reference to law dictionaries are supererogatory. Even the backward psychiatry of the Jail Manual considers continuation of such confinement as "likely to prove injurious to mind or body" or even prone to make the person "permanently unfit to undergo such confinement"*

63. It is further held that the form and description of the segregation has no bearing on the character and substance of segregation and cannot be used to bypass the interdict against solitary confinement. In paragraph 88, it is held:

> *"If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy but a working technique of justice. The Penal Code and the Criminal Procedure Code regard punitive solitude too harsh and the Legislature cannot be intended to permit preventive solitary confinement, released even from the restrictions of section 73 and 74 I.P.C., Section 29 of the Prisons Act and the*

> *restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, masked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Commonsense quarrels with such nonsense."*

64. In the case of ***AJAY KUMAR PAL*** stated *supra*, it is held that only a prisoner under a 'finally executable sentence of death' can be moved into solitary confinement and any violation of this rule would result in complete transgression of Article 21 of the Constitution of India causing incalculable harm to the prisoner. The interpretation of phrase 'under a sentence of death' as found in Section 30(2) of the Prisons Act has been elaborated upon as follows:

> *"10. Furthermore, as submitted in the petition, the petitioner has all the while been in solitary confinement i.e. since the day he was awarded death sentence. While dealing with Section 30(2) of the Prisons Act, 1894, which postulates segregation of a person 'under sentence of death' Krishna Iyer J. in Sunil*

Batra v. Delhi Administration[5] observed : "The crucial holding under Section 30(2) is that a person is not 'under sentence of death', even if the sessions court has sentenced him to death subject to confirmation by the High Court. He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Hon'ble Apex Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, Code and Prison Rules, has not been disposed. Of course, once rejected by the Governor and the President, and on further application there is no stay of execution by the authorities, he is 'under sentence of death', even if he goes on making further mercy petitions. During that interregnum he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means 'to be under a finally executable death sentence".

Speaking for the majority in the concurring Judgment D.A. Desai J. stated thus:

> *"The expression "prisoner under sentence of death" in the context of Sub-section (2) of Section 30 can only mean the prisoner whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority ....."*

In the light of the enunciation of law by this Court, the petitioner could never have been "segregated" till his Mercy Petition was disposed of. It is only after such disposal that he could be said to be under a finally executable death sentence. The law laid down by this Court was not adhered to at all while confining the petitioner in solitary confinement right since the order of death sentence by the first court. In our view, this is complete transgression of the right under Article 21 of

the Constitution causing incalculable harm to the petitioner."

65. The following principles can be culled out based on the law laid down by the Hon'ble Apex Court :

(i) The test to determine if segregation amounts to solitary confinement is two-fold – 1. Seclusion of prisoner from sight of other prisoners 2. Seclusion of the prisoner from communicating with other prisoners;

(ii) No death row prisoner can be placed under solitary confinement until he is said to be under a finally executable sentence of death;

(iii) A finally executable sentence of death arises only after dismissal of mercy petition preferred after exhaustion of all available judicial remedies.

66. In the present case on hand, it is alleged that the petitioner has been kept in solitary confinement in violation of the principles set out in ***SUNIL BATRA'S*** case stated *supra*, the respondents have denied that fact. Moreover, the petitioner cannot rely on the Medical Officer's letter dated 06.02.2021 since the Medical Officer is not the competent jurisdictional officer to comment or to declare the nature of segregation. We have to keep in

mind mere separation is different from segregation that amounts to solitary confinement. If a person is segregated and kept individually in such a way that he has other prisoners in his view, though at a distance, it cannot be said that he is in solitary confinement. Petitioner cannot blow hot & cold at the same time as he claims to be mentally sick and when he is given necessary treatment and subject to a separate call for his own protective custody, it cannot be said that he is put in solitary confinement. Hence given the technical meaning assigned to the concept of solitary confinement, it is neither safe nor appropriate to rely on the observation of the Medical Officer in his letter dated 06.02.2021. Another important aspect to be considered in this case is that in her letter dated 17.07.2018, the mother of the petitioner had expressed concerns that her son's life inside prison is under threat and it is on this basis that the petitioner, for his own security reasons, had been kept away from the other prisoners. But as we have clarified earlier, mere separation is not equivalent to solitary confinement. For

separation to amount to solitary confinement, the petitioner must be excluded from sight and communication with prisoners, which is not the case in the present facts as he is kept in protective custody. In order to corroborate their statement supported by affidavit of the Superintendent of Jail prisons that the petitioner was not kept in solitary confinement, they have produced documents to show that the petitioner was given regular access to libraries, prison canteen and to meet visitors. Hence, the contention of the petitioner that he has been kept in solitary confinement in violation of the principles of ***SUNIL BATRA'S*** case stated *supra* cannot be countenanced. Our view is also fortified by his Hon'ble Apex Court in famous/heinous "Nirbhaya Gang Rape Case", in ***VINAY SHARMA's*** case stated supra, wherein it is held at para-27 reads as under:

> *"27. According to the petitioner, he has been kept in solitary confinement for a period of one year. This contention is however refused by the respondents. In the affidavit dated 13.02.2020 filed by the Director General*

(Prisons), Tihar Jail, it is stated that for security reasons, the petitioner was placed in one ward having multiple single rooms and barracks. It is further stated that during that limited period , the petitioner was kept in a single rooms and during such duration, whenever all prisoners came out, the petitioner convict was also coming out. It is stated that the single room where the petitioner was placed had iron bars open to air and the same cannot be equated with solitary confinement as the petitioner, was permitted to come out and mingle with other inmates submitted inmates at regular intervals on daily basis like other prisoners. Further, it has been submitted that such placement of the petitioner in a single room was for limited duration and intermittent period either for security reasons or other reasons in the interest of convict. It is clear from the affidavit filed by the Director General (Prisons) that the petitioner was not kept in solitary confinement, rather he was kept in protective custody which was for the benefit of the petitioner and also for ensuring the security. Considering the averments in the affidavit filed by the Director General (Prisons), the contention of the petitioner that he has

been kept in solitary confinement in violation of the principles of ***SUNIL BATRA'S*** *case stated supra does not merit acceptance and this cannot be a ground for review of the order rejecting the mercy petition of the petitioner."*

Judicial Review:

67. Learned counsel appearing for petitioner has fairly conceded that it is not his case that petitioner is presently suffering from any mental illness. Consequently, he has not relied on 'mental illness' as a supervening event. But has instead, argued that the Executive's failure to place records of the petitioner's past mental illnesses before His Excellency, the Governor and His Excellency, the President of India respectively vitiates the order rejecting the mercy petition as it fails the judicial review test. He has referred, in particular, to the letter dated 06.02.2011 passed by the Medical officer addressed to the Superintendent of Police, in which the Medical officer has confirmed that the petitioner was suffering from 'prison psychosis and depression'. Refuting these contentions, Sri M.B.Nargund, learned ASG has submitted that all relevant materials have been placed before the constitutional

authorities, who have arrived at their decision after properly applying their mind to the materials placed before them.

68. This would require us to consider the authorities which have discussed the scope of judicial review in matters pertaining to exercise of mercy jurisdiction under Articles 72 and 161 of the Constitution of India. It is now well settled that exercise of powers by His Excellency, the President of India under Article 72 of the Constitution of India and His Excellency, the Governor under Article 161 of the Constitution of India is subject to judicial review, though its scope is rather narrow and circumscribed.

69. In order to understand the scope of judicial review, it would be helpful to consider the Constitution Bench decision of the Hon'ble Apex Court in ***BIKAS CHATTERJEE v. UNION OF INDIA*** reported in ***(2004)7 SCC 634*** where the Court has elaborated on the limited grounds on which the exercise of executive power under

Articles 72 and 161 of the Constitution of India may be judicially reviewed. It is held:

> *"Although the decision of the President of India on a petition under Article 72 of the Constitution is open to judicial review but the grounds therefore are very very limited. In the Constitution Bench decision in Maru Ram v. Union of India (1981 (1) SCC 107 : 1981 SCC(Cri) 112) this Court has held that it is only a case of no consideration or consideration based on wholly irrelevant grounds or an irrational, discriminatory or mala fide decision of the President of India which can provide a ground for judicial review.*
>
> *In a Division Bench decision of this Court in Satpal v. State of Haryana (2000 (5) SCC 170 : 2000 SCC(Cri) 920) these very grounds have been restated as : (i) the Governor exercising the power under Article 161 himself without being advised by the Government; or (ii) the Governor transgressing his jurisdiction; or (iii) the Governor passing the order without application of mind; or (iv) the Governor's decision is based on some extraneous consideration; or (v) mala fides. It is on these grounds that the Court may exercise its power*

of judicial review in relation to an order of the Governor under Article 161, or an order of the President under Article 72 of the Constitution, as the case may be.

70. The limited grounds on which the Constitutional Courts may review the exercise of power has been further delineated in ***NARAYAN DUTT'S*** case stated *supra*, which has been affirmed with approval in ***SHATRUGAN CHAUHAN'S*** case stated *supra*. The grounds of challenge are :

a) If the Governor had been found to have exercised the power himself without being advised by the government;

b) If the Governor transgressed his jurisdiction in exercising the said power;

c) If the Governor had passed the order without applying his mind;

d) The order of the Governor was mala fide; or

e) The order of the Governor was passed on some extraneous considerations

71. The present guidelines that has been followed by the Ministry of Home Affairs, Government of India while deciding mercy petitions is titled 'Guidelines for dealing

with Mercy Petitions'. The 7 point guidelines indicate that the scope of mercy powers under the Constitution is extraordinary and is not limited by any judicial findings. The guidelines are extracted for easy reference :

(i) Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);

(ii) Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;

(iii) Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;

(iv) Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;

(v) Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;

(vi) Consideration of evidence in fixation of responsibility in gang murder case;

(vii) Long delays in investigation and trial etc.

72. In ***Shatrugan Chauhan's*** case stated *supra*, the Hon'ble Apex Court has recommended the addition of 'delay in execution' as an additional guiding factor.

73. Further, it needs to be remembered that there is always a presumption that the constitutional authority acts with application of mind as has been reiterated in ***BIKAS CHATTERJEE'S*** case stated *supra*. It has been held in ***MARU RAM'S*** case stated *supra* that the higher authority exercising power more cautiously would be its exercise. It is within this narrow framework of law as set out above that we would have to decide if judicial interference is called for in the facts of the present case.

74. We would have to first understand the meaning of 'relevant materials/documents' in order to decide if any relevant materials have been withheld from the consideration of the His Excellency, the President of India/Governor. Some guidance on the scope and meaning of relevant materials can be had from certain observations in ***SHATRUGAN CHAUHAN'S*** case stated *supra* where it was held :

> *"For illustration, on receipt of mercy petition, the Department concerned has to call for all the records/materials connected with the conviction. Calling for piece-meal records instead of all the materials connected with the conviction should be deprecated. When the matter is placed before the President, it is incumbent upon the part of the Home Ministry to place all the materials such as judgment of the Trial Court, High Court and the final Court, viz., Apex Court as well as any other relevant material connected with the conviction at once and not call for the documents in piece meal."*

75. It cannot be said that past medical health reports have any connection, even remotely, with the

conviction of the petitioner. Hence, this argument of the petitioner will have to be rejected. We can seek further guidance on the question of what is relevant or irrelevant based on the 7 point guidelines that has been followed by the Ministry of Home Affairs, Government of India in advising the President of India as regards exercise of mercy jurisdiction. It would be seen that the 'Personality of the accused' embraces within it, the mental health of the petitioner. Further, since it is only *present* mental illnesses which operates as a supervening event for commutation of the death penalty to life imprisonment, it has to be inferred that the relevant materials in respect of the mental health of the prisoner ought to be the latest 'mental health' reports and not every past medical record of the death row prisoner since he was kept in custody. The latest medical records/health reports have been placed before the authorities concerned. Hence, we do not find merit in the argument that relevant materials were kept out of consideration.

CONCLUSION:

76. For the aforesaid reasons, we summarise our view by holding that the cumulative effect of all circumstances of the case leads us to the following conclusion:

(i) There is no excessive, unexplained, inordinate delay attributable to the respondents in deciding the mercy petition;

(ii) There is no violation of the petitioner's right under Article 21 of the Constitution of India;

(iii) All the relevant and crucial materials required for deciding the mercy petition were placed before His Excellency, the Governor and His Excellency, the President of India and nothing has been kept out of consideration;

(iv) Petitioner cannot be said to have been kept in solitary confinement.

77. We do not find any ground to exercise judicial review of the order of the President of India in

rejecting the petitioner's mercy petition. Hence, we proceed to pass the following:

ORDER

(i) Writ Petition is ***dismissed***;

(ii) Original records pertaining to this case is ordered to be returned to the learned counsel for respondent No.1 and to learned counsel for respondents 2 to 4 forthwith.

Sd/-
JUDGE

Sd/-
JUDGE

VK/LB