
(2012) 01 GAU CK 0032
In the Gauhati High Court
Case No : Writ Petition (Cr.) No. 35 of 2011

Mahendra Nath Das

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-01-2012

Acts Referred:

Constitution of India, 1950 — Article 134, 14, 142, 161, 19
Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 354, 354(3), 367(5), 401
Penal Code, 1860 (IPC) — Section 302
Prisons Act, 1894 — Section 30(2)

Citation : (2012) 3 GLD 411

Hon'ble Judges : Adarsh Kumar Goel, C.J;C.R. Sharma, J

Bench : Division Bench

Advocate : A.K. Bhattacharyya with Dr. Y.M. Choudhury, for the Appellant; R. Sharma, ASGI, Mrs. B. Goyal, GA, Assam and B.D. Konwar, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goel, CJ.

1. This petition seeks quashing of order, rejecting the mercy petition of the petitioner by the President of India, conveyed vide letter dated 27.5.2011 by the Joint Secretary to the Government of Assam, Home Department (Annexure-I) and also prays for commuting the death sentence to the life imprisonment.

Facts:

On 24.12.1990 at 12 Noon, the petitioner, who was an expelled member of Assam Motor Workers Union, stabbed Rajen Das, the Secretary of the said Union. When Rajen Das tried to escape, the accused followed him and inflicted more stabs. Rajen Das died on account of injuries received. The trial Court, vide judgment dated 11.11.1997, convicted the petitioner u/s 302, IPC and sentenced him to undergo imprisonment for life. During pendency of the said trial, the petitioner who had been granted, bail, jumped bail and on 24.4.1996 at 7.00

a.m., killed Hare Kanta Das by severing his head from the neck by a sword for which he was tried and convicted by the trial Court vide judgment dated 18.8.1997 u/s 302, IPC and sentenced to death. The sentence awarded by the trial Court was affirmed by this Court vide judgment dated 3.2.1998 and by the Hon"ble Supreme Court vide judgment dated May 14, 1999 in CrI. A. 700/98, Sri Mahendra Nath Das @ Sri Gobinda Das Vs. State of Assam, , inter alia, with the following observations :

Now coming to the facts of this case, the circumstances of the case unmistakably show that the murder committed was extremely gruesome, heinous, coldblooded and cruel. The manner in which the murder was committed was atrocious and shocking. After giving blows with a sword to the deceased when he fell down the appellant amputated his hand, severed his head from the body carried it through the road to the police station (majestically as the trial Court puts it) by holding it in one hand and the blood dripping weapon on the other hand. Does it not depict extreme depravity of the appellant? In our view it does.

The mitigating circumstances pointed out by the learned counsel for the appellant are, though the appellant himself did not state any mitigating circumstances when inquired about the same by the learned Sessions Judge, that the appellant is a young man of 33 years and having three unmarried sisters and aged parents and he was not well at that time. These circumstances when weighed against the aggravating circumstances leave us in no doubt that this case falls within the category of rarest of rare cases. The trial Court has correctly applied the principles in awarding the death sentence and the High Court has committed no error of law in confirming the same.

On these facts declining to confirm the death sentence will, in our view, stultify the course of law and justice. In Govindasami Vs. State of Tamil Nadu, , Mukherjee, J. speaking for the Court observed, "if, inspite thereof, we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy.

2. The petitioner made mercy petition dated 4.6.1999 to the Governor of Assam and the President of India. The same was rejected by the Governor on 7.4.2000. Thereafter, his mercy petition addressed to the President of India was processed by the Home Ministry in Government of India after receiving record from the State and the file was submitted to the President Secretariat in June, 2001. The file was returned by the President Secretariat in July, 2004 for re-examination and was re-submitted to the President's Secretariat in April, 2005. The petitioner sent reminder dated 4.10.2005 which was forwarded by the State Government on 22.5.2006 to the Government of India. He also sent reminders dated 26.4.2007, 25.8.2008 and 17.11.2009 which were forwarded by the State Government to the Central Government. The Ministry of Home Affairs sought withdrawal of the file from the President's Secretariat and on receiving the same on 27.9.2010, the file was re-submitted on 19.10.2010. The Hon"ble President of India was pleased to reject the mercy petition on 8.5.2011 which was

communicated to the Ministry of Home Affairs on 12.5.2011 (as per averments in paragraphs 6 and 7 of the affidavit-in-opposition filed on behalf of the Union of India).

3. The mother of the petitioner filed WP (Crl.) 17/2011 which was dismissed by this Court on 8.9.2011 as not maintainable for want of locus standi. Thereafter, the present petition has been filed on 12.9.2011 claiming that death sentence be commuted to life imprisonment on account of delay of 11 years 11 months 23 days in adjudicating upon the mercy petition by the office of the President of India.

Pleadings:

4. According to the petitioner, he has gone through a living hell not knowing whether he would live or die, and whether he would live to see another day or draw another breath, or whether that day and that breath would be his last. The petitioner says that he has been swinging between life and death for these past 15 years in solitary confinement. The petitioner says that he has suffered enough, and that it would not be in the interest of justice to compound this suffering by executing him. The petitioner states that the interests of justice would be served by converting the sentence of death to one of life imprisonment. The petitioner states that cases where the delay has been less than half of what it is in the present case have been held by the Supreme Court to be unconscionable and excessive". It has also been stated that frustrated by the delay in decision of his mercy petition, the petitioner went on hunger strike. After rejection of his mercy petition there was news report that no hangman could be found and the person later identified had no experience. The petitioner had been continuously in custody since 20.4.1996 and has been under sentence for more than 14 years. He has been kept in separate confinement and deprived of human companionship with the threat of imminent death hanging over his head and thus, suffered mental agony and torture. He was swinging between life and death not knowing whether he will be spared or not, and when the hangman's noose will close around his neck. Every person passing his prison cell is imagined to be the harbinger of news regarding the outcome of the mercy petition, or the date of his execution. Such torment is a punishment far worse than death. Further averments in the petition are as follows:-

5. That the petitioner states that he has been leading a very disciplined and orderly life in prison assisting fellow prisoners and officials alike. Through his conduct, he has exhibited concern for the welfare of others and tended to their social, emotional and spiritual needs. The jail authorities would testify to the good conduct of the petitioner. It would be in the fitness of things therefore that his life be spared from the gallows, as he has demonstrated that he is capable of leading of life with responsibility and service to the society. The petitioner says that his conduct in prison is a factor to be taken into consideration while considering his plea for mercy and commutation of sentence.

6. That the petitioner states that the former President of India, Dr. Abdul Kalam, during his Presidency between 2002-07, had formulated a set of criteria to guide the Home Ministry when it considered commutation petitions. These include:-

(i) The Home Ministry, before recommending any action on a petition, should consider the sociological aspect of the cases;

(ii) Besides the legal aspects, the Ministry should examine the humanist and compassionate grounds in each case; these grounds include the age of the convict and his physical and mental condition;

(iii) The Ministry should examine the scope for recidivism in case a death sentence is commuted to life imprisonment through the President's action; and

(iv) The Ministry should examine the financial liabilities of the convict's family.

8. That the petitioner states that the question raised in this petition is whether because of supervening events post the SLP decision, the infliction of the most extreme penalty in the circumstances of the case would violate the petitioner's fundamental rights under Article 21 of the Constitution of India, even if the death sentence was justly imposed at the time of delivering initial judgment by the Sessions Judge, Kamrup.

5. The petition also refers to the judgments of the Hon'ble Supreme Court in Triveniben Vs. State of Gujarat, , Jagdish Vs. State of Madhya Pradesh, , T.V. Vatheeswaran Vs. State of Tamil Nadu, , Sher Singh and Others Vs. State of Punjab, , Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra, , K.P. Mohammed Vs. State of Kerala, , Madhu Mehta Vs. Union of India and Others, , Shivaji Jaising Babar Vs. State of Maharashtra, , Daya Singh Vs. Union of India and others, , Ramesh Vs. State of Rajasthan, , of the Madras High Court in Haja Moideen and etc. Vs. Government of India and Others, etc., , of Delhi High Court in Khem Chand Vs. State, , of Bombay High Court in Bhagwan Patilba Palve Vs. State of Maharashtra, , and of Rajasthan High Court in Sawai Singh Vs. State of Rajasthan and Another, , apart from other judgments.

6. Reply has been filed on behalf of the State of Assam stating that it is only after receipt of the Presidential order rejecting his mercy petition on 12.5.2011 that the petitioner has been kept in solitary confinement u/s 30(2) of the Prisons Act, 1984. In view of law laid down in Sunil Batra Vs. Delhi Administration and Others etc., , Section 30(2) of the Prisons Act applies only when death sentence becomes conclusive after rejection of the mercy petition. It has been further stated that the State Government furnished relevant information to the Central Government well in time. A professional hangman from Lucknow has been duly found but in view of the interim order passed by this Court the Officer deputed to escort the hangman was called back. The petitioner repeatedly resorted to hunger strike which was a major offence under the Jail Manual.

7. An affidavit-in-opposition has also been filed on behalf of Union of India giving particulars of step taken on the mercy petition and further stating that from

March, 1998 to May, 2004 no mercy petition was decided by the President and between May, 2004 to April, 2009 only 2 mercy petitions were decided while between May, 2009 to 31.10.2011, 13 mercy petitions were decided. The averments in the said affidavit, inter alia, read as follows :-

8... After the new Government was formed in May, 2009, in September, 2009, it was decided to recall the cases pending with the President's Secretariat for review in the Ministry of Home Affairs, to assist in expediting a decision by the President of India in each case. The cases were recalled from President's Secretariat one-by-one, on the basis of the date of trial Court judgment and were resubmitted to the President's Secretariat after review. Recalling of the cases were not under a Constitutional provision but an administrative decision to ensure a fair and equal treatment of all cases and to assist in expediting a decision by the Hon'ble President. Till 31.10.2011, 26 Mercy Petitions were submitted/submitted to the President's Secretariat. The Hon'ble President decided one Mercy Petition in November, 2009, four Mercy Petitions in 2010 and eight Mercy Petitions in 2011 (till 31st October, 2011). Thereafter, a total of 13 Mercy Petitions have been decided by the President since November, 2009. As on 31.10.2011, 19 Mercy Petitions are pending under Article 72 of the Constitution; out of which 15 are pending with President's Secretariat and four are pending with Ministry of Home Affairs (including the two new petitions which have been received in 2011).

17. That with regard to the statements made in paragraph 3 (b) to 3 (g) of the Writ Petition the deponent herein would like to place before this Hon'ble Court the chronological sequence of events in the mercy petition case of Mahendra Nath Das of Assam. They are as follows :-

24.04.1996. Petitioner Mahendra Nath Das murdered Hare Kanta Das, a truck owner while he was having morning cup of tea with others on the corner of tea stall of FD Road and Chamber Road, Guwahati, Assam and was arrested for the crime.

18.08.1997. Date of judgment of trial Court and sentenced to death.

03.02.1998. Date of judgment of Hon'ble High Court, Guwahati.

14.5.1999. Date of judgment of Hon'ble Supreme Court.

07.04.2000. Date of rejection of mercy petition by Hon'ble Governor of Assam.

April, 2000. A petition dated nil of Mahendra Nath Das addressed to the Hon'ble President of India was received through Government of Assam.

June, 2001. File submitted to President's Secretariat for the first time.

July, 2004. File returned by President's Secretariat for re-examination in Ministry of Home Affairs (MHA).

April, 2005. File submitted to the President's Secretariat for the second time.

27.09.2010. File called back for review in Ministry of Home Affairs (MHA).

19.10.2010. After review, file submitted to the President's Secretariat for the third time.

08.05.2011. Decision communicated to the Government of Assam.

31. That with regard to the statements made in paragraphs 32 to 33 of the Writ Petition the deponent begs to state that Mahendra Nath Das is a repeat offender. He murdered Hare Kanta Das when he jumped bail given by Hon"ble High Court in another murder case of one Rajan Das for which he was awarded life sentence later on. The Supreme Court described the murder of Hare Kanta as "extremely gruesome, heinous, cold-blooded and cruel. The manner in which the murder was committed was atrocious and shocking. After giving blows with a sword to the deceased, when he fell down, the appellant amputated his hand, severed his head from the body, carried it through the road to the Police Station by holding it in one hand and the blood dripping weapon on the other hand. Does it not depict the extreme depravity of the appellant? In our view it does" Mahendra Nath Das has already availed of all legal as well as constitutional remedies.

8. We have heard Mr. A.K. Bhattacharyya, learned senior counsel appearing for the petitioner, learned counsel appearing for the Union of India, for the State of Assam and the victim of crime viz. Amal Das, son of late Hare Kanta Das, the complainant in the murder case.

Rival contentions:

9. Contention vehemently raised on the behalf of the petitioner is that even after conviction and sentence attained its finality, delay in executing the death sentence furnishes an independent cause of action to seek commutation of death sentence to life imprisonment. Such right directly flows from Article 21 of the Constitution of India. So long a person is alive, he has a right to be treated with dignity. The expression "life" includes right to live with dignity which can be taken away only by just and fair procedure. Causing agony and torture to a person by keeping his mercy petition pending is in violation of Article 21 of the Constitution and only remedy for enforcement of the said right is to commute the death sentence into life imprisonment. There is no other remedy available for enforcing the violation of right under Article 21 of the Constitution by undue delay in disposal of the mercy petition. In support of this submission reliance was placed on the judgments mentioned above.

10. Learned counsel for the respondents, on the other hand, opposed the submission made on behalf of the petitioner by submitting that sentence of death awarded for gruesome, heinous, coldblooded and cruel murder which may shock the society cannot in all cases be commuted into life imprisonment merely on the ground that there was undue delay in disposal of the mercy petition. Time taken in disposal of the mercy petition is to the benefit of the accused who continues to live instead of being executed immediately. Right of the accused under Article 21

of the Constitution cannot be considered in isolation but has to be seen with the equally competing right of the victim of heinous crime and the right of society to free itself from a person who is found to be involved in a dastardly and diabolic crime. The circumstances of the crime cannot be ignored even when inordinate delay takes place in execution of the death sentence. Delay does not render the execution of the death sentence to be unconstitutional. In support of this submission, reliance is placed on judgments of the Hon'ble Supreme Court in *Triveniben (supra)*, *State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others*, and *Govindasami Vs. State of Tamil Nadu*, .

The Issue:

11. Question for consideration is whether there is undue delay in decision of mercy petition which renders sentence of death awarded to the petitioner liable to be converted to life imprisonment.

Law Relating to Death Sentences:

12. We may make a brief reference to law relating to death sentence in India. Murder is one of the offences for which death sentence is provided u/s 302, IPC. Prior to 1955, death sentence was the rule for the offence of murder but alternative sentence of life could be awarded by giving reasons. Section 367(5) of the Code of Criminal Procedure, 1898 required giving of reasons if sentence of death was not given. In 1955, this requirement was deleted vide Act 26 of 1955. Thereafter, in Code of Criminal Procedure, 1973, Section 354(3) requires giving of special reasons for awarding death sentence when alternative sentence of life imprisonment is provided. The amendment indicates trend against death sentence while retaining the same to meet the ends of justice by giving reasons.

13. In *Jagmohan Singh Vs. The State of U.P.*, , validity of death sentence was challenged on the ground that it conferred uncontrolled discretion resulting in violation of fundamental rights of Articles 14, 19 and 21 of the Constitution. Reliance was mainly placed on American Supreme Court judgment in *Furman v. State of Georgia*, decided on June 29, 1972, 408 US 238 holding death sentence to be violative of 8th amendment to the US Constitution. Repelling the challenge, the Hon'ble Supreme Court held :

12. So far as we are concerned in this country, we do not have, in our constitution any provision like the Eighth Amendment nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. Indeed what is cruel and unusual may, in conceivable circumstances, be regarded as unreasonable. But when we are dealing with punishments for crimes as prescribed by law we are confronted with a serious problem. Not a few are found to hold that life imprisonment, especially, as it is understood in USA is cruel. On the other hand, capital punishment cannot be described as unusual because that kind of punishment has been with us from ancient times right up to the present

day though the number of offences for which it can be imposed has continuously dwindled. The framers of our Constitution were well aware of the existence of capital punishment as a permissible punishment under the law. For example, Article 72(1)(c) provides that the President shall have power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence "in all cases where the sentence is a sentence of death". Article 72 further provides that "nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force". The obvious reference is to Sections 401 and 402 of the Criminal Procedure Code. Then again Entries 1 and 2 in List III of the Seventh Schedule refer to Criminal Law and Criminal Procedure. In Entry No. 1 the entry Criminal Law is extended by specifically including therein "all matters included in the Indian Penal Code at the commencement of this Constitution." All matters not only referred to offences but also punishments--one of which is the death sentence. Article 134 gives a right of appeal to the Supreme Court where the High Court reverses an order of acquittal and sentences a person to death. All these provisions clearly go to show that the Constitution-makers had recognised the death sentence as a permissible punishment and had made constitutional provisions for appeal, reprieve and the like. But more important than these provisions in the Constitution is Article 21 which provides that no person shall be deprived of his life except according to procedure established by law. The implication is very clear. Deprivation of life is constitutionally permissible if that is done according to procedure established by law. In the face of these indications of constitutional postulates it will be very difficult to hold that capital sentence was regarded per se unreasonable or not in the public interest.

14. We have grave doubts about the expediency of transplanting Western experience in our country. Social conditions are different and so also the general intellectual level. In the context of our Criminal Law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty. We have not been referred to any large-scale studies of crime statistics compiled in this country with the object of estimating the need of protection of the society against murders. The only authoritative study is that of the Law Commission of India published in 1967. It is its Thirty-fifth Report. After collecting as much available material as possible and assessing the views expressed in the West both by abolitionists and the retentionists the Law Commission has come to its conclusion at paras 262 to 264. These paragraphs are summarized by the Commission as follows at p. 354 of the Report:

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be

borne in mind.

It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment.

Arguments which would be valid in respect of one area of the world may not hold good in respect of another area, in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts.

On a consideration of all the issues involved, the Commission is of the opinion, that capital punishment should be retained in the present state of the country.

15. In *Rajendra Prasad Vs. State of Uttar Pradesh*, , it was held that death sentence could be awarded only if security of State and society, public order and interest of general public compel that course as provided under Article 19(2) to (6) of the Constitution and judgment in *Jagmohan Singh* had to be applied limited in that manner. Doubting correctness of this view, matter was referred to larger Bench and finally in *Bachan Singh Vs. State of Punjab*, , constitutionality to death sentence was upheld if the Court found a case to be "rarest of rare". Conclusions reached by the Court are :-

132. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the

people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware--as we shall presently show they were--of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provisions in Section 302, violates neither the letter nor the ethos of Article 19.

164. Attuned to the legislative policy delineated in Sections 354(3) and 235 (2), propositions (iv) (a) and (v)(b) in Jagmohan--shall have to be recast and may be stated as below :

(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder u/s 302 of the Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitute, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence.

209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the Courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency--a fact which attests to the caution and compassion which

they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354, viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

16. In *State of Madhya Pradesh Vs. Munna Choubey and Another*, , it was observed :-

9. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be a cornertone of the edifice of "order" should meet the challenges confronting the society. Friedman in his *Law in Changing Society* stated that "State of criminal law continues to be--as it should be--a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation sentencing process be stem where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapon used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In *Mahesh and Others Vs. State of Madhya Pradesh*, , this Court while refusing to reduce the death sentence observed thus : (SCC p. 82, para 6).

It will be a mockery of justice to permit these appellants [the accused] to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of this country suspect. The common man will lose faith in Courts. In such cases, he understands and appreciates the language of deterrence more than the reformatory jargon.

10. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of

law, and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. This position was illuminatingly stated by this Court in *Sevaka Perumal, etc. Vs. State of Tamil Nadu*, .

11. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

12. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilised societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

13. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Counce McGautha v. State of California*, 402 US 183 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

14. In *Jashubha Bharatsinh Gohil and Others Vs. State of Gujarat*, , it has been

held by this Court in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenge. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

15. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be resultwise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

16. In *Dhananjay Chatterjee alias Dhana Vs. State of W.B.*, , this Court has observed that a shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the societies cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

17. Similar view has also been expressed in *Ravji alias Ram Chandra Vs. State of Rajasthan*, , It has been held in the said case that it is the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society cry for justice against the criminal." If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

17. In *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka*, , explaining the judgment in *Bachan Singh*, it was observed that even when the case was not rarest of rare case, and where instead of death sentence, life imprisonment was awarded, a direction could be issued that convict may not be released from the Prison for rest of the life.

Effect of undue delay in execution of Death Sentence:

18. We may now refer to development of law dealing with the right of convict to seek commutation of death sentence to life imprisonment on the ground of delay in execution.

19. In *T.V. Vatheeswaran Vs. State of Tamil Nadu*, , the prisoner was kept in solitary confinement in violation of law laid down in *Sunil Batra Vs. Delhi Administration and Others etc.*, and there was 8 years delay in executing the sentence. It was observed that when a person is made to undergo inhuman and degrading punishment where execution is endlessly delayed and the accused is made to suffer most excruciating agony and anguish, the Court could give relief where necessary. Prolonged delay in execution of death sentence was against the right of fair procedure recognised in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, . Even a person under lawful sentence of death or imprisonment was entitled to fundamental rights as held in *D. Bhuvan Mohan Patnaik and Others Vs. State of Andhra Pradesh and Others*, , it was observed that right to speedy trial was implicit in right to fair trial as held in *State of Maharashtra Vs. Champalal Punjaji Shah*, and *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, . Long delay in executing death sentence was a recognised factor which rendered death sentence liable to be vacated. It was further held that delay exceeding two years in execution of sentence was to be considered sufficient to entitle a person to demand quashing of death sentence.

20. In *Sher Singh*, a Bench of three Judges, observed that right under Article 21 required fair procedure at all stages, including the stage of execution. Even where death sentence was justified when passed, its execution may not be justified by reason of undue delay. In appropriate cases, the Court could direct that death sentence be not executed by reason of supervening circumstances. The Court could consider reasons for delay and responsibility for the same, nature of offence and attendant circumstances, pattern of crime and its impact in society. It was observed that the Executive should follow self imposed rule that a mercy petition under Articles 72 and 161 of the Constitution should be disposed of within a period of 3 months as long delay erodes the confidence of the people in the very system of justice. It was further held that rule of two years could not be laid down for every case. It could not be laid down that if there was long delay in execution of death sentence, the sentence must be substituted by sentence of life imprisonment. Several factors were required to be taken into account. The conclusion reached as follows :

15. The fact that it is permissible to impose the death sentence in appropriate cases does not, however, lead to the conclusion that the sentence must be executed in every case in which it is upheld, regardless of the event which have happened since the imposition or the upholding of that sentence. The inordinate delay in the execution of the sentence is one circumstance which has to be taken into account while deciding whether the death sentence ought to be allowed to be executed in a given case.

16. A prisoner who has experienced living death for years on end is therefore entitled to invoke the jurisdiction of this Court for examining the question whether, after all the agony and torment he has been subjected to, it is just and fair to allow the sentence of death to be executed. That is the true implication of Article 21 of the Constitution and to that extent, we express our broad and respectful agreement with our learned Brethren in their visulisation of the meaning of that Article. The horizons of Article 22 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Article 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable. It is well-established that a prisoner cannot be tortured or subjected to unfair or inhuman treatment (see Prabhakar Pandurang Sangzgiri Bhuvan Mohan Patnaik and Sunil Batra). it is a logical extension of the self-same principle that the death sentence, even is justifiably imposed, cannot be executed if supervening events make its execution harsh, unjust or unfair Article 21 stands like a sentinel over human misery, degradation and oppression. Its voice is the voice of justice and fair play. That voice can never be silenced on the ground that the time to heed to its imperatives is long since past in the story of a trial. It reverberates through all stages--the trial, the sentence, the incarceration and finally, the execution of the sentence.

18. What we have said above delineates the broad area of agreement between ourselves and our learned Brethren who decided *Vatheeswaran*. We must now indicate with precision the narrow area wherein we feel constrained to differ from them and the reasons why. Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But, according to us, no hard and fast rule can be laid down as our learned Brethren have done that [SCC para 21, p. 79 : SCC (CrI) p. 353] "delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence to death to invoke Article 21 and demand the quashing of the sentence of death". This period of two years purports to have been fixed in *Vatheeswaran* after making [SCC para 21, p. 79 : SCC (CrI) p. 353] "all reasonable allowance for the time necessary for appeal and consideration of reprieve." With great respect, we find it impossible to agree with this part of the judgment.

19. Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme 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 sentences 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. The Vinoba Bhaves, who undertake the "Prayopaveshana" do not belong to the world of ordinary mortals. Therefore, it is understandable that a convict sentenced to death will take recourse to every remedy which is available to him under the law to ask for the commutation of his sentence even after the death sentence is finally confirmed by this Court by dismissing his SLP or appeal. But, it is, at least, relevant to consider whether the delay in the execution of the death sentence is attributable to the fact that he has resorted to a series of untenable proceedings which have the effect of defeating the ends of justice. It is not uncommon that a series of review petitions and writ petitions are filed in this Court to challenge judgments and orders which have assumed finality, without any seeming justification. Stay orders are obtained in those proceedings and then, at the end of it all, comes the argument that there has been prolonged delay in implementing the judgment or order. We believe that the Court called upon to vacate a death sentence on the ground of delay caused in executing that sentence must find why the delay was caused and who is responsible for it. If this is not done, the law laid down by this Court will become an object of ridicule by permitting a person to defeat it by resorting to frivolous proceedings in order to delay its implementation. And then, the rule of two years will become a handy tool for defeating justice. The death sentence should not, as far as possible, be imposed. But, in that rare and exceptional class of cases wherein that sentence is upheld by this Court, the judgment or order of this Court ought not to be allowed to be defeated by applying any rule of thumb.

20. Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed. The substitution of the death sentence by a sentence of life imprisonment cannot follow by the application on the two years" formula, as a matter of quod erat demonstrandum.

21. In Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra, , while converting death sentence to life imprisonment on account of long lapse of time in passing the death sentence and its execution, it was observed that judgment

of Bench of 3 Judges in Sher Singh could not be held to have overruled the view of two Judges in T.V. Vatheeswaran v. State of Tamil Nadu.

22. In view of conflicting decisions in T.V. Vatheeswaran v. State of Tamil Nadu, Sher Singh v. State of Maharashtra and Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra, the matter was referred to larger Bench and in Triveniben v. State of Gujarat. After considering the conflicting views, it was held as under :-

2. We are of the opinion that:

Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions readied by the Court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled.

23. Thus, while it was held that "undue long delay" in executing death sentence will entitle the condemned prisoner to approach the Court and the Court will examine the nature of delay caused and circumstances that ensued after the death sentence was confirmed, it was not spelt out as to in what circumstances the Court may commute the same to life imprisonment and when the delay could be held to be "undue long". In that case, five cases were considered by the Court. Four of the writ petitions were dismissed and one of the writ petition was allowed, without any discussion on the aspect, in the following manner:

3. In the light of these principles and giving our anxious consideration to every one of these cases, we allow in part only W.P. (Crl.) No. 186 of 1986 and quash the sentence of death awarded to the accused (Harbhajhan Singh). In the place of the sentence of death, we substitute the sentence of imprisonment for life to that accused.

4. We dismiss all other writ petitions.

24. Reasons for the above conclusion are separately recorded in Triveniben Vs. State of Gujarat, . In the majority judgment, the main observations are :

16... but it could not be doubted that go long as the matter is pending in any Court before final adjudication even the person who has been condemned or who has been sentenced to death has a ray of hope. It therefore could not be contended that he suffers that mental torture which a person suffers when he knows that he is to be hanged but waits for the doomsday. The delay therefore which could be considered while considering the question of commutation of

sentence of death into one of life imprisonment could only be from the date the judgment by the Apex Court is pronounced i.e. when the judicial process has come to an end.

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. Sometimes 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 is 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 delay in disposal of the mercy petitions or delays occurring at the instance of the executive.

18. So far as the scope of the authority of the President and the Governor while exercising jurisdiction under Article 72 and Article 161 are concerned the question is not at all relevant so far as the case in hand is concerned. But it must be observed that when such petitions under Article 72 or 161 are received by the authorities concerned it is expected that these petitions shall be disposed of expeditiously.

22. It was contended that the delay in execution of the sentence will entitle a prisoner to approach this Court as his right under Article 21 is being infringed. It is well settled now that a judgment of Court can never be challenged under Article 14 or 21 and therefore the judgment of the Court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in *Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another*, and also in *R.S. Nayak Vs. A.R. Antulay*, , 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.

25. In concurring judgment after referring to earlier judgments dealing with the question of effect of delay in deciding the case as a mitigating circumstance or otherwise, held that such decisions are of little help in determining the question of validity of death sentence on account of delay in its execution after finality of conviction. While the delay may not render the execution unconstitutional and no fixed period of delay rendering the sentence in-executable could be fixed, principle of speedy trial continued to apply in disposal of mercy petition and if there was undue delay in disposal of mercy petition, such delay was a significant factor, though could not by itself render the execution unconstitutional. Such factor had to be considered in the diverse circumstances. The relevant observations are :

76. What should be done by the Court is the next point for consideration. It is necessary to emphasise that the jurisdiction of the Court at this stage is extremely limited. If the Court wants to have a look at the grievance as to delay it is needless to state, that there should not be any delay either in listing or in disposal of the matter. The person who complains about the delay in the execution should not be put to further delay. The matter, therefore, must be expeditiously and on top priority basis, disposed of. The Court while examining the matter, for the reasons already stated, cannot take into account the time utilised in the judicial proceedings up to the final verdict. The Court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The Court may only consider whether there was undue long delay in disposing of mercy petition; whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself. The Court has still to consider as observed in Sher Singh case [SCR p. 596 : SCC p. 357 : SCC (Cri) p. 474, para 20].

The nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead to its repetition, if the death sentence is vacated, are matters which must enter into the verdict as to whether the sentence should be vacated for the reason that its execution is delayed.

26. In *Madhu Mehta*, applying the principle in *Triveniben*, death sentence was converted to life imprisonment. It was observed as follows :

3... In the instant case, Gyasi Ram has suffered a great deal of mental agony for over eight years. It is not disputed that there has been long delay. We do not find reasons sufficiently commensurate to justify such long delay. The convict has suffered mental agony of living under the shadow of death for long, far too long. He should not suffer that agony any longer.

27. In *Daya Singh*, the Court converted the death sentence into life imprisonment with the following observations :

7... In absence of any reasonable explanation by the respondents we are of the view that if the concerned officers had bestowed the necessary attention to the matter and devoted the time its urgency needed, we have no doubt that the entire process of consideration of the questions referred would have been completed within a reasonable period without leaving any yawning gap rightly described by the learned Additional Solicitor General as "embarrassing gap". There has, thus, been an avoidable delay, which is considerable in the totality of circumstances in the present case, for which the condemned prisoner is in no way responsible.

28. In *Haja Moideen*, the Madras High Court converted the death sentence into life imprisonment on account of unexplained delay in dealing with the mercy petition. In *Bhagwan Patilba Palwe*, the Bombay High Court adopted the same course which was upheld by the Hon'ble Supreme Court in *Shivaji Jaysingh*. Same was the position in *Sawai Singh* decided by the Rajasthan High Court.

Analysis of legal position :

29. A reference to leading judgments on the issue of the effect of undue delay in execution of death sentence shows that undue delay violates right of convict to fair procedure under Article 21 of the Constitution and entitles him to apply for converting death sentence to life imprisonment. The question still remains whether in every case of undue delay death sentence must be converted to life imprisonment or delay was a significant factor to be taken into account with other factors. While according to learned counsel for the petitioner, unless delay is by the prisoner, death sentence must be vacated irrespective of any other circumstance, the stand of the respondent is that undue delay only requires the Court to consider whether it is just and fair to allow the death sentence to be executed, notwithstanding the finality of the decision of the Court. Undue delay is a significant factor which cannot be divorced from dastardly and diabolical circumstances of the crime, nature of offence, its impact on the society, likelihood of its repetition. If on evaluation of all the diverse features, it is to be held that it is unfair to execute death sentence, the Court may convert the same to life imprisonment. On the other hand, if it is held that in spite of undue delay, having regard to nature of offence and impact on the society or any other relevant circumstance, death sentence ought to be executed, the Court may

decline to interfere.

30. Before we examine the question of effect of delay in the present case, we may go into the question whether the explanation given by the Union of India in Para 8 above which mainly is that the delay took place in the President Secretariat can be held to be valid. While Article 361 of the Constitution is a complete bar to implead the President or the Governor to any proceedings, as they are not answerable to any Court for the exercise and performance of their powers and duties, their personal immunity is, however, not a bar to challenge their actions. It is not open to the Government to say that because of immunity, their actions could not be satisfactorily answered. The legal position to this effect has been laid down, inter alia, in *Rameshwar Prasad and Others Vs. Union of India (UOI) and Another*, as follows :

173. A plain reading of the aforesaid article shows that there is a complete bar to the impleading and issue of notice to the President or the Governor inasmuch as they are not answerable to any Court for the exercise and performance of their powers and duties. Most of the actions are taken on the aid and advice of the Council of Ministers. The personal immunity from answerability provided in Article 361 does not bar the challenge that may be made to their actions. Under law, such actions including those actions where the challenge may be based on the allegations of mala fides are required to be defended by the Union of India or the State, as the case may be. Even in cases where personal mala fides are alleged and established, it would not be open to the Governments to urge that the same cannot be satisfactorily answered because of the immunity granted. In such an eventuality, it is for the respondent defending the action to satisfy the Court either on the basis of the material on record or even filing the affidavit of the person against whom such allegation of personal mala fides are made. Article 361 does not bar filing of an affidavit if one wants to file on his own. The bar is only against the power of the Court to issue notice or making the President or the Governor answerable. In view of the bar, the Court cannot issue direction to the President or the Governor for even filing of affidavit to assist the Court. Filing of an affidavit on one's own volition is one thing than the issue of direction by the Court to file an affidavit. The personal immunity under Article 361(1) is complete and, therefore, there is no question of the President or the Governor being made answerable to the Court in respect of even charges of mala fides.

31. In *Epuru Sudhakar and Another Vs. Govt. of A.P. and Others*, , dealing with the issue of judicial review of exercise of power under Article 72 of the Constitution, it was observed :

68. As stated above, exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases Courts will not interfere in its supervisory

jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. The Constitutional Law remain constant in all areas, but the mechanism for giving effect to that justification varies.

In view of above, plea that delay took place in President Secretariat, which was not required to be explained, cannot be accepted.

32. We may now come to the last and the crucial question whether or not in the facts and circumstances of the present case, the prayer for commuting the death sentence to the life imprisonment can be accepted. We have already noted the stand of the State that till decision on mercy petition, the petitioner has never been kept in the condemned cell which was in compliance with the law laid down in Sunil Batra. The said stand has not been rebutted in any manner. Though delay in deciding the mercy petition does appear to be unexplained and if delay alone is a conclusive factor, the death sentence may be liable to be set aside but in view of law laid down by Constitution Bench in Triveniben, delay is a factor which has to be seen in the light of subsequent circumstances, coupled with the nature of offence and circumstances in which the offence was committed, as already found by the competent Court while passing the final verdict. At this stage, the correctness of the final verdict is not in issue as held in Triveniben (particularly in paragraphs 22 and 76). Beyond delay, there is no subsequent circumstance showing any adverse effect on the petitioner on that count. Throughout he has continued to live as normal prisoner with other prisoners. If delay is considered along with dastardly and diabolical circumstances of the crime, in absence of any further supervening circumstances in favour of the petitioner, no case is made out for vacating the death sentence. Thus while delay has furnished cause of action to the writ petitioner to seek altering of death sentence, in absence of any other subsequent circumstance necessitating vacation of death sentence, and taking into account the circumstances for which the death sentence was awarded, there is no ground to vacate the sentence so awarded. As held in Sher Singh (last portion of paragraphs 19 and 20), while death sentence should not, as far as possible, be imposed but in rare and exceptional class of cases where sentence is held to be valid, the same cannot be allowed to be defeated by applying and rule of thumb. We have already noticed reasons for which retention of death sentence was upheld by the Hon''ble Supreme Court in Jagmohan Singh and Bachan Singh by distinguishing the American judgments and taking into account the study conducted by the Law Commission of India in its 35th Report and conditions prevailing in the Country. It was noted that in the perspective of prevailing condition of India, the Parliament has repeatedly rejected all attempts to abolish death sentence. We have also referred to judgment of the Hon''ble Supreme Court in Munna Choubey wherein after referring to earlier judgments, the Court cautioned that inadequate punishment may harm the justice system and undermine the public confidence in

efficacy of law, there was need to maintain proportion in punishment and crime and to protect the society, adequate punishment was necessary. Thus, mere delay though is a significant factor, cannot itself be a ground for commuting the death sentence to life imprisonment in absence of any further circumstance justifying such a course when offence and circumstances are rarest of rare.

33. We have analysed the principle of law laid down in Triveniben and not found any ground for vacating the death sentence. Judgments in Madhu Mehta and Daya Singh do not lay down any further principle as precedent and appear to in exercise of the jurisdiction of the Hon''ble Supreme Court under Article 142 of the Constitution. We are also not persuaded to follow the view taken by the High Court of Madras, Rajasthan and Bombay that delay alone was conclusive for commuting death sentence to life. In our view, this interpretation is contrary to law laid in Triveniben for the reasons already discussed. In view of above, we are unable to grant the prayer made in the writ petition and the same is dismissed.