**(2015) 01 AHC CK 0116**

**Allahabad High Court**

**Case No:** Civil Misc. Writ Petition (PIL) No. 57810 of 2014 and Criminal Misc. Writ Petition No. 23471 of 2014

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| Peoples'' Union for Democratic Rights (PUDR) | APPELLANT |
| Vs | |
| Union of India and Others | RESPONDENT |

**Date of Decision:** Jan. 28, 2015

**Acts Referred:**

- Constitution of India, 1950 - Article 136, 14, 161, 163(3), 19
- Criminal Procedure Code, 1973 (CrPC) - Section 401, 413, 414, 415
- Penal Code, 1860 (IPC) - Section 120-B, 201, 302, 364, 376
- Prisons Act, 1894 - Section 30(2)

**Citation:** (2015) 2 ADJ 398 : (2015) 5 ALJ 178 : (2015) CriLJ 4141 : (2015) 3 RCR(Criminal) 7

**Hon'ble Judges:** D.Y. Chandrachud, C.J; Pradeep Kumar Singh Baghel, J

**Bench:** Division Bench

**Advocate:** Rakesh Singh, Smriti Kartikeya, Ragini Ahuja, Yug Mohit Chaudhry, Siddhartha and B.N. Jagadeesha, for the Appellant; Ashok Mehta, A.S.G., Krishna Agrawal, S.C., Vijay Bahadur Singh, A.G., Akhilesh Singh, G.A. and Vimlendu Tripathi, A.G.A., Advocates for t

**Final Decision:** Allowed

**Judgement**

1. The case

The execution of the sentence of death which has been imposed on Surendra Koli, pursuant to a final judgment holding him guilty of the offence of having committed the murder of Rimpa Haldar has been called into question in two writ petitions instituted before this Court under Article 226 of the Constitution. The first of the two petitions was filed by the Peoples'' Union for Democratic Rights (PUDR) seeking a declaration that the execution of the sentence of death pursuant to the rejection of a mercy petition under Article 72 of the Constitution is unconstitutional and seeking a commutation of the sentence to imprisonment for life. On 31 October 2014, this

Court stayed the execution of the sentence of death by hanging. The second petition was filed by the convict seeking relief in his personal capacity.

On 8 February 2005, the victim, who was fourteen years of age, was reported missing. Surendra Koli ("the convict") was arrested on 29 December 2006. A charge-sheet was filed against him by the Central Bureau of Investigation (CBI) which investigated the crime, on 19 May 2007. Charges were framed on 18 June 2007 by the trial Court under Sections 302, 364 and 376 of the Indian Penal Code, 1860 (Penal Code) in Sessions Trial No. 611 of 2007. On 13 February 2009, the Additional Sessions Judge, Ghaziabad convicted Surendra Koli of offences under Sections 302, 364 and 376 read with Sections 511 and 201 and Section 120-B of the Penal Code and sentenced him to death. The conviction was upheld and the sentence confirmed by this Court on 11 September 2009 while disposing of the confirmation hearing and the appeal filed by the convict. A criminal appeal was dismissed by the Supreme Court on 15 February 2011.

2. At this stage, it would be necessary to note that on 3 May 2011, the Additional Sessions Judge, Ghaziabad issued a warrant for the execution of the sentence of death under Sections 413 and 414 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and scheduled the execution of the convict between 24 May 2011 and 31 May 2011 at 4.00 am. The grievance of the convict is that he was not furnished with a notice of the proceedings for the issuance of a death warrant nor was he informed by the prison officials of the scheduled date of execution.

3. On 7 May 2011, the convict addressed a mercy petition to the Governor of the State of Uttar Pradesh under Article 161 of the Constitution. According to the State Government, "the procedure to entertain and to process any mercy petition has been prescribed in Government Order No. 660/22-2-2005-17(346)/92 dated 13 April 2005". The State Government informed the Court that in accordance with the procedure which was prescribed in the Government Order, a letter dated 20 May 2011 was addressed to the District Magistrates of Ghaziabad (within whose jurisdiction the offence was tried) and of Gautam Budh Nagar (where the offence had been committed) as well as the Prison Superintendent, Ghaziabad calling upon them to submit their reports on eleven points referred to in the Government Order dated 13 April 2005 and to provide copies of the judgments of the trial Court, this Court and the Supreme Court at the earliest. Subsequently, reminders were addressed to the District Magistrates and to the Prison Superintendent on 9 June 2011 and 2 September 2011. A report of the District Magistrate, Gautam Budh Nagar dated 18 October 2012 was received by the State Government on 26 October 2012 (after a delay of one year and five months). On 10 December 2012, the file was forwarded to the Home Department of the State Government. On 20 December 2012, a meeting took place after which, as stated before the Court by the State Government, the file was received back with a noting of the Law Department on 24 January 2013. On 31 January 2013, the file was processed for being placed before

the Chief Minister whose approval was obtained on 12 February 2013. The file was forwarded to the Governor of the State on 13 February 2013 and after a preparatory note of the Legal Advisor to the Governor, the file was placed before the Governor on 1 April 2013. The mercy petition was rejected by the Governor on 2 April 2013.

4. Nearly three and a half months after the rejection of the mercy petition by the Governor, the State Government informed the prison authorities of the rejection of the petition. On 19 July 2013, the mercy petition which had been rejected by the Governor was forwarded together with other relevant records to the Secretary in the Home Department of the Union Government. After a lapse of nearly four months, on 11 November 2013, the Union Government addressed a letter to the State Government seeking information about and documents of the case including the mercy petition addressed to the President of India. On 21 November 2013, the State Government addressed a letter to the District Magistrate, Ghaziabad for supplying the information which had been sought by the Union Government. On 5 February 2014, the Union Government addressed a reminder to the State Government for providing the information and documents as sought. The State Government, in turn, addressed a reminder to the District Magistrate, Ghaziabad on 19 February 2014. On 28 February 2014, the District Magistrate submitted the information required by the Union Government. The mercy petition was considered by the Union Home Minister on 18 June 2014 and the file was submitted to the President of India for decision. The mercy petition was rejected by the President of India on 20 July 2014. Information about the rejection of the mercy petition was furnished to the State Government on 23 July 2014, following which the Prison Superintendent was informed on 28 July 2014. The convict was intimated by the prison authorities on 2 August 2014 of the rejection of his mercy petition.

5. On 24 July 2014, the Supreme Court rejected the review petition which was filed by the convict. It is not in dispute before this Court that no stay operated during the pendency of the review petition before the Supreme Court. The execution of the sentence of death was postponed in consequence of the pendency of the mercy petition. On 2 September 2014, the Supreme Court held in Mohd. Arif Vs. The Registrar,Supreme Court of India, (2014) AIRSCW 5337 : (2014) 10 SCALE 84 , that all review petitions in matters pertaining to the death penalty shall be heard in open Court. Under the directions of the Supreme Court, the benefit of the order was to be granted in those review petitions which had been dismissed earlier in chambers, where the convict had not been executed and where no curative petition had been filed. A period of one month was granted for filing applications for re-opening and listing of such review petitions which had been dismissed in chambers. Since the review petition of the convict in the present case had been dismissed on 24 July 2014, he was entitled, in pursuance of the directions of the Supreme Court in Mohd Arif (supra) to have his review petition reopened and heard in Court. On 2 September 2014, which was the very day on which the decision in Mohd Arif was delivered by the Supreme Court, a warrant for the execution of the death sentence

was issued by the Additional Sessions Judge, Ghaziabad on an application by the Prison Superintendent moved on the instructions of the Inspector General of Prisons. The warrant scheduled the execution of the convict on any day between 7 September 2014 and 12 September 2014 at 6.00 am. Again, the grievance of the convict is that he had no notice about the proceeding for the issuance of the death warrant and he was not informed by prison officials about the scheduled date for execution.

6. On 4 September 2014, the convict was shifted from Dasna Jail at Ghaziabad to the District jail at Meerut for execution of the death sentence since the jail at Ghaziabad did not have facilities for hanging. It was at this stage that the convict obtained knowledge of his impending execution. On 6 September 2014, an application for restoration of the review petition was filed in the registry of the Supreme Court. Following news reports of the scheduled execution of the convict, the Supreme Court was moved at 1.00 a.m. on 8 September 2014 when an order was passed staying the execution of the death warrant issued by the Additional Sessions Judge, Ghaziabad on 2 September 2014 for a period of one week. The execution of the convict was stayed by the Supreme Court on 12 September 2014 and the hearing of the review petition was scheduled in open Court on 28 October 2014. Thereafter, the convict was shifted back to Dasna Jail, Ghaziabad on 17 September 2014. The Supreme dismissed the review petition on 28 October 2014. Proceedings before this Court were instituted on 31 October 2014 when, on the petition moved by the PUDR, an interim stay of the execution of the warrant of death was granted.

7. The total period which has elapsed between the submission of the mercy petition to the Governor of the State until the communication of the rejection of the mercy petition by the President spans a period from 7 May 2011 to 2 August 2014, covering 3 years and 3 months. The convict has been in custody since 29 December 2006 for about eight years. The total period of custody which has been suffered under the sentence of death is about 5 years and 10 months. The period of 3 years and 3 months which has elapsed between the filing of the mercy petition with the Governor until the final communication of the rejection by the President, is comprehended in two components. The first period between 7 May 2011 and 19 July 2013 of two years and two months is the period which was taken by the State Government from the receipt of the mercy petition until, following the rejection by the Governor, it was forwarded to the Union Government. The second component comprises of the period from 19 July 2013 to 2 August 2014 - one year and fifteen days - from the receipt of the petition by the Union Government until the communication of the rejection to the petitioner.

Submissions

8. The submission which has been urged on behalf of the petitioners is that the execution of the sentence of death in the present case would violate the right to life of the convict under Article 21 of the Constitution. This violation of the right to life is,

it is submitted, founded on three premises to which we now turn. These submissions are summarised below:

(I) There has been a prolonged, unnecessary and avoidable delay of 3 years and 3 months in the disposal of the mercy petition. Of this period, large portions of the time which had elapsed are totally unexplained. Out of the total period of 3.3 years, the period of unexplained and avoidable delay amounts to 2.6 years as explained in the following chart which has been placed on the record in the written submissions:

Moreover, it has been submitted that the counter-affidavits which have been filed by the State would indicate that as many as five reminders were addressed to the District Magistrates and to the Prison Superintendent for furnishing documents for processing the mercy petition. This was in addition to a reminder which was addressed by the Central Government. These reminders, it has been submitted, are an admission of the delay on the part of the authorities which is unexplained and unnecessary;

(II) The convict was placed in solitary confinement since the date of the trial Court judgment on 13 February 2009 which, it has been urged, stands admitted by the supplementary counter-affidavit filed by the State Government on 15 January 2015 stating that the petitioner had been kept alone in a separate room. This, it has been submitted, amounts to a violation of the constitutional safeguards enunciated in Sunil Batra Vs. Delhi Administration and Others etc., AIR 1980 SC 1579 : (1980) CriLJ 1099 : (1978) CriLJ 1741 : (1980) 3 SCC 488 : (1978) 4 SCC 494 : (1980) SCC(Cri) 580 : (1979) SCC(Cri) 155 : (1980) 2 SCR 557 : (1979) 1 SCR 392 ;

(III) There have been manifest illegalities in the consideration of the mercy petition by the Governor, which have emerged before the Court in pursuance of the inspection of files which was granted to learned counsel appearing for the petitioners by an order of this Court. These are:

(i) The Government Order dated 13 April 2005 under which the mercy petition was processed initially is ex facie applicable only to convicts other than those sentenced to death. The Government Order applies to applications for the grant of premature release/pardon. Hence, considerations relevant to such an application, which would be irrelevant to an application for the grant of mercy to a death convict under Article 161 of the Constitution, have been applied;

(ii) The file notings indicate that the Principal Secretary (Home) admitted that he lacked the competence and jurisdiction to furnish his recommendation in matters pertaining to the award of the death penalty since under the Uttar Pradesh Distribution of Business Rules, 1975 (Business Rules of 1975), the Law Department had to make a recommendation. Despite this, the Principal Secretary (Home)

recommended the rejection of the mercy petition. This recommendation of the Principal Secretary (Home) dated 17 January 2013 was relied on by the Principal Secretary (Law) in advising the Governor;

(iii) The Legal Advisor to the Governor proceeded on a misconception that the Governor was bound by the judicial findings of guilt and sentence, contrary to the position of law laid down by the decision of a Constitution Bench of the Supreme Court in Kehar Singh and Another Vs. Union of India (UOI) and Another, AIR 1989 SC 653 : (1989) CriLJ 941 : (1989) 1 Crimes 238 : (1988) 4 JT 693 : (1989) 1 SCALE 242 : (1988) 2 SCALE 1565 : (1989) 1 SCC 204 : (1988) 3 SCR 1102 Supp ;

(iv) There has been an infraction of the guidelines laid down by the Supreme Court in Shatrughan Chauhan and Another Vs. Union of India (UOI) and Others, (2014) AIRSCW 793 : (2014) CriLJ 1327 : (2014) 2 JT 106 : (2014) 1 SCALE 437 : (2014) 3 SCC 1 , since there was no mental health evaluation of the convict prior to issuance of the death warrant; and

(v) The period of custody and delay in the disposal of the mercy petition has not been considered either by the Governor or by the President.

On behalf of the Union of India, it has been submitted by the Additional Solicitor General that-

(i) A delay of 7.5 months in the disposal of the mercy petition between the date of the receipt of files from the State Government and the ultimate decision cannot be regarded as being disproportionate;

(ii) The Union Ministry of Home Affairs received the mercy petition on 22 July 2013. On 11 November 2013, a letter was addressed by the Union Ministry of Home Affairs to the Government of U.P. for the disclosure of documents and a report in response was received only on 5 March 2014. Hence the delay was occasioned not by the Union Government but by the State Government;

(iii) On 23 April 2011, the convict preferred a petition to the Supreme Court which remained pending for a period of 1 year 9 months and 20 days until it was disposed of on 13 February 2013 and this period is liable to be excluded in computing the delay, if any;

(iv) The only issue before the Court in a matter, such as the present, is whether there was some relevant material which had not been taken into consideration in disposing of the review petition;

(v) The circumstances of the case and whether the motivation of the offender and the pattern of offences is such that the offences may be committed again is a matter which should be considered and the fact that the convict in the present case is a serial killer could militate against the exercise of judicial review;

(vi) In view of the provisions of Article 163(3) of the Constitution, the question whether any, and if so what, advice was tendered by Council of Ministers to the Governor shall not be inquired into in any Court.

9. The Advocate General appearing on behalf of the State has urged that-

(i) Delay is only one of the circumstances which should be borne in mind by the Court in the exercise of its power of judicial review and the Court would be justified in looking at the depravity of the crime and the circumstances in which the offence was committed including the pattern of a series of offences in the present case;

(ii) On 19 April 2011, the convict submitted a letter to the Supreme Court after the Supreme Court had dismissed his criminal appeal on 15 February 2011, seeking a rehearing or reference to a larger Bench. This request was rejected by the Registrar of the Supreme Court on 26 October 2012. On 13 February 2013, an appeal against the rejection of the representation by the Registrar was also dismissed by the Supreme Court; and

(iii) The explanation of the State Government for the delay which has taken place in the disposal of the mercy proceedings is that because a petition was filed by the convict before the Supreme Court, there was a genuine apprehension that the conviction has not become final. This explanation is a possible explanation and should not be dealt with mathematical exactitude. Even if, arguably, this was a misconstruction of the application which was submitted by the convict, the State Government acted with abundant caution and the explanation ought to be accepted. Moreover, the delay was also because information was called on eleven points on the basis of the Government Order dated 13 April 2005 from the District Magistrates and from the Prison Superintendent which was awaited.

The rival submissions now fall for consideration.

10. Constitutional principle

Death row jurisprudence in India has evolved as a humanizing component in the execution of the death penalty. Article 21 of the Constitution, which guarantees to every person the right to life, postulates existence with dignity. Any deprivation of life or, for that matter, of personal liberty, must accord with the dictates of Article 21. The procedure for deprivation has to be fair, just and reasonable.

The constitutional validity of the death penalty has been upheld in Bachan Singh Vs. State of Punjab, AIR 1980 SC 898 : (1980) CriLJ 636 : (1982) 1 SCALE 713 : (1980) 2 SCC 684 : (1980) SCC(Cri) 174 : (1983) 1 SCR 145 . But, the execution of the sentence of death, when it is imposed in "the rarest of rare cases" has to conform to the norms embodied in Article 21. A prolonged delay in the execution of the sentence of death has a dehumanizing effect on the convict and, as a well-settled principle of our constitutional jurisprudence, is regarded as a deprivation of the right to life itself. Death row jurisprudence has evolved norms and standards for judicial review by

which the period which has been spent in the disposal of mercy petitions under Articles 72 and 161 of the Constitution has to conform to standards of fairness. Implicit in this is the requirement that such applications must be disposed of without a prolonged and unnecessary delay. Once a judgment of conviction and the award of the death penalty attain finality, jurisprudential norms of fair treatment impose duties and constitutional obligations and the Court, as the ultimate arbiter of constitutional doctrine is duty bound to ensure that there has been no avoidable or unnecessary delay. Any delay which is regarded as prolonged and unnecessary imposes upon the convict an additional period of incarceration which is not within the contemplation of the law. A convict under a sentence of death is subject to an intense psychological stress, caused by the trauma of the uncertainty of life it self. Judicial recognition of what is described as the death row phenomenon has evolved into a constitutional standard that the execution of a sentence of death should not be unnecessarily prolonged. This is but an intrinsic part of the evolving standards of decency derived from constitutional principle. Retribution and deterrence which underlie the death penalty is balanced by the necessity of humanizing penological imperatives. These humanizing perspectives are hallmarks of a mature and civilized society and of a legal order such as ours where the validation of all public acts is founded on constitutionalism and constitutional morality. In recognising every person''s right to live and to be secure against the deprivation of that right except by a procedure which is fair, the Constitution values the human being in every person including a convict. The offence committed is not obliterated but neither is the human element in every person effaced either in fact or by a fiction of law.

11. Death row jurisprudence operates in an area commencing with the post-conviction stage after the award of the death penalty has attained finality. In the exercise of its power of judicial review, the constitutional Court will apply well-settled tests in determining whether, in the circumstances which have emerged before the Court, the deprivation of the right to life by the execution of a sentence of death would be rendered arbitrary and, therefore, violative of Articles 14 and 21 of the Constitution. Where the manner of consideration of a mercy petition can be faulted on the ground that a constitutional authority has borne in mind or taken into account irrelevant circumstances or, where it is demonstrated that circumstances which are germane have been ignored, that would be a ground for the exercise of the power of judicial review. Similarly, where the constitutional power to decide a mercy petition has been exercised for extraneous considerations, the power of judicial review would extend to a declaration that the execution of the sentence of death would be unconstitutional and the sentence must be substituted by a sentence of imprisonment for life.

12. The test of delay in the execution of the sentence of death which has been evolved in India over the last three decades is an objective test. The test requires the Court to determine whether a delay which has occurred in the execution of the death sentence after the judgment of conviction had attained finality had been

avoidable or unnecessary. Requiring the Court to scrutinize the reasons for the delay imparts a measure of objectivity to the process since there can be no greater anathema to the law than a subjective application of norms and standards in the execution of the death penalty. As an intrinsic part of this doctrine, which is a now settled part of our law, the true test is not whether the delay has crossed a particular threshold of time. The quantum test is not accepted as a part of constitutional doctrine in India. Hence, the execution of the sentence of death cannot be regarded as being unconstitutional because the passage of a particular period of time is regarded improper. The true test or enquiry is not about a particular quantum of time but whether the delay is such as should be regarded as being avoidable, unnecessary and, therefore, prolonged. As an integral part of this doctrine, the Court which is exercising its power of judicial review has to consider whether the convict is responsible for the delay which has taken place. A convict may adopt, as experience shows, strategies to delay the execution of the death sentence including the filing of successive review petitions. As a principle of law, a convict is not entitled to the benefit of a delay which has been caused by their own conduct. Hence, when the execution of the sentence of death has been stayed during the course of proceedings for review, after the final judgment of the Court of competent jurisdiction, the period of stay that has elapsed in the disposal of the review petition would not ensure to the benefit of the convict. The significant point to note is that there is no thumb rule of a particular quantum of delay or a particular period being regarded as a justification for granting mercy. It is not the quantum of delay but the reason for delay which assumes significance.

13. Precedent

In T.V. Vatheeswaran Vs. State of Tamil Nadu, AIR 1983 SC 361(2) : (1983) CriLJ 481 : (1983) 1 SCALE 115 : (1983) 2 SCC 68 : (1983) 2 SCR 348 , the Supreme Court held that a prolonged detention to await the execution of a sentence of death constitutes an unjust, unfair and unreasonable procedure for the deprivation of life. The Supreme Court held that prolonged delay has the effect of dehumanizing the person who is under the sentence of death and this element of dehumanizing violates the right to life under Article 21:

"...Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out Fundamental Rights. A person under sentence of death may also claim Fundamental Rights. The fiat of Article 21, as explained, is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable. Just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies a right to a speedy trial. It implies humane conditions of detection, preventive or punitive. Procedure established by law'' does not end with the pronouncement of sentence; it includes the carrying out of sentence. That is as far as we have gone so far. It seems to us but a short step, but a step in the right

direction, to hold that prolonged detention to await the execution of a sentence of death is an unjust, unfair and unreasonable procedure and the only way to undo the wrong is to quash the sentence of death...the dehumanising factor of prolonged delay in the execution of a sentence of death has the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way as to offend the Constitutional guarantee that no person shall be deprived of his life or personal liberty except according to procedure established by law. The appropriate relief in such a case is to vacate the sentence of death."

14. Having said this, the Bench of two learned Judges in Vatheeswaran held after "making all reasonable allowance for the time necessary for appeal and consideration of reprieve" that a delay exceeding two years in the execution of a sentence of death should be considered sufficient" to entitle the person under a sentence of death to invoke Article 21 and demand the quashing of the sentence of death. (This aspect or the quantum formulation in Vatheeswaran has been subsequently overruled).

15. In a subsequent decision of a Bench of three learned Judges in Sher Singh and Others Vs. State of Punjab, AIR 1983 SC 465 : (1983) 1 Crimes 1017 : (1983) 1 SCALE 283 : (1983) 2 SCC 344 : (1983) 2 SCR 582 , the Supreme Court affirmed the basic premise that supervening events which make the execution of a sentence of death harsh, unjust or unfair can be taken into consideration and that Article 21 was attracted at all stages of a criminal prosecution from the trial to the sentencing, incarceration and the execution of the death sentence. The Supreme Court held thus:

"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 visualization of the meaning of that article. The horizons of Article 21 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 State of Maharashtra Vs. Prabhakar Pandurang Sangzgiri and Another, AIR 1966 SC 424 : (1966) CriLJ 311 : (1966) 1 SCR 702 , Bhuvan Mohan Patnaik, 1974 SCC (Cri) 803 : AIR 1974 SC 2092 : (1975) 2 SCR 24 : (1975) 3 SCC 185 and Sunil Batra, AIR 1978 SC 1675 : 1978 Cri.L.J. 1741 : (1979) 1 SCR 392 : (1978) 4

SCC 494 : 1979 sec (Cri) 155. It is a logical extension of the self-same principle that the death sentence, even if 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."

16. The decision in Sher Singh, however, differed with the view which was taken by the earlier Bench in T.V. Vatheeswaran (supra) insofar as it had held that a period of two years should be regarded as the outer limit beyond which the execution of the sentence of death would involve an infraction of Article 21 of the Constitution. That part of the decision in T.V. Vatheeswaran was disapproved in the following observations:

"...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 T.V. Vatheeswaran Vs. State of Tamil Nadu, AIR 1983 SC 361(2) : (1983) CriLJ 481 : (1983) 1 SCALE 115 : (1983) 2 SCC 68 : (1983) 2 SCR 348 , 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..."

17. The decision in Sher Singh (supra) also emphasised that it was "relevant to consider whether the delay in the execution of the death sentence was attributable to the fact that (the convict) has re-sorted to a series of untenable proceedings which have the effect of defeating the ends of justice" Para 19 at page 356:

"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."

18. In the view of the Supreme Court, when the Court is called upon to vacate a death sentence on the ground of delay caused in the execution of the sentence, it must enquire into and "find why the delay was caused and who is responsible for if. The judgment of the Supreme Court impressed upon the Union and the State Governments the need to dispose of petitions under Articles 72 and 161 of the Constitution expeditiously and suggested a self-imposed rule by which every such petition should be disposed of within a period of three months from the date on which it was received. However, as a matter of principle, the decision indicated that there was no rule of thumb that could be applied that a particular quantum of delay must invariably result in invalidating the execution of the sentence of death.

19. In another decision in K.P. Mohammed Vs. State of Kerala, (1983) 1 Crimes 796 : (1984) 1 SCC 684 Supp : (1984) SCC 684 Supp , the Supreme Court noted the endemic delays in disposing of such petitions with the observation that the expectation of a person condemned to death of being granted a chance to live is surely not of a lesser social significance than the expectation of a contestant to an election petition that his petition be disposed of expeditiously.

20. A Constitution Bench of the Supreme Court in Triveniben Vs. State of Gujarat, AIR 1989 SC 142 : (1988) 3 Crimes 771 : (1988) 4 JT 112 : (1988) 2 SCALE 907 : (1988) 4 SCC 574 , reconsidered the question as to whether a prolonged delay in the execution of the sentence of death would entitle the accused to a lesser sentence of life imprisonment. That issue was answered in the following terms:

"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 ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached 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 in-executable and to this extent the decision in Vatheeswaran''s case cannot be said to lay down the correct law and therefore to that extent stands overruled."

21. Among the principles which have been laid down by the Constitution Bench, the following would merit emphasis for the purposes of the present proceedings:

(i) The delay which has to be considered while dealing with the question of commuting the sentence of death into life imprisonment is the delay which has occurred after the judicial processes has come to an end upon the pronouncement of the judgment by the Supreme Court;

(ii) While considering the question of delay after the final verdict was pronounced, time which has been spent on a petition for review and on repeated mercy petitions at the instance of the convict shall not be considered;

(iii) The only delay which would be material for consideration would be the delay in the disposal of the mercy petition.

Hence, where the delay has occurred due to the conduct of the convict, the Supreme Court has declined to accede to a prayer for commutation. For instance, in Munawar Harun Shah and Others Vs. State of Maharashtra, AIR 1983 SC 585 : (1983) CriLJ 971 : (1983) 1 SCALE 408 : (1983) 3 SCC 354 , the Supreme Court held that the delay which had taken place after the judicial process had come to an end upon the disposal of the special leave petition against the conviction and sentence was caused by the petitioners. Each of them had preferred a review petition and even after the dismissal of the review petitions, fresh writ petitions were filed followed by review petitions against the dismissal of the writ petitions. Even thereafter, further writ petitions were filed under Article 32 of the Constitution before the Supreme Court. In this view of the matter, the Supreme Court observed that for a part of the period of delay, the petitioners who had taken re-sort to successive petitions had been responsible. Another decision which highlights a case in the same genre is Jumman Khan Vs. State of U.P., AIR 1991 SC 345 : (1991) CriLJ 439 : (1991) 1 Crimes 151 : (1991) 1 JT 31 : (1990) 2 SCALE 1167 : (1991) 1 SCC 752 : (1990) 3 SCR 398 Supp : (1991) 1 UJ 328 .

22. The position that no rule of thumb in regard to a particular quantum of delay can be applied or has been applied is also noted from a judgment delivered by the Supreme Court in Daya Singh Vs. Union of India and others, AIR 1991 SC 1548 : (1991) CriLJ 1903 : (1991) 2 Crimes 180 : (1991) 2 JT 349 : (1991) 1 SCALE 780 : (1991) 3 SCC 61 : (1991) 2 SCR 462 : (1991) 2 UJ 131 . In that case, the accused was convicted and sentenced to death. The conviction and sentence attained finality after the dismissal of his special leave petition by the Supreme Court. The convict filed mercy petitions before the Governor and the President of India which were also rejected. The petition filed on behalf of the convict was also a part of the batch of petitions which was disposed by the Supreme Court in Triveniben (supra). The petitioner then filed a mercy petition before the Governor of the State on 18 November 1988 and the matter remained pending, awaiting the final outcome of his petition. The Supreme Court held that there was no reason for keeping the mercy petition which was filed by the petitioner, in abeyance for over two years. The Supreme Court observed as follows:

"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."

(emphasis supplied)

In Daya Singh the Supreme Court applied the test whether there has been an avoidable delay.

23. In Devender Pal Singh Bhullar Vs. State of N.C.T. of Delhi, (2013) 4 ABR 800 : (2013) 7 AD 29 : AIR 2013 SC 1975 : (2013) CriLJ 2888 : (2013) 5 JT 598 : (2013) 2 RCR(Criminal) 647 : (2013) 5 SCALE 575 : (2013) 6 SCC 195 : (2013) AIRSCW 2939 : (2013) 2 Supreme 642 , a Bench of two learned Judges of the Supreme Court held that (i) if a murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. The President or the Governor in the exercise of the power under Article 72 and Article 161 of the Constitution would be justified in considering the enormity of the crime and a decision not to entertain a prayer for mercy cannot be regarded as arbitrary nor can the Court exercise the power of judicial review only on the ground of delay; and (ii) the rule which was enunciated in Sher Singh (supra) and other cases that long delay may be one of the grounds for commutation of death sentence into imprisonment for life cannot be invoked in cases where a person is convicted for offences under TADA or similar statutes. Before disposing of the proceedings, the Supreme Court also took note of the delay which was being caused on the part of the Union Government in disposing of mercy petitions and expressed the hope that in future such petitions would be disposed of without unreasonable delay.

24. In Shatrughan Chauhan (supra) which was a decision of three learned Judges, the Supreme Court considered a batch of petitions under Article 32 of the Constitution filed by convicts who had been awarded the death sentence, the members of their families or by public spirited bodies including PUDR following the rejection of mercy petitions by the State Government. Among the supervening events which were relied upon before the Supreme Court in support of the plea of a commutation of the death sentence to life imprisonment were:

(i) Delay;

(ii) Insanity;

(iii) Solitary confinement;

(iv) Judgments declared per incuriam; and

(v) Procedural lapses

The principles of law which have emerged from the judgment of the Supreme Court may be formulated for convenience of analysis. These principles are:

(i) An undue long delay in the execution of the sentence of death would entitle a condemned prisoner to approach the constitutional Court seeking commutation to imprisonment for life;

(ii) In deciding upon such a plea, the Court would only examine the circumstances surrounding the delay that has occurred and those that have ensued after the sentence was finally confirmed by the judicial process;

(ill) Keeping a convict in suspense while a mercy petition is being considered under Article 72 or Article 161 for many years is a matter of agony which creates adverse physical and psychological conditions;

(iv) The Court while considering a plea for commutation cannot excuse an agonizing delay caused to the convict only on the basis of the gravity of the crime;

(v) Though, no time limit can be fixed for the President and the Governor to dispose of mercy petitions, it is the duty of the executive to expedite the matter at every stage including calling for the records, orders and documents filed in Court, preparation of a note for approval of the minister concerned and the ultimate decision of the constitutional authority;

(vi) An undue, unexplained and inordinate delay in execution of the sentence of death due to pendency of mercy petitions would entitle the Court to hear the grievance of the convict and commute the sentence of death into imprisonment for life;

(vii) Where the executive or the constitutional authorities have failed to take note of or consider relevant aspects, that independently would justify the invocation of the jurisdiction to commute a sentence of death into imprisonment for life;

(viii) The ambit of Article 21 travels beyond the pronouncing of the sentence and extends to the execution of the sentence. Where there is a prolonged delay in the execution of the sentence of death beyond the control of the prisoner, that would mandate the commutation of the sentence;

(ix) The constitutional authorities, while disposing of mercy petitions must be made aware of the delay which has been caused ''at their end'' which has to be considered while arriving at a decision on the mercy petition;

(x) Where a convict moves the Court with a plea of commutation on the ground that the delay in execution of the sentence has violated the right to life under Article 21, he/she approaches the Court as a victim of a violation of a guaranteed fundamental right as distinct from a criminal appeal against the conviction and sentence where he/she is accused of an offence;

(xi) Only delay which could not have been avoided even if the matter was proceeded with a sense of urgency or was caused in essential preparations for the execution of the sentence may be a relevant factor in a petition under Article 32 of the

Constitution;

(xii) Considerations such as the gravity of the crime, the extraordinary cruelty involved or the horrible consequence for society are not relevant after the judgment of the Supreme Court in Bachan Singh (supra) since the sentence of death can only be imposed in the rarest of rare cases.

(xiii) An undue or prolonged delay in the execution of the sentence of death would amount to an additional incarceration of the convict and would be unconstitutional.

Significantly, the decision of the Supreme Court in Bhullar''s case was held to be per incuriam in Shatrughan Chauhan. The Supreme Court held that there was no basis to disqualify cases under the TADA as a class from relief on account of a delay in the execution of the sentence of death.

25. The decision in Shatrughan Chauhan has been subsequently followed in recent decisions of the Supreme Court. In V. Sriharan @ Murugan Vs. Union of India (UOI) and Others, AIR 2014 SC 1368 : (2014) AIRSCW 1350 : (2014) CriLJ 1681 : (2014) 3 JT 112 : (2014) 2 SCALE 505 : (2014) 4 SCC 242 , the Supreme Court has once again emphasized that - (i) an inordinate delay in the disposal of a mercy petition would render the process of execution of the death sentence arbitrary, whimsical and capricious; (ii) regardless and independent of the suffering it causes, delay makes the process of execution of the sentence unfair, unreasonable, arbitrary and capricious and, hence, violative of Article 21 of the Constitution; and (iii) a convict who complains of avoidable and prolonged delay in the execution of the sentence of death is under no obligation to produce evidence of suffering or the harm caused on account of the delay. Proof of actual harm is not a requirement of law to sustain a plea of commutation.

26. In Navneet Kaur Vs. State of NCT of Delhi and Another, AIR 2014 SC 1935 : (2014) AIRSCW 2372 : (2014) CriLJ 2474 : (2014) 4 JT 280 : (2014) 4 SCALE 459 : (2014) 7 SCC 264 , a Bench of four learned Judges of the Supreme Court considered a curative petition filed by the spouse of Devender Pal Singh Bhullar for commuting his sentence of death to one of imprisonment for live on the ground of a supervening delay of eight years. The Bench of four learned Judges adverted to the decision in Shatrughan Chauhan and more specifically to the observation that in considering a plea for commutation of the death sentence, considerations such as the gravity of the crime, the extraordinary cruelty involved or horrible consequences for society caused by the offence would not be relevant particularly after the decision in Bachan Singh (supra). On behalf of the Union of India, a concession was made by the Attorney General to the effect that after the decision in Shatrughan Chauhan, the ratio in Devender Pal Singh Bhullar would be per incuriam and, consequently, the death sentence was liable to be commuted to life imprisonment. The statement which was made on behalf of the Union Government was accepted.

27. In Ajay Kumar Pal Vs. Union of India (UOI), (2015) 1 CCR 145 : (2015) 1 RCR(Criminal) 281 , which was decided on 12 December 2014, a Bench of three learned Judges of the Supreme Court held that though no time limit can be fixed for the disposal of a mercy petition, a period of three years and ten months in that case fell within the ambit of an inordinate delay. The delay was not on account of the petitioner or as a result of any proceedings initiated by him. The second ground which weighed with the Supreme Court was that the petitioner had been placed in solitary confinement since the day on which he was awarded the sentence of death contrary to the principles enunciated in Sunil Batra. The Supreme Court held that the combined effect of the inordinate delay in the disposal of the mercy petition and solitary confinement for such a long period had caused a deprivation of the right to life under Article 21 and consequently, commuted the sentence to one of life imprisonment.

28. Comparative law : The position in other jurisdictions

Privy Council

Frietas v. Benny, 1976 AC 239 (PC), was an initial case, dealt with by the Privy Council relating to the death row phenomenon. The Privy Council held that a delay of three years preceding the clemency petition of the prisoner which was caused by his own action of appealing against his conviction could not be considered as a ground for complaint. This principle was followed in Abbott v. Attorney General of Trinidad and Tobago, (1979) 1 WLR 1342 (PC), where the Privy Council held that the delay caused by the use of judicial processes by a prisoner could not be used as an evidence of inhumanity. A total delay of eight months, after three years of appeal and two years of a pardon petition, was excluded from the total period of delay and the delay was not regarded as inordinate. In Riley and others v. Attorney General of Jamaica, (1982) 3 All ER 469 (PC), the convicts argued that the prolonged delay in their execution had caused them mental anguish and their punishment was inhuman and degrading. In a majority opinion rendered by Lord Chancellor, Lord Diplock and Lord Bridge of Harwich, it was held that "period of anguish and suffering is an inevitable consequence of sentence of death" ID at p. 473. Therefore, any period of delay brought about by a resort to appellate procedure for a convict was to be excluded. The Privy Council held that "it is no answer to say that the man will struggle to stay alive" ID at p. 471. The Privy Council held that "whatever the reason for, or the length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention" of law, ID at page 473. Lord Scarman and Lord Brightman dissented in Riley v. Attorney General of Jamaica. The dissenting opinions postulate that the execution of the death sentence, which is a culmination of a prolonged period of respite, was inhuman. Prolonged delay, it was held, can result in inhuman and degrading punishment.

29. In 1993, Earl Pratt and Ivan Morgan v. Attorney General of Jamaica, Privy Council Appeal No. 10 of 1993, overturned the decision in Riley. The Privy Council observed thus:

"There is an instinctive revulsion against the prospect of executing a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time."

In the view of Lord Griffith:

"...if delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time-wasting resort to legal procedures which amount to an abuse of process, the accused cannot be allowed to take advantage of that delay.

...much more difficult question is whether the delay occasioned by the legitimate resort of the accused to all available appellate procedures should be taken into account, or whether it is only delay that can be attributed to the shortcomings of the State that should be taken into account. There is a powerful argument that it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution.

...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... Appellate procedures that echo down the years are not compatible with capital punishment...The death row phenomenon must not become established as a part of our jurisprudence".

30. European Court of Human Rights

In Soering v. United Kingdom, 11 Eu HR Rep 439 (1989), the issue was whether the extradition of a fugitive to Virginia in the U.S., where capital punishment had not been abolished, amounted to a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which stipulates "no one shall be subjected to torture or to inhuman and degrading treatment or punishment". The European Court of Human Rights held that Article 3 of the Convention would be violated for extradition to Virginia to face capital murder charges. The ECHR relied on evidence that capital convicts in Virginia typically spent between six to eight years on death row before they are executed. While on death row, such convicts were kept under strict conditions of confinement and experience "extreme stress, psychological deterioration and risk of homosexual abuse and physical attack". The Court regarded this mental stress and the accompanying

anxiety as "the death row phenomenon" and observed as follows:

"Having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant''s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3".

31. An interesting review of the position in various jurisdictions has been traced in an Article by Dwight Aarons titled "Can inordinate delay between a death sentence and execution constitute cruel and unusual punishment?" Recognising the death row phenomenon, the article states:

"Mental strain is the most obvious collateral consequence experienced by capital defendants on death row for an inordinate period of time. Typically, death row inmates are confined to their cells for the great majority of each day and have relatively limited opportunities to exercise or communicate with other inmates or individuals from outside the prison. Research on the impact of this confinement indicates that inmates exhibit several emotional and psychological stages (See Robert Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 Law and Psychol Rev 141 (1979)). Capital defendants have been described as experiencing a "living death." Years ago, Albert Camus wrote of the "two deaths" that are imposed on a person sentenced to death and confined to death row (See Albert Campus, Reflections on the Guillotine 25-29 (Richard Howard trans, 1960). These debilitating effects have, of late, been classified by some Courts as the "death row phenomenon (See Soering v. United Kingdom, 11 Eur HR Rep 439 (1989)." The death row phenomenon is an ancillary, unauthorized corollary of a death sentence. The anguish suffered during the inordinate delay makes "no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering (Coker v. Georgia, 433 U.S. 584, 592 (1977)." When it is experienced beyond that which is necessary, the death row phenomenon should be viewed as an excessive form of punishment. As such, a state may, over time, forfeit its ability to go forward with an apparently lawfully imposed death sentence because the execution now violates the Eighth Amendment."

32. The reference in the above quotation to Albert Camus is from ''Reflection on the Guillotine'', [25-29] (Richard Howard trans, 1960) where he observed as follows:

"...For the man condemned to death, on the other hand, the horror of his situation is served up to him at every moment for months on end. Torture by hope alternates only with the pangs of animal despair. His lawyer and his confessor, out of simple humanity, and his guards, to keep him docile, unanimously assure him that he will reprieved. He believes them with all his heart, yet he cannot believe them at all. He

hopes by day, despairs by night. And as the weeks pass his hope and despair increase proportionately, until they become equally insupportable. According to all accounts, the color of his skin changes: fear acts like an acid. "It''s nothing to know if you''re going to die," one such man in the Fresnes prison said, "but not to know if you''re going to live is the real torture." ...As a general rule, the man is destroyed by waiting for his execution long before he is actually killed. Two deaths are imposed, and the first one is worse than the second, though the culprit has killed but once."

33. The Jail Manual

Having adverted to the principles of law which have been laid down by the Supreme Court, it would be necessary to refer to the provisions of the Uttar Pradesh Jail Manual (Jail Manual) at this stage. Chapter XVII contains provisions relating to convicts under the sentence of death. Para 384(2) requires the Jail Superintendent, on receipt of an intimation of the dismissal by the Supreme Court of an appeal or special leave petition to inform the convict forthwith that he may, if he so desires, submit a petition for mercy within seven days of the date of the intimation. A convict is given all of seven days to file a mercy petition. Para 384(3) requires that if a convict submits a petition within a period of seven days prescribed by clause (2), it has to be addressed to the Governor and to the President of India and the Superintendent of Jail would forthwith despatch it to the Secretary to the State Government together with a covering letter reporting the date fixed for execution and certifying that the execution has been stayed pending receipt of the order of the Government on the petition. If no reply is received within fifteen days from the date of despatch of the petition, the Superintendent is required to communicate to the Secretary to the State Government in the Judicial Department. In the event that a convict submits a petition after a period of seven days, Para 384(4) requires the Superintendent of Jail to forward it at once to the State requesting for orders on whether the execution should be postponed and stating that, pending a reply, the sentence will not be carried out. If the petition is received by the Superintendent later than noon on the day preceding that fixed for the execution, it has to be forwarded forthwith to the State Government stating that the sentence would be carried out unless orders to the contrary are received.
For convenience of reference, clauses (2), (3) and (4) of Para 384 are extracted herein below:

"384. Rule in connection with petition for mercy.--The following are the instructions relating to the duties of Superintendents of Jails in connection with petitions for mercy from and on behalf of convicts under sentence of death:

(1).....

(2) On receipt of the intimation of the dismissal by the Supreme Court of the appeal or the application for special leave to appeal to it, lodged by or on behalf of the convict, in case the convict concerned has made no previous petition for mercy, the

Jail Superintendent shall forthwith inform him (the convict) that if he desires to submit a petition for mercy it should be submitted in writing within seven days of the date of such intimation.

(3) If the convict submits a petition within the period of seven days prescribed by Instruction (2), it should be addressed to the Governor of Uttar Pradesh and the President of India. The Superintendent of the jail shall forthwith despatch it to the Secretary to the State Government in the Judicial (A) Department, together with a covering letter reporting the date fixed for the execution and shall certify that the execution has been stayed pending receipt of the orders of the Government on the petition. If no reply is received within 15 days from the date of the despatch of the petition, the Superintendent shall telegraph to the Secretary to the State Government. Judicial (A) Department, drawing attention to the fact, but he shall in no case carry out the execution before the receipt of the State Government''s reply.

(4) If the convict submits the petition after the period prescribed by Instruction (2), the Superintendent of the jail shall at once forward it to the State Government and at the same time telegraph the substance of it, requesting orders whether the execution should be postponed and stating that, pending a reply, the sentence will not be carried out. If such petition is received by the Superintendent later than noon on the day preceding that fixed for the execution, he shall at once forward it to the State Government, and at the same time telegraph the substance of it, giving the date of execution and stating that the sentence will be carried out unless orders to the contrary are received."

34. A convict, whose appeal has been dismissed by the Supreme Court resulting in the conviction and the sentence of death being affirmed is allowed a period of seven days by the Jail Manual to submit a mercy petition. This is clearly an indicator of the intent that such pleas for mercy must be moved at the earliest. Surely, if such an obligation is cast upon the convict, the least that is to be expected is that a decision on a mercy petition ought not to be prolonged unduly and should be arrived at with all reasonable despatch.

35. The facts analysed - delay and more

In the present case, following the decision of the Supreme Court on 15 February 2011, the convict addressed a mercy petition to the Governor of the State on 7 May 2011. On 20 May 2011, the State Government called for a report of the District Magistrates of Ghaziabad and Gautam Budh Nagar and from the Prison Superintendent on eleven points "at the earliest". On 9 June 2011, the State Government sent a reminder to the District Magistrate and to the Prison Superintendent. This was followed by another reminder on 2 September 2011. The State Government received a report on 26 October 2012. There was an admitted delay of 1.5 years on the part of the District Magistrates in submitting a report to the State Government. During the course of the hearing of these proceedings, we had

directed the State Government as well as the Union Government to grant inspection of the original files to the learned counsel for the petitioners. Inspection of files has been granted by the State Government. An application was filed by the Union Government for modification of the order passed by the Court directing the grant of the inspection of its files. During the course of the hearing, this Court was informed by the learned counsel for the petitioners that the plea for inspection of the files of the Union Government is not being pressed in order to avoid any further delay in the disposal of these proceedings.

36. We now proceed to examine the record of the State Government produced in Court. On 13 May 2011, a noting was made on the file that in dealing with the mercy petition, a Government Order dated 13 April 2005 would be applied and that the Committee set up in Para 1 thereof, headed by the Principal Secretary (Prisons), would enquire into all aspects of the matter. It was in pursuance of this, that reports were called from the District Magistrates and the Prison Superintendent on eleven points required by the Government order. On 18 August 2011, a file noting was made to the effect that matters relating to the award of the death penalty are evaluated by Law Section V and not by Prison Section-2. On 30 November 2012, a file noting was made by the Special Secretary (Law) to the effect that proceedings be placed before the Committee constituted under the Government Order dated 13 April 2005. This noting was affirmed by the Principal Secretary (Law) on 10 December 2012. On 17 December 2012, when the file was placed before the Under Secretary (Prisons), he made a noting thereon stating that the Government Order dated 13 April 2005 applies only to convicts other than those who have been sentenced to death. Hence, it was stated in the file noting that the Government Order dated 13 April 2005 would not apply to the convict in question and a reference was made to the earlier noting to the effect that Prison Section - 2 only dealt with convicts other than those under a sentence of death. The same view was reiterated on 11 January 2013 by the Deputy Secretary (Prisons) and by the Home Secretary. On 17 January 2013, the Deputy Secretary (Prisons) put up a note stating that under the Business Rules of 1975, matters pertaining to death convicts could not be handled by the Prison Section. Ultimately on 24 January 2013, the Principal Secretary (Home) agreed with the noting of the Deputy Secretary that the Home Department had no authority to make any recommendation in the matter of a death convict. However, though the Principal Secretary (Home) clearly stated that the Home Department had no role in the matter in relation to the request of a death convict for commutation of his sentence, he still proceeded to record his opinion to the effect that the convict in the present case, Surendra Koli, should not be granted mercy. On 31 January 2013, the Special Secretary (Law) put up a note stating that the Home Department had recorded its opinion not to grant mercy to the convict and placed the file for further processing. On 6 February 2013, the Principal Secretary (Law) recorded on the file that the Home Department had opined that having regard to the seriousness of the crime, the brutality involved and all other surrounding

circumstances, the case was not fit for the grant of mercy. This file noting was approved by the Chief Minister on 12 February 2013.

37. The file was thereafter transmitted to the Secretariat of the Governor of the State of Uttar Pradesh. The Legal Advisor to the Governor submitted the following report on the file:

"8. As regards the truth or falsity in the grounds taken by the convict/prisoner Surendra Koli in his above mercy petition dated 7.5.20.11, it is submitted that all the Hon Tale Courts, i.e., from the trial Court up to the Apex Court, have declined to accept convict''s aforesaid defence pleas. The said convict failed to convince the said Hon''ble Courts regarding the truth and acceptability of his said pleas. The findings of guilt of the convict Surendra Koli arrived at by the said trial Court and affirmed by the two appellate Courts cannot be reversed, reviewed or set aside by H.E. the Governor in exercise of his powers under Article 161 of the Constitution."

The note of the Legal Advisor also stated that the power of pardon under Article 161 of the Constitution is exercised on the advice of the council of ministers and the Chief Minister had declined to recommend the grant of pardon. Eventually on 2 April 2013, the Governor of Uttar Pradesh recorded his agreement with the comments recorded by the Legal Advisor and accepted the advice/recommendation made by the State Government not to accept the mercy petition. The mercy petition was hence rejected in exercise of powers conferred by Article 161 of the Constitution.

38. The facts which have come before the Court upon a perusal of the original record make, to say the least, disturbing reading. First and foremost, there is absolutely no cogent explanation for the delay which took place in the disposal of the proceedings before the State Government leading up to the rejection of the mercy petition by the Governor of the State. Initially, as we have already noted, a period of over one and half years elapsed between 20 May 2011 and 26 October 2012 in addressing letters and reminders to the District Magistrates to submit their reports together with the report of the Prison Superintendent. The delay was compounded by the State Government at several stages thereafter. Several months elapsed even after the reports of the District Magistrates were received for the file to be put up before the Chief Minister, on 31 January 2013. After the mercy petition was rejected on 2 April 2013, several months elapsed before the papers were forwarded to the Union Government in July 2013. In November 2013, the Union Government sought information from the State Government and addressed a reminder in February 2014. A delay took place at every stage by the State Government. The delay was prolonged, unnecessary and avoidable. Secondly, it is significant that in a matter as crucial as the fate of a death convict, there was a total lack of clarity on the part of the State Government on the applicability of its Government Order dated 13 April 205. Ex facie, the Government dated 13 April 2005 does not apply to cases of mercy petitions submitted by convicts under the sentence of death. The subject of the Government Order makes the position clear and we

extract it in extensor:

This is made further evident by Para 2 of the Government Order. The Government Order, inter alia, requires an application of mind to various circumstances many of which have no bearing on a convict who has been sentenced to death. Yet, as the counters which have been filed by the State Government indicate, the matter was initially processed as if the Government Order dated 13 April 2005 applied to the situation. Thirdly, as we have also noted from the file it was the Prison Section which indicated in its file noting that matters relating to the grant of mercy to death convicts would not fall within its purview under the Business Rules of 1975 and that the matter would have to be proceeded for consideration before the Law Department. The Principal Secretary (Home) agreed with this position. Nonetheless he chose it fit to record his own opinion that the case is not fit for the grant of mercy. Having taken the firm position that the Home Department was not entitled to consider the matter in the first place, it defies explanation as to how a view was expressed on whether or not the petition deserved the grant of mercy by the Principal Secretary (Home). Such an observation was clearly beyond jurisdiction. This glaring lapse was compounded when the matter went to the Law Department. The Law Department proceeded on the basis that there was an opinion of the Home Secretary recommending the rejection of mercy. The Principal Secretary (Law), as the file would indicate, has not applied his mind independently at all. The manner in which the file has progressed reveals a disturbing state of affairs. Evidently, the State Government had no processes and systems in place to deal with or streamline the disposal of mercy petitions filed under Article 161 of the Constitution of death convicts. Surely, a matter as serious as one impinging upon the right to life of a convict cannot be dealt with in such a cavalier fashion.

39. The explanation of the State for delay

Now, it is in this background that we would advert to the explanation which has been tendered on behalf of the State Government for the delay which took place in the disposal of the mercy petition. The substance of the defence has been placed before the Court in paragraph 24 of the second supplementary counter-affidavit dated 27 January 2015 which reads as follows:

That the Revision/Larger Bench Hearing Petition dated 23.4.2011 sent by the convict Surendra Koli to the Hon Tale Supreme Court for hearing and consideration of his case by a Larger Bench instead of a Division Bench of two judges was eventually rejected by the Registrar (Judicial), Supreme Court, against which an appeal was numbered as Criminal Misc. Petition No. 681 of 2013 in Criminal Appeal No. 2227 of 2010 and was placed before the Division Bench of Hon''ble Supreme Court and was ultimately rejected by the Hon''ble Apex Court vide order dated 13.2.2013 passed in Criminal Misc. Petition No. 681 of 2013 in Criminal Appeal No. 2227 of 2010. A copy of the order dated 13.2.2013 passed by the Hon''ble Supreme Court in Criminal Misc. Petition No. 681 of 2013 in Criminal Appeal No. 2227 of 2010 (Surendra Koli v. State

of U.P. and others) is being enclosed herewith and marked as Annexure-SCA-8 to this affidavit."

40. The submission which has been urged on behalf of the State during the hearing is that on 19 April 2011, the convict submitted a letter to the Supreme Court for consideration of his case by a larger Bench. According to the State, it was this letter which was rejected by an order of the Registrar (Judicial) of the Supreme Court on 16 October 2012 against which an appeal was filed which, in turn, was dismissed on 13 February 2013. Since the relevant documents have been annexed together with the counter filed by the State, we have been in a position to examine the tenability of the submission on the basis of documents which are not in dispute. The record indicates that on 6 October 2012, the convict addressed a communication to the Hon''ble Chief Justice of India through the jail authorities. In his representation, the convict stated that in five sessions cases, he had been sentenced to death of which in three cases he had been unable to defend himself. The relief which he sought in his application was for the retrial of those three cases which were pending before the Allahabad High Court on the ground that he had not been effectively defended by the amicus curiae appointed in those cases. This request of the convict was turned down by the Registrar (Judicial-III) of the Supreme Court on the ground that no proceeding was pending before the Supreme Court. On 29 October 2012, the convict addressed an application to the Hon''ble Chief Justice of India through the jail authorities drawing attention to the order of rejection dated 16 October 2012. The prayer in that application was for a retrial of three sessions cases (ST Nos. 696 of 2007, 740 of 2007 and 850 of 2007). This, in fact, tallies with the chart which has been annexed with the second supplementary counter-affidavit filed by the State Government at Annexure SCA-11. On 13 February 2013, the Supreme Court dismissed Criminal Misc Petition No. 681 of 2013 in Criminal Appeal No. 2227 of 2010 in the following terms:

"This is an appeal against the order dated 16th October, 2012 passed by Registrar (Judl. III) wherein the Registrar has taken a view that since no proceeding is pending before this Court and some applications are pending before the Allahabad High Court regarding the prayer of the applicant for retrial, the present application cannot be considered by this Court.

We think that the Registrar has taken a right view and, therefore, we are not inclined to entertain this appeal against the order passed by the Registrar.

The Criminal Miscellaneous Petition stands dismissed."

41. The order of the Supreme Court makes it clear that the rejection by the Registrar (Judicial-III) on 16 October 2012 was because that no proceeding was pending before the Supreme Court and, in fact, some applications were pending before the Allahabad High Court regarding the prayer of the convict for retrial. Affirming the decision, the Supreme Court held that the Registrar was correct in the view which

was taken and that the prayer for retrial could not be entertained by the Supreme Court.

42. This sequence of events makes it clear that the application which the convict had filed and which is now set up in the counter of the State as a ground justifying the delay had nothing to do with the present case at all but related to a plea for retrial of three other criminal cases which were pending before the Allahabad High Court. Though, following the dismissal of his appeal by the Supreme Court, the convict had sought a decision by a larger Bench, it is not in dispute that no stay was ever granted on that application. In fact, the entire basis of the defence of the State that the convict had filed a petition for revision/review before the Supreme Court on 23 April 2011 and that petition was decided on 13 April 2013 is thoroughly misconceived. The submission is clearly contrary to the documentary material on the record as well as the original record of the case. The defence has been set up in a sworn affidavit without application of mind. Worse still, there has been an attempt to mislead the Court and obfuscate the truth.

43. Did the convict cause any delay?

The essential question which has to be posed is whether the conduct of the convict has caused any delay in the execution of the sentence of death after the final judgment of the Supreme Court on 15 February 2011 affirming the conviction and sentence. First and foremost, in dealing with this issue, it has to be appreciated that the execution of the sentence of death was stayed during the pendency of the mercy petition which was filed on 7 May 2011. Once a mercy petition has been filed, Para 384 of the Jail Manual mandates that the sentence should not be carried into execution. Secondly, the review petition which was filed by the convict before the Supreme Court was listed and disposed of on one and the same day namely on 24 July 2014. After the decision of the Supreme Court in Mohd Arif''s case on 2 September 2014, and since the convict was entitled to a re-hearing of the review petition in open Court, an application for restoration was filed on 6 September 2014. In the meantime, on 2 September 2014 a warrant of death was issued by the Additional Sessions Judge at Ghaziabad. The Supreme Court was moved at 1:00 am on 8 September 2014. An interim stay on the execution of the sentence of death was granted by the Supreme Court on 8 September 2014. This continued to hold the field until the review petition was dismissed on 28 October 2014. Undoubtedly, the convict would not be entitled to claim any equities on the ground of the period which elapsed during the pendency of the review petition in which stay was granted between 8 September 2014 and 20 October 2014. However, for the delay of 3 years and 3 months which took place in the disposal of the mercy petition under Articles 72 and 161 of the Constitution, plainly the convict is not responsible. During this period, no order of stay was obtained at the behest of the convict in any judicial forum. Consequently, applying the test which has been formulated in successive decisions of the Supreme Court including Sher Singh and Shatrughan Chauhan, it is

clear that the conduct of the convict, post-conviction, is not such as to disentitle him from claiming relief under the head of delay, since the execution of the death sentence was not postponed by any dilatory tactic or proceeding adopted by the convict.

44. Application of the wrong principle in ignorance of the Kehar Singh principle

The Legal Advisor to the Governor in formulating a note for consideration of the Governor took the view that since the judgment of conviction and sentence of the trial Court had been carried in appeal to this Court and later to the Supreme Court and had attained finality, it was not open to the Governor, while disposing of the mercy petition under Article 161 to look into the merits of the case or to consider the merits. Responding to the grounds which were taken by the convict in his mercy petition, the Legal Advisor to the Governor submitted that since all the Courts, namely the trial Court, High Court and the Supreme Court had declined to accept the plea of the convict, the finding of guilt which has been arrived at by the sessions Court and affirmed by two appellate Courts could not be reversed, reviewed or set aside by the Governor in exercise of his powers under Article 161 of the Constitution. The Legal Advisor to the Governor proceeded on a manifestly erroneous comprehension of the scope of authority that is vested in the Governor under Article 161 of the Constitution. When the Governor exercises powers under Article 161 of the Constitution or, for that matter, when the President is to discharge constitutional functions under Article 72, the constitutional power which is exercised is distinct from the judicial power which is vested in the judicial wing. The President under Article 72 and the Governor under Article 161 are entitled to examine the record of evidence in a criminal case and to determine whether the case itself is deserving of the exercise of powers to grant a mercy or a pardon. In doing so, neither the Governor nor the President acts as an appellate judicial forum. They do so as a repository of a constitutional power which is entrusted to a constitutional functionary to grant mercy or pardon.

45. The principle has been formulated in the judgment of the Constitution Bench of the Supreme Court in Kehar Singh (supra) in the following terms:

"10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinize the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In U.S. v. Benz, 75 ED 354, 358, Sutherland, J.

observed:

The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In Sarat Chandra Rabha and Others Vs. Khagendranath Nath and Others, AIR 1961 SC 334 : (1961) 2 SCR 133 , Wanchoo, J. speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal Court has the effect of reducing the sentence passed by a trial Court, and after discussing the law relating to the power to grant pardon, he said:

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the Court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years'' imprisonment and had actually served only about sixteen months'' imprisonment, did not in any way affect the order of conviction and sentence passed by the Court which remained as it was and again:

Now where the sentence imposed by a trial Court is varied by way of reduction by the appellate or revisional Court, the final sentence is again imposed by a Court; but where a sentence imposed by a Court is remitted in part under Section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the Court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the Court. The order of remission affects the execution of the sentence imposed by the Court but does not affect the sentence as such, which remains what it was in spite of the order of remission.

It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it

by this Court."

46. The decision in Kehar Singh has been cited with approval in Shatrughan Chauhan (paragraph 14) and the principle has been formulated in the following terms:

"Both Articles 72 and 161 repose the power of the people in the highest dignitaries, i.e., the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Articles 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. This Court, in numerous instances, clarified that the executive is not sitting as a Court of appeal rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases, i.e., distinct, absolute and unfettered in its nature."

47. Undoubtedly, the power under Articles 72 and 161 is exercised on the aid and advice of the Council of Ministers. What the view of the Legal Advisor, which has been specifically approved by the Governor, has done is to disable an application of mind to the record of evidence of the criminal case so as to enable the Governor to determine whether a case was made out for the grant of mercy or pardon. In that sense, the Governor has been disabled from exercising a constitutional jurisdiction and has excluded, from his purview, material which was germane and relevant to the formation of the ultimate decision.

48. Solitary confinement

Another grievance which has been addressed before the Court in these proceedings is that after the judgment of the sessions Court on 13 February 2009, the convict was placed in solitary confinement, contrary to the law laid down by the Supreme Court in Sunil Batra (supra). In order to buttress this submission, the convict has filed an affidavit dated 7 January 2015, stating that since the date on which he was sentenced to death (13 February 2009), he was confined to a solitary single cell in Dasna Prison. Moreover, during the short duration of time when he was lodged in Meerut Prison, he stated that he was kept in a single cell solitary confinement (fansi yard). It was his case that in the affidavit that the prison record would bear out his averments. On 9 January 2015, we had permitted the respondents to respond to the affidavit of the convict and to produce all the records and a counter for the perusal of the Court. In response to the directions of the Court, a supplementary counter-affidavit dated 15 January 2015 has been filed by the Senior Superintendent of the Central Jail, Naini. The following statement has been made in paragraph 5 of the affidavit:

"...In view of sensitivity of Sessions Trials and the matter in question and also in view of Administrative and Security Arrangements of the Prison as well as Security Arrangement of the petitioner Surendra Koli, he has been detained in Barrack No. 6

of High Security Ward with 5 other sensitive prisoners in a separate room. The said High Security Ward has a large space in which total 10 rooms are situated alongwith one Baramda. Out of these 10 rooms, the 6 rooms are occupied by 6 prisoners including the petitioner, as above stated. All the rooms have proper basic amenities like light, air, toilet and bathrooms etc. This ward has proper arrangement of cleaning and has proper place even for Indoor Games having plantation also. In other words, the said ward has healthy atmosphere. The district jail, Ghaziabad has no arrangement of solitary confinement. The petitioner Surendra Koli has been detained in the same High Security Ward from the very beginning with proper security arrangement..."

49. In the second supplementary counter-affidavit which has been filed on behalf of the State on 27 January 2015, it has been stated that the convict was lodged in Barrack No. 6 alongwith other sensitive prisoners and that there are more than ten rooms in the barrack. Annexure SCA-14, which is a sketch of Barrack No. 6, indicates that there are ten independent cells forming a part of Barrack No. 6. This is also borne out by the photographs which have been placed on the record by the learned Advocate General. SCA-15 and SCA-16 of the second supplementary counter-affidavit are illustrative lists taken from the register of inmates of Barrack No. 6 which indicate that there were no more than 9 prisoners lodged in the barrack on the dates reflected therein. In fact, it is not necessary for the Court to dwell upon any disputed question of fact since, from the affidavit which was filed by the State on 15 January 2015, it is clear that the convict was detained, as is described, "from the very beginning" in one of the ten cells forming a part of Barrack No. 6.

50. This is nothing but solitary confinement. The convict cannot be described as a convict under an executable sentence of death so long as the judgment of the sessions trial was not confirmed by the High Court and thereafter until the matter had not attained finality before the Supreme Court and for that matter until the rejection of the mercy petition. The affidavits which have been filed by the State have not established any need, having a bearing on the security or the safety of the convict or any other compelling circumstance which warranted his segregation in a solitary cell from the date of the judgment of the trial Court on 13 February 2009. Nor for that matter, have the affidavits drawn any facts to the notice of the Court bearing on the behavior of the convict which warranted a decision to place him in solitary confinement. The law on this is formulated in the judgment of the Supreme Court in Sunil Batra (supra). The Supreme Court observed as follows:

"...It will be a stultification of judicial power if, under guise of using Section 30(2) of the Prisons Act, the Superintendent inflicts what is substantially solitary confinement which is a species of punishment exclusively within the jurisdiction of the criminal Court...."

Again, the Supreme Court has explained the position as follows:

"Confinement inside a prison does not necessarily impart 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 subversion of this statutory provision (Sections 73 and 74 IPC) to impart a meaning to Section 30(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 as 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."

51. The submission which was urged on behalf of the State by the learned Advocate General is that the convict was permitted access to jail visitors and having due regard to the pendency of other cases against him, he was transported to Court regularly to attend the hearing of the sessions trials. Neither of these circumstances would result in obliterating the consequence of an unlawful act of solitary confinement. In fact, in the decision in Sunil Batra, the Supreme Court observed that the mere act of the prison authorities in allowing the convict to meet prison visitors would not result in taking an act of solitary confinement out of that category. Similarly and by parity of reasoning, there can be no doubt about the legal position that occasions when a prisoner is required to be taken to Court for attending a hearing before the Court, would not result in a solitary confinement being regarded as anything but solitary confinement.

52. The death warrants

In the present case, three execution warrants were issued against the convict on 3 May 2011, 2 September 2014 and 3 September 2014. The first warrant dated 3 May 2011 stipulated that the sentence of death would be executed at any time between 24 May 2011 and 31 May 2011 at 4:00 am.

53. Section 413 of the Cr.P.C. stipulates that when a case is submitted to the High Court for the confirmation of a sentence of death and the Court of sessions receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. Section 414 provides that when a sentence of death is passed by the High Court in an appeal or revision, the Court of sessions shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant. Under sub-section (3) of Section 415, where a sentence of death is passed or confirmed by the High Court, and it is satisfied that the person sentenced intends to prefer a petition before the Supreme Court under Article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition. Form 42 of the Second Schedule to the Cr.P.C. provides for the warrant of execution of a sentence of death. Form 42 contemplates that the authorization to the officer in

charge of the jail requires him to carry out the sentence of death into execution by causing the prisoner to be hanged by the neck until he is dead, at a particular time and place of execution. The essence of a warrant of death is the determination of a specific time and place for the execution of the sentence of death. We find no reason or justification for the issuance of an open ended warrant of death prescribing a range of dates within which the sentence of death would have to be executed. This would plainly not be consistent with the provisions envisaged in law.

54. The second warrant of death was issued on 2 September 2014. Significantly, that was the very day on which the decision of the Supreme Court in Mohd Arif entitling a convict to an open hearing of a review petition was delivered. The petitioner was furnished with no notice of the proceeding initiated for the execution of the warrant of death nor was he afforded a hearing by the Court before the issuance of the warrant. Though Sections 413 and 414 of Cr.P.C. are silent in regard to observance of the principles of natural justice, it is a well-settled principle of our jurisprudence that the rules of natural justice must be read into the interstices of a statute even where the statute is silent. Natural justice is an adjunct of fair procedure since it affords a hearing to a person who would be adversely affected by a proposed action before a decision is taken or an order is passed. As the law has developed, the strict lines between a quasi judicial and administrative act have also been effaced. If the petitioner were to be afforded a hearing, he would have been in a position to inform the Additional Sessions Judge at Ghaziabad that the decision which has been delivered by the Supreme Court in Mohd Arif''s case on 2 September 2014 vested in him a procedural entitlement for the restoration of his review petition and for an open hearing in Court. This was evidently not done when the warrant was issued on 2 September 2014 authorising the Jail Superintendent of the district jail at Ghaziabad to carry the sentence of death into execution between 7 September 2014 and 12 September 2014 at 6.00 am.

55. On 3 September 2014, the warrant of death was modified by the Additional Sessions Judge at Ghaziabad. The order of the Additional Sessions Judge records that the Deputy Jailor had appeared in Court on that day itself together with a letter of the Jail Superintendent seeking orders on a letter of the Deputy Inspector General of Jails, Lucknow for the transfer of the convict to the district jail at Meerut. The Additional Sessions Judge, Ghaziabad observed, upon perusing the letter of the Deputy Inspector General, Lucknow that the district jail at Meerut had arrangements for execution of the sentence of death whereas there was no such arrangement at the Ghaziabad Jail. Consequently, an authorization was issued for the transfer of the convict and for the execution of the sentence of death at the district jail at Meerut. These warrants of death were issued on 2 September 2014 and 3 September 2014, oblivious of the fact that the convict had a valuable safeguard and remedy open to him in terms of the decision of the Supreme Court in Mohd Arif to apply for the restoration of his review petition and for an open hearing in Court. The warrant, in all probability, would have been carried into execution but

for the fact that upon the convict being shifted to the jail at Meerut, and the attendant publicity, urgent reliefs were sought before the Supreme Court on the intervening night between 7 and 8 September 2014 at 1:00 am.

56. We are affirmatively of the view that in a civilized society, the execution of the sentence of death cannot be carried out in such an arbitrary manner, keeping the prisoner in the dark and without allowing him recourse and information. Essential safeguards must be observed. Firstly, the principles of natural justice must be read into the provisions of Sections 413 and 414 of Cr.P.C. and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the sessions Court that would enable the convict to consult his advocates and to be represented in the proceedings. Secondly, the warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Thirdly, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict will have a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution. Fourthly, a copy of the execution warrant must be immediately supplied to the convict. Fifthly, in those cases, where a convict is not in a position to offer a legal assistance, legal aid must be provided. These are essential procedural safeguards which must be observed if the right to life under Article 21 is not to be denuded of its meaning and content.

57. Is the nature of the crime relevant at this stage?

The submission which was urged on behalf of the State by the learned Advocate General is that this Court should not entertain these proceedings and should decline to exercise the power of judicial review because of the ghastly nature of the crime. Binding precedent negatives the submission. Precisely the same submission has been considered and rejected in the judgment of the Supreme Court in Shatrughan Chauhan (supra). The Supreme Court has specifically held that once the death penalty can be imposed only in the rarest of rare cases, as mandated by the judgment in Bachan Singh (supra), all death sentences involve the most heinous and barbaric offences of the rarest kind. The view of the Supreme Court is that the legal effect of the extraordinary depravity of the offence stands exhausted when a prisoner is sentenced to death and considerations such as the gravity of the crime, the extraordinary cruelty involved or the horrible consequence for society caused by the crime would not be relevant at the stage when consideration of the sentence of death to life imprisonment is sought. The Supreme Court held as follows:

"...we are of the view that only delay which could not have been avoided even if the matter was proceeded with a sense of urgency or was caused in essential preparations for execution of sentence may be the relevant factors under such petitions in Article 32. Considerations such as the gravity of the crime, extraordinary cruelty involved therein or some horrible consequences for society caused by the

offence are not relevant after the Constitution Bench ruled in Bachan Singh Vs. State of Punjab, AIR 1980 SC 898 : (1980) CriLJ 636 : (1982) 1 SCALE 713 : (1980) 2 SCC 684 : (1980) SCC(Cri) 174 : (1983) 1 SCR 145 : 1980 SCC (Cri) 580 , that the sentence of death can only be imposed in the rarest of rare cases. Meaning, of course, all death sentences imposed are impliedly the most heinous and barbaric and rarest of its kind. The legal effect of the extraordinary depravity of the offence exhausts itself when Court sentences the person to death for that offence. Law does not prescribe an additional period of imprisonment in addition to the sentence of death for any such exceptional depravity involved in the offence."

58. In the earlier decision of the Supreme Court in Sher Singh (supra), there were observations to the effect that the nature of the offences, the surrounding circumstances and whether the pattern of the crime may lead to its likely repetition are matters which are relevant to the issue of commutation. The view which was formulated, was in the following terms:

"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 of the two years'' formula as a matter of "quod erat demonstrandum."

59. When a conflict between the the decision in Vatheeswaran and Sher Singh was placed for consideration by the Constitution Bench in Triveniben, the leading judgment of four Hon''ble Judges was delivered by Hon Tale Mr. Justice G.L. Oza. In a separate judgment which was delivered by Justice K. Jagannatha Shetty, the learned Judge observed as follows:

"...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."

In taking the view that the Court exercising the power of judicial review would be entitled to consider the nature of the offence and the surrounding circumstances, reliance was placed on the decision in Sher Singh (supra).

60. The subsequent decision of three learned Judges of the Supreme Court in Shatrughan Chauhan (supra) considered the observations of Mr. Justice K. Jagannatha Shetty in Triveniben and held that those observations represent a minority view which was not consistent with the majority opinion which had held that it was not open to the Supreme Court in the exercise of its jurisdiction under Article 32 to go behind the final verdict and that the nature of the offence and the circumstances in which the offence was committed will have to be taken as found by the competent Court. Subsequently, the decision in Shatrughan Chauhan has been considered in the curative petition which was filed before a Bench of four Hon''ble Judges in Navneet Kaur (supra). In Navneet Kaur, the Supreme Court cited with approval, the view of the three judge Bench in Shatrughan Chauhan holding that considerations, such as the gravity of the crime, the extraordinary cruelty involved and the consequences for society are not relevant after the decision in Bachan Singh, on the issue as to whether a case for commutation has been made out. Consequently, the view on this position of law as expounded in Shatrughan Chauhan has been specifically affirmed by four Hon''ble Judges in Navneet Kaur. Having regard to this position, the submission which has been urged on behalf of the State by the learned Advocate General cannot be countenanced.

61. Article 163(3)

We find no merit in the argument that the Court is called upon, in the exercise of its power of judicial review, to enquire into whether and if so what advice was tendered by the Council of Ministers to the Governor in breach of the provisions of Article 163(3).

We make it clear that this is not an inquiry into whether and, if so, what advice was tendered to the Governor by the Council of Ministers. What the Court is called upon to decide and determine is the constitutional validity of the execution of the sentence of death in a situation where there has been a prolonged and unexplained delay on the part of the State in disposing of the mercy petition. Incidental to this issue, the Court has been called upon to decide as to whether the decision on the mercy petition has been vitiated by taking irrelevant circumstances into account and by a failure to consider relevant and germane circumstances. This is not in the teeth of the provisions of Article 163(3) of the Constitution. Whether, and if so, what advice was tendered by the Council of Ministers is not in issue or question.

Conclusion

In conclusion, we summarize our view by holding that the cumulative effect of the circumstances which have been placed before the Court in the present case, leads us to hold that the execution of the sentence of death on the convict Surendra Koli

on the facts of this case would constitute an unconstitutional violation of his right to life under Article 21 of the Constitution. In coming to this conclusion, we have relied on the following circumstances:

(i) There was a delay of three years and three months in disposing of the mercy petitions filed by the convict under Articles 72 and 161 of the Constitution. Of this period, a period of 26 months that elapsed between the presentation of the mercy petition to the Governor on 7 May 2011 and the forwarding of the file by the State Government to the Union Government on 19 July 2013 upon the rejection of the mercy petition was avoidable, prolonged and unnecessary;

(ii) The explanation of the State Government for the delay of 26 months is palpably unfounded and unsound. We find it disturbing that an effort has been made on an affidavit to mislead the Court to believe that there was a revision/review petition of the convict which was pending between 23 April 2011 until the order of the Supreme Court on 13 February 2013. As we have noted earlier, after the final judgment of the Supreme Court, the convict moved an application for retrial of three other sessions cases. The Registrar (Judicial-III) of the Supreme Court rejected that application on 6 October 2012 as not being maintainable. An appeal against the order of rejection by the Registrar was dismissed by the Supreme Court on 13 February 2013 on the ground that applications were pending before the Allahabad High Court in regard to the prayer for retrial. The issue of retrial of three distinct and independent cases had no connection whatsoever with the finality of the proceeding in the present case. Moreover, at no stage, had the convict obtained an order of stay from the Supreme Court and the only order of stay that was passed was after the decision in Mohd Arif''s case when the review petition which was required to be heard in open Court was directed to be listed and a stay operated between 8 September 2014 and 28 October 2014 (that period has to be excluded and does not ensure to the benefit of the convict);

(iii) There was, at the inception, a manifest misapplication by the State Government of the Government Order dated 13 April 2005 which, on its terms, did not apply to death convicts;

(iv) Though, the Home Department of the State expressed the view that it did not have jurisdiction under the Business Rules of 1975 to entertain a plea of a death convict, the Principal Secretary (Home) acted in excess of jurisdiction and proceeded to make an observation on merits recommending that the mercy petition be rejected;

(v) The Special Secretary (Law) as well as the Principal Secretary (Home) proceeded on the manifestly misconceived basis that the Home Department recommended rejection of the mercy petition when, as a matter of fact, in the view of the Home Department, the jurisdiction to entertain the mercy petition lay with the Law Department and not with the Home Department;

(vi) The note prepared by the Legal Advisor to the Governor clearly ignored the position in law enunciated by the Constitution Bench of the Supreme Court in Kehar Singh''s case and adopted a manifestly misconceived view of the constitutional power of the Governor. The Governor in accepting the recommendation has denuded himself of the consideration of vital aspects of the case which fell within his constitutional authority;

(vii) The convict, contrary to the law laid down by the Supreme Court in Sunil Batra (supra), was held in solitary confinement without a judicial order, even when he was not under an executable sentence of death, at construed by the Supreme Court;

(viii) In the facts of the present case, there has been no delay or dilatory tactics on the part of the convict nor has his conduct contributed to the delay on the part of the State Government in disposing of the mercy petition;

(ix) The warrants of death which were issued on three occasions by the Additional Sessions Judge at Ghaziabad were without following due process of law and have resulted in serious detriment to the constitutional rights of the convict.

In conclusion, we may also note that the issue as to whether, in these circumstances, an order of remand should be passed, has also been dwelt upon by the Supreme Court in Shatrughan Chauhan. The following observations of the Supreme Court indicate that once the constitutional Court comes to the conclusion that the execution of a warrant of death would be unconstitutional as a result of the delay caused in the disposal of the mercy petition and for other attendant reasons which we have noted above, it is for the Court to hear the grievance of the convict and commute the death sentence into life imprisonment:

"...Under the ground of supervening events, when Article 21 is held to be violated, it is not a question of judicial review but of protection of fundamental rights and Courts give substantial relief not merely procedural protection. The question of violation of Article 21, its effects and the appropriate relief is the domain of this Court. There is no question of remanding the matter for consideration because this Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution. Further, this Court is best equipped to adjudicate the content of those rights and their requirements in a particular fact situation. This Court has always granted relief for violation of fundamental rights and has never remanded the matter. For example, in cases of preventive detention, violation of free speech, externment, refusal of passport etc., the impugned action is quashed, declared illegal and violative of Article 21, but never remanded. It would not be appropriate to say at this point that this Court should not give relief for the violation of Article 21."

We, accordingly, allow the petitions by issuing a declaration that the execution of the sentence of death on the convict Surendra Koli in the facts of the present case and to which these proceedings relate, would amount an unconstitutional infraction

of his right to life under Article 21 of the Constitution. We, accordingly, hold and direct that the sentence of death shall be commuted to the sentence of life imprisonment which the convict shall and is ordered to undergo.

The original records produced by the learned Advocate General are directed to be returned to him. Similarly, the records which were produced before this Court by the learned Additional Solicitor General of India be returned to him.