Smt. Triveniben

Vs

State of Gujarat

Writ Petition (Criminal) No. 1566 of 1985

Harbhajan Singh

Vs

State of J&K

Writ Petition (Criminal) No. 186 of 1986

Lal Singh

Vs

Union of India and Another

Writ Petition (Criminal) No. 191 of 1986

Indian Council of Family and Social Welfare

Vs

State of Tamil Nadu

Writ Petition (Criminal) No. 338 of 1988

Gurcharan Singh and Pritam Singh Rep. By Theirm Mother

Vs

State of Punjab

Writ Petition (Criminal) No. 649 of 1987

(K. N. Singh, L. M. Sharma, M. M. Dutt, S. Natarajan, K. Jagannatha Shetty JJ)

07.02.1989

JUDGMENT

G. L. OZA, J. (for M. M. Dutt, K. N. Singh and L. M. Sharma, JJ.) –

1. These matters came up before us because of the conflict in the two decisions of this Court : (i) T. V. Vatheeswaram v. State of Tamil Nadu ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348), Sher Singh v. State of Punjab ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582)

and observation in the case of Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8). In Vatheeswaram case ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348) a bench of two judges of this Court held that two years delay in execution of the sentence after the judgment of the trial court will entitle the condemned prisoner to ask for communication of his sentence of death to imprisonment for life. The court observed that [SCC p. 79 : SCC (Cri) p. 353, para 21]

Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and demand the quashing of the sentence of death.

2. In Sher Singh case ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582) which was a decision of a three Judges' bench it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years rule could not be laid down in cases of delay. It was held that the court in the context of the nature of offence and delay could consider the question of commutation of death sentence. The court observed : (SCC p. 356 : SCC (Cri) p. 473, para 19)

Apart from the fact that the rule of two years runs in the teeth of common experience as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities, we are of the opinion that no absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of a death sentence, the sentence must be substituted by the sentence of life imprisonment. There are several other factors which must be taken into account while considering the question as to whether the death sentence should be vacated. A convict is undoubtedly entitled to pursue all remedies lawfully open to him to get rid of the sentence of death imposed upon him and indeed, there is no one, be he blind, lame, starving or suffering from a terminal illness, who does not want to live.

It was further observed : (SCC p. 357 : SCC (Cri) p. 474, para 20)

Finally, and that is no less important, the nature of the offence, the diverse circumstances attendant upon it, the nature of the upon the contemporary society and the question whether the motivation and pattern of the crime are such as are likely to lead on 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.

3. In Javed case ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8) it was observed that the condemned man who had suffered more than two years and nine months and was repenting and there was nothing adverse against him in the jail records, this period of two years and nine months with the sentence of death heavily weighing on his mind will entitle him for commutation of sentence of death into imprisonment for life. It is because of this controversy that the matter was referred to a five judges' bench and hence it is before us.

4. Learned counsel for the petitioners at length has gone into the sociological, humane and other aspects in which the question of sentence of dearth has been examined in various decision and by various authors. It is however not disputed that in Bachan Singh v. State of Punjab ((1980) 2 SCC

684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) constitutionality of sentence of death has been upheld by this court. Learned counsel has at length referred to the opinion of Hon'ble Mr. Justice P. N. Bhagwati, as he then was, which is the minority opinion in Bachan Singh case. In his opinion Justice P. N. Bhagwati has conducted a detailed research and has considered the materials about the various aspects of sentence of death. Learned Attorney General appearing for the respondents also referred to some portions of the judgment but contended that howsoever condemned the sentence may be but its constitution as validity having been accepted by this Court all this study about looking at it from various angles is not of much consequence. He also contended that the opinion has been drifting and the statistics reveal that at one time there was a trend towards abolition of death sentence and ten a reverse trend started and therefore all this, so far as the present case is concerned, is not necessary. One of the contentions advanced by learned counsel for the petitioners was that apart from all other considerations it is clear that this is a sentence which if executed is not reversible and even if later on something so glaring is detected which will render the ultimate conclusion to be erroneous the person convicted and executed could not be brought back to life and it was on this basis that it was contended that although the law provides for the sentence and it has been held to be constitutional but still the courts should be slow in inflicting the sentence and in face it was contended that court are in fact show in awarding the sentence. In Bachan Singh case ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) it was observed : (SCC p. 726 : SCC (Cri) p. 625, para 132)

To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact the persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the would over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in these last there decades, rejected all attempts, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the are of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware ... of the existence of death penalty as punishment for murder, under the India Penal Code, If the Thirty-fifth Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending decision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354 (3) in that code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-73 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the Public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.

We are in entire agreement with the view expressed above.

5. It is not necessary to go into the jurisprudential theories of punishment deterrent or retributive in view of what has been laid down in Bachan Singh case with which we agree but the learned counsel at length submitted that the modern theorists of jurisprudence have given a go-by to the retributive theory of punishment although in some countries it is recognised on a different principle i.e. to pacify the public anger whereas some theorists have tried to put both the theories together. So far as the deterrent theory of punishment is concerned even about that doubts have been expressed as regards the real deterrent effect of punishment. The absence of deterrent effect has been attributed to various causes sometimes long delay itself as public memory is always short. When the convict is ultimately sentenced and executed people have forgotten the offense that he has committed and on this basis it is sometimes felt that it has lost its importance. In the present case we are not very much concerned with all these questions except to some extent the question of delay and its effect.

6. It was also contended that this sentence is a sentence which is irreversible thereby meaning that if ultimately some mistake in convicting and executing the sentence is detected after the sentence is executed there is no possibility of correction. After all the criminal jurisprudence which is in vogue in our system even otherwise eliminates all possibilities of error as benefit of doubt at all stages goes in favour of accused. Apart from it there are only a few offences where sentence of death is provided and there too the manner in which the law has now been changed ultimately the sentence of death is awarded in the rarest of rare case. Therefore not mush could be made of the possibility of an error.

7. The offences in which sentence of death is provided are under Sections 120-B (in some cases), 121, 132, 302, 307, (in some cases) and 396.

8. The law as it stood before 1955 the court was expected to give reasons if it chose not to pass a sentence of death as normally sentence of death was the rule and alternative sentence of imprisonment of life could only be given for special reasons. Section 367(5) in the Code of Criminal Procedure, 1898 stood :

> If the accused is convicted for an offence punishable with death, and the court sentences him to any punishment other than death, the court shall in its judgment state the reasons why the sentence of death was not passed.

Section 367(5) of CrPC was amended in 1955 and after the amendment discretion was left to the courts to give either sentence. Section 367(5) after the amendment reads :

> In trials by jury, the court need not write a judgment, but the court of session shall record the heads of the charge to the jury :

Provided that it shall not be necessary to record such heads of the charge in cases where the charge has been delivered in English and taken down in shorthand.

Thus the legislature dropped that part of the sub-clause which made it necessary for the court to state reasons for not awarding sentence of death. Thus after the amendment the legal position was that it was the discretion of the court to award either of the sentences.

9. In the Code of Criminal Procedure, 1973 Section 354(3) has now been introduced and it has been provided that in all case of murder, life imprisonment should be given unless there are special reasons for giving sentence of death. This provision in Section 354(3) reads :

> When the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment of a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

It is thus clear that before 1955 sentences of death was the rule, the alternative sentence had to be explained be reasons. Thereafter it was left to the discretion of the court to inflict either of the sentences and ultimately in the 1973 Code normal sentence is imprisonment for life except for the special reasons to be recorded sentences of death could be passed. It is therefore clear that this indicates a trend against sentence of death but this coupled with the decisions ultimately wherein sentence of death has been accepted as constitutional go to show that although there is a shift from sentence of death to lesser sentence but there is also a clear intention of maintaining this sentence to meet the ends of justice in appropriate cases. It is therefore clear that in spite of the divergent trends in the various parts of the world there is a consistent thought of maintaining the sentence of death on the statute book for some offences and in certain circumstances where it may be thought necessary to award this extreme penalty. As stated generally that it is awarded in the rarest of rare cases and in this accepted position of law, in our opinion, it is not necessary to go into the academic question about sociological and humane aspects of the sentence and detailed examination of the jurisprudential theories.

10. It was also contended though not very seriously that in ultimate analysis out of the two sentences imprisonment for life or death it has been left to the discretion of the courts. On the one hand it was suggested that there are no norms laid down for exercise of discretion but on the other hand it was also admitted that it is very difficult to lay down any hard and fast rule and apparently both the sides realised that attempt was made by this Court in enumerating some of the circumstances but it could not lay down all possible circumstances in which the sentence should be justified. In Machhi Singh v. State of Punjab ((1983) 3 SCC 470 : 1983 SCC (Cri) 681) it was observed that : (SCC p. 489 : SCC (Cri) p. 700, paras 38-40)

In this background the guidelines indicated in Bachan Singh case ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arise. The following proposition emerge from Bachan Sigh case ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) :

> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance-sheet of aggravating and mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating

and the mitigating circumstances before the option is exercised

In order to apply these guidelines inter alia the following question may be asked and answered :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answer to the question posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

11. In ultimate analysis it could not be disputed and was not seriously disputed that the circumstances in which the extreme penalty should be inflicted cannot be enumerated in view of complex situation in society and the possibilities in which the offence could be committed and in this context in ultimate analysis it is not doubted that the legislature therefore was right in leaving it to the discretion of the judicial decision as to what should be the sentence in particular circumstances of the case. But the legislature has put a further rider that when the extreme penalty is inflicted it is necessary for the court to give special reasons thereof.

12. In the matter before us we are mainly concerned with (a) delay in execution of the sentence of death; (b) what should be the starting point for computing this delay ?; (c) what are the rights of a condemned prisoner who has been sentenced to death but not executed ?; and (d) what could be the circumstances which could be considered along with the time has been taken before the sentence is executed.

13. The main theme of the arguments on the basis of delay has been the inhuman suffering which a condemned prisoner suffers waiting to be executed and the mental torture it amounts to and it is in this background also that the parties argued at length about the starting point which should be considered for computing delay in executing of the sentence. On the one hand according to the petitioners the mental torture commences when the trial court i.e. the Sessions Court pronounce the judgment and awards capital punishment. However, learned counsel also conceded that even the condemned prisoner knows that the judgment pronounced by the Session Court in the case of capital punishment is not final unless confirmed by the High Court. Mainly therefore it was contended that the real mental torture commences after the death sentence is confirmed by the High Court and therefore to consider the question of delay the time should be computed from the date of the High Court judgment. On the other hand learned Attorney General contended that even if the judgment of confirmation by the High Court is Court is passed in which capital punishment is awarded, it invariably comes to this Court and this Court ordinarily grants leave and appeals are heard at length and it was therefore contended that the delay in execution of the sentence really could be considered after the pronouncement of the final verdict by this Court and it is only after the final verdict is pronounced that it could be said that the judicial process has concluded. It is no doubt true that sometimes in these procedures some time is taken and sometimes even long time is spent. May be for unavoidable circumstances and sometimes even at that instance of the accused but it was contended and rightly so that all this delay up to the final judicial process is taken care of while the judgment is finally pronounced and it could not be doubted that in number of cases considering (sic)

the time that has elapsed from the date of the offence till the final decision has weighted with the courts and lesser sentence awarded only on this account.

14. As early as in 1944, the Federal Court in Piare Dusadh v. King Emperor (1944 FCR 61 : AIR 1944 FC 1 : 45 Cri LJ 413) observed :

It is true that death sentences were imposed in these cases several months ago, that the appellant have been lying ever since under threat of execution, and that the long delay has been caused very largely by the time taken in proceedings over legal points in respect of the constitution of the courts before which they were tried and of the validity of the sentences themselves. We do not doubt that this Court has power, where there has been in coordinate delay in executing death sentences in cases which come before it, to allow the appeal insofar as death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed.

Similarly in State of Uttar Pradesh v. Lalla Singh ((1978) 1 SCC 142 : 1978 SCC (Cri) 70), Sadhu Singh v. State of U. P. ((1978) 4 SCC 428 : 1979 SCC (Cri) 49 : AIR 1978 SC 1506), State of U. P. v. Sahai ((1982) 1 SCC 352 : 1982 SCC (Cri) 223 : AIR 1981 SC 1442) and Joseph Peter v. State of Goa, Daman & Diu ((1977) 3 SCC 280 : 1977 SCC (Cri) 486 : (1977) 3 SCR 771) while finally deciding the matter the courts have taken notice of the delay that has occurred in the judicial process.

15. It was contended that Article 21 contemplates not only a fair procedure but also expeditious procedure and in this context it was contended that observations be be made so that judicial process also is concluded as expeditiously as possible. Learned Attorney General has filed compilation of rules of various High Court and it is not disputed that practically in all the High Courts, a confirmation case where the sentence of death is awarded by the Sessions Court and the case is pending in the High Court for confirmation time bound programme is provided in the rules and it could be said that except on some rare occasion the High Court has disposed of a confirmation case between six months to one year and therefore it could not be said that there is no procedure provided for expeditious disposal of these cases. At the sessions level also the normal procedure of the Sessions trial is that it is taken up day to day although after coming into force of the Code of Criminal Procedure in 1973 where the number of offences triable by the Sessions Court have been increased but there is sometimes a slight departure from the normal rule which is the cause to some extent for some slackness in the sessions trail but attempt is always made and it is expected that sessions case where offence alleged is one which is punishable with death should be given top priority and normally it is given top priority and it is expected that the trials must continue day to day unless it is concluded. Although it is well known that sometimes it is at the instance of the advocates appearing for defence also that this normal rule is given a go-by but ordinarily it is expected that these cases must be tried expeditiously and disposed of.

16. Even in this Court although there does not appear to be a specific rule but normally these matters are given top priority. Although it was contended that this reference before us-a bench of five Judges, was listed for hearing after a long interval of time. We do not know why this reference could not be listed except what is generally well known the difficulty of providing a bench of five Judges but ordinarily it is expected that even in this Court the matters where the capital punishment is involved will be given top priority and shall be heard and disposed of as expeditiously as possible but it could not be doubted that so long as the matter is pending in any court before final adjudication even the person who has been condemned or who has been sentenced to death has a ray

of hope. It therefore could not contended that he suffers that mental torture which a person suffers when he knows that he is to be hanged but waits for while considering the question of communication of sentence of death into one of life imprisonment could only be from the date the judgment by the apex court is pronounced i.e. when the judicial process has come to an end.

17. After the matter is finally decided judicially, it is open to the person to approach the President or the Governor, as the case may be with a mercy petition. Sometimes person or at his instance or at the instance of some of his relatives, mercy petition and review petitions are filed repeatedly causing undue delay in execution of the sentence. It was therefore contended that when such delay is caused at the instance of the person himself he shall not be entitled to gain any benefit out of such delay. It is no doubt true that sometimes such petitions are filed but a legitimate remedy is available in law, a person is entitled to seek it and it would therefore be proper that if there has been undue and prolonged delay that alone will be a matter attracting the jurisdiction of this Court, to consider the question of the execution of the sentence. While considering the question of delay after the final verdict is pronounced, the time spent on petitions for review and repeated mercy petitions at the instance of the convicted person himself however shall not be considered. The only delay which would be material for consideration will be the delay in disposal of the mercy petitions or delays occurring at the instance of the executive.

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

19. It was also contended that when capital punishment is awarded the sentence awarded is only sentence of death but not sentence of death plus imprisonment and therefore if a condemned prisoner has to live in jail for long in substance it amounts to punishment which is sentences of death and imprisonment for some time and this according to the learned counsel will amount to double jeopardy which is contrary to Article 20 and the imprisonment cannot be justified in law. Section 366 of the Code of Criminal Procedure provides :

> 366. Sentence of death to be submitted by Court of Session for confirmation. - (1) When the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court.
>
> (2) The court passing the sentence shall commit the convicted person to jail custody under a warrant.

This no doubt authorities the Court of Sessions to commit a person sentenced to death to jail custody under a warrant. But this section does not contemplate how long he has to be in jail. Clause (1) of Section 366 provides that when the Court of Sessions passes a sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. It is therefore apparent that sub-section (2) provided for committing the convicted person to jail awaiting the confirmation of the sentence by the High Court. It is also clear that when a person is committed to jail awaiting the execution of the sentence of death, it is not imprisonment but the prisoner has to be kept secured till the sentence awarded by the court is executed and it appears that it is with that purpose in view that sub-section (2) of Section 366 simply

provided for committing the convicted person to jail custody under a warrant.

20. The question about solitary confinement or keeping the condemned prisoner alone under strict guard as provided in various jail manuals was considered by this Court in Sunil Batra v. Delhi Administration ((1978) 4 SCC 494 : 1979 SCC (Cri) 155 : (1979) 1 SCR 392) and considering the question of solitary confinement it was observed : [SCC p. 571 : SCC (Cri) p. 232, para 220]

In our opinion, sub-section (2) of Section 30 does not empower the jail authorities in the garb of confining a prisoner under sentence of death, in a cell apart from all other prisoners, to impose solitary confinement on him. Even jail discipline inhabits solitary confinement as a measure of jail punishment. It completely negatives any suggestion that because a prisoner is under sentence of death therefore, and by reason of that consideration alone, the jail authorities can impose upon him additional and separate punishment of solitary confinement. They have no power to add to the punishment imposed by the court which additional punishment could have been imposed by the court itself but has in fact been not imposed. Upon a true construction, sub-section (2) of Section 30 does not empower a prison authority to impose solitary confinement upon a prisoner under sentence of death.

In the same judgment, it was further observed : [SCC p. 573 : SCC (Cri) p. 234 paras 224 and 225]

What then is the nature of confinement of a prisoner who is awarded capital sentence by the Sessions Judge and no other punishment from the time of sentence till the becomes automatically executable ? Section 366(2) of the CrPC enables the court to commit the convicted person who is awarded capital punishment to jail custody under a warrant. It is implicit in the warrant that the prisoner is neither awarded simple nor rigorous imprisonment. The purpose behind enacting sub-section (2) of Section 366 is to make available the prisoner when the sentence is required to be executed. He is to be kept in jail custody. But this custody is something different from custody of a convict suffering simple or rigorous imprisonment. He is being kept in jail custody for making him available for execution of the sentence as and when that situation arises. After the sentence becomes executable he may be kept in a cell apart from other prisoners with a day and night watch. But even here, unless special circumstance exist, he must be within the sight and sound of other prisoners and be able to take food in their company.

If the prisoner under sentence of death is held in jail custody, punitive detention cannot be imposed upon him by jail authorities except for prison offences. When a prisoner is committed under a warrant for jail custody under Section 366 (2) CrPC and if he is detained in solitary confinement which is a punishment prescribed by Section 73 IPC, it will amount to imposing punishment for the same offence more than once which would be violative of Article 20(2). But as the prisoner is not to be kept in solitary confinement and the custody in which he is to be kept under Section 30(2) as interpreted by us would preclude detention in solitary confinement, there is no chance of imposing second punishment upon him and therefore, Section 30(2) is not violative of Article 20.

21. It is therefore clear that the prisoner who is sentenced to death and is kept in jail custody under a warrant under Section imprisonment. In substance he is in jail so that he is kept safe and protected with the purpose that he may be available for execution of the sentence which has been awarded and in this view the aspect of solitary confinement has already been dealt with in the above noted case but it must be said that the life of the condemned prisoner in jail awaiting execution of sentence must be such which is not like a prisoner suffering the sentence but it is also essential that he must be kept safe as the purpose of the jail custody is to make him available for execution after the

sentence is finally confirmed.

22. It was contended that the delay in execution of the sentence will entitle a prisoner to approach this Court as his right under Article 21 is being infringed. It is well settled now that a judgment of court can never be challenged under Article 14 or 21 and therefore the judgment of the court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in Naresh Shridhar Mirajkar v. State of Maharashtra ((1966) 3 SCR 744 : AIR 1967 SC 1) and also in A. R. Antulay v. R. S. Nayak ((1988) 2 SCC 602 : 1988 SCC (Cri) 372), the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict also cannot be considered for coming to the conclusion whether the sentence could be altered on that ground also.

23. So far as our conclusions are concerned we had delivered our order on October 11, 1988 and we had reserved the reasons to be given later. Accordingly in the light of the discussions above our conclusion is as recorded in our order dated October 11, 1988 (Smt. Triveniben v. State of Gujarat, (1988) 4 SCC 574 : 1989 SCC (Cri) 25), reproduced below : [SCC p. 576 SCC (Cri) pp. 26-27, para 2]

Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusion 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 inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled.

K. JAGANNATHA SHETTY, J. (concurring) –

In Bachan Singh v. State of Punjab ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145), this Court pronounced that the provision of death penalty as an alternative punishment for murder, under Section 302 IPC is valid and constitutional. Sarkaria J. who spoke for the majority view held that the provisions relating to imposition of death sentence and the procedure prescribed thereof would ensure fairness and reasonableness within the scope of Article 21. It was also observed that by no strength of imagination it can be said that death penalty under Section 302 either per se or because of execution by hanging constitutes an unreasonable, cruel or unusual punishment. Nor is the mode of its execution a degrading punishment which would defile the "dignity of the individual"

within the preamble to the Constitution. The learned Judge, however, cautioned (at 751) : (SCC p. 751 : SCC (Cri) p. 647, para 209)

A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

25. Bachan Singh case ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) has thus narrowly tailored the sentencing discretion of court as to death sentence. Death sentence cannot be given if there is any mitigating circumstance in favour of the accused. All circumstances of the case should be aggravating. It is in the gravest go grave crimes or rare cases, the death sentence may be awarded. There is no offence in the Penal Code carrying mandatory death penalty. Section 303 IPC carrying the mandatory punishment has been declared unconstitutional in Mithu v. State of Punjab ((1983) 2 SCC 277 : 1983 SCC (Cri) 405). So much so, the death sentence is now awarded only in miniscule number of cases.

26. All the accused in these cases belong to that limited and exceptional category. The trial court convicted them under Section 302 IPC and sentenced them to death. The High Court confirmed their conviction and sentence. This Court dismissed their special leave petitions or appeals and subsequent review petitions. Their mercy petitions of the President and/or the Governor were also rejected. They have now moved writ petitions under Article 32 of the Constitution. They are not seeking to overturn the death sentence on the ground that the court has illegally inflicted it. Obviously, that they cannot do. The judgment of the court has become final. Under Article 141, it shall be binding on all courts. Under Article 142, it shall be enforceable throughout the territory of India. Under Article 144 all authorities, civil and judicial, in the territory of India shall act in aid of this Court. The judicial verdict pronounced by court in relation to a matter cannot be challenged on the ground that it violates one's fundamental right. The judgment of a court cannot be said to affect the fundamental rights of citizens (see Naresh Sridhar Mirajkar case ((1966) 3 SCR 744 : AIR 1967 SC 1)).

27. The petitioners, however, contend that this Court must set aside the death penalty and substitute a sentence of life imprisonment in view of the prolonged delay in the execution. The dehumanising factor of prolonged delay with the mental torture in solitary confinement in jail, according to them, has rendered the execution unconstitutional under Article 21. There are also some other subsidiary contentions to which I will presently refer.

28. We have earlier dismissed all but one petition giving our unanimous conclusion stating therein that we would give our reasons later. Here are any own reasons in support of that conclusion.

29. The question whether prolonged delay renders death sentence inexecutable and entitles the accused to demand the alternate sentence of life imprisonment has arisen amid the diversity of judicial decisions in (i) T. V. Vatheeswaram v. State of Tamil Nadu ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348); (ii) Sher Singh v. State of Punjab ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582) and (iii) Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8). Vatheeswaram case was decided by a two Judge bench, where Chinnappa Reddy, J said : (SCR p. 359 : SCC pp. 78-79 : SCC (Cri) pp. 352-53, para 20)

[W]e find no impediment in holding that the dehumanising factor of prolonged delay in the

execution of 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.

There then the learned Judge said : (SCR p. 360 : SCC p. 79 SCC (Cri) p. 353, para 21]

Making all reasonable allowance for the time necessary for appeal and consideration of reprieve, we think that delay exceeding two years in he execution of sentence of death should be considered sufficient to entitle the person under sentence of death to invoke Article 2 and demand the quashing of the sentence of death.

30. Sher Singh case ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582) was decided by a three Judge bench. Chandrachud, C.J. who spoke for the bench while disagreeing with above view in Vatheeswaram ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348), said : [SCR p. 595 : SCC p. 357 : SCC (Cri) p. 474 para 20]

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.

31. Then followed the decision in Javed Ahmed case ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8). There Chinnappa Reddy, J. raised a question whether a three Judge bench could overrule the decision of a two Judge bench merely because three is larger than two ? The learned Judge said : [SCC p. 283 : SCC (Cri) p. 661, para 4]

The court sits in division of two and three Judge for the sake of convenience and it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of two Judges. Vide Young v. Bristol Aeroplane Co. Ltd. ((1944) 2 All ER 293 : (1944) 1 KB 718 : 171 LT 113 (CA) It may be otherwise where a full bench or a Constitution Bench does so. We do not however desire to embark upon this question in this case. In the present case we are satisfied that an overall view of all the circumstance appears to us to entitle the petitioner in invoke the protection of Article 21 of the Constitution. We accordingly quash the sentence of death and substitute in its place the sentence of imprisonment for life.

32. The question posed in Javed Ahmad case ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8) relates to the practice and procedure of this court. It presents little problem and could be conveniently disposed of without much controversy. At the time of framing the constitution, Mr. B. N. Rau, after his return from united States reported reported to the President of the Constituent Assembly as follows :

> Again, Justice Frankfurter was very emphatic that any jurisdiction exercisable by the Supreme Court, should be exercised by the Full Court. His view is that the highest court of appeal in the land should not sit in divisions. Every judge, except of course such judges as may be disqualified by personal interest or otherwise from hearing particular cases, should share the responsibility for every decision of the court (The Framing of India's Constitution, Vol. III by S. Shiva Rao p. 219).

This was a very good suggestion. But unfortunately that suggesting was not accepted and the principle which was dear to Justice Frankfurter was not incorporated in our Constitution. The result is that each Judge does not share the responsibility for every decision of this Court.

33. For a proper working management in the court, we have framed Rules under Article 145 of the Constitution conferring power on the Chief Justice to constitute benches for disposal of cases. Order VII Rule (1) of the Supreme Court Rules, 1966 provides that every cases, appeal or matter shall be heard by a bench consisting of not less than two judge nominated by the Chief Justice. But this rule is subject to the requirement under Article 145(3) of the Constitution. Article 145(3) requires a minimum number of five judge for deciding any case involving substantial question of law as to interpretation of the Constitution. In any event, the Supreme Court has to sit in benches with judges distributed as the Chief Justice desires.

34. In this context, Order VII Rule 2 of the Supreme Court Rules also needs to be noted. It provides :

> Where in the course of the hearing of any cause, appeal or other proceeding, the bench considers that the matter should be dealt with by a larger bench, it shall refer the matter to the Chief Justice, who shall thereupon constitute such a bench for the hearing of it.

35. This is undoubtedly a salutary rule, but it appears to have only a limited operation. It apparently governs the procedure of a smaller bench when it disagrees with the decision of a larger bench. If the bench in the course of hearing of any matter considers that the to the chief Justice. The Chief Justice shall then constitute a larger bench for disposal of the matte. This exercise seems to be unnecessary when a larger bench considers that a decision of a smaller bench is incorrect unless a constitutional question arise. The practice over the years has been that a larger bench straightway considers the correctness of and if necessary overrules the view of a smaller bench. This practice has been held to be a crystallised rule of law in a recent decision by a special bench of seven learned Judges. In A. R. Antulay v. R. S. Nayak ((1988) 2 SCC 602 : 1988 SCC (Cri) 372), Sabyasachi Mukharji, J. speaking for the majority said : [SCC p. 653 : SCC (Cri) p. 423, paras 43 and 44]

The principle that the size of the Bench - whether it is comprised of two or three or more Judges - does not matter was enunciated in Young v. Bristol Aeroplane Co. Ltd. ((1944) 2 All ER 293 : (1944) 1 KB 718 : 171 LT 113 (CA)) and followed by Justice Chinnappa Reddy in Javed Ahmad Abdul Hamid Pawala v. State of Maharashtra ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8) where it has been held that a Division Bench of three Judges, should not overrule a Division Bench of two Judge, has not been followed by our courts.

> #* * *##

The law laid down by this court is somewhat different. There is a hierarchy within the court itself here, where larger Bench overrule smaller Benches. See the observations of this Court in Mattulal v. Radhe Lal ((1974) 2 SCC 365 : (1975) 1 SCR 127); Union of India v. K. S. Subramanian ((1976) 3 SCC 677 : 1976 SCC (L&S) 492 : (1977) 1 SCR 87, 92) and State of U. P. v. Ram Chandra Trivedi ((1976) 4 SCC 52 : 1976 SCC (L&S) 542 : (1977) 1 SCR 462, 473). This is the practice followed by this Court and now it is a crystallised rule of law.

36. The answer to the question posed in Javed Ahmad Case ((1985) 1 SCC 275 : 1984 SCC (Cri) 653 : (1985) 2 SCR 8) thus stands concluded and it is now not open to anyone to contend that a bench of two judge cannot be overruled by a bench of three judges. We must regard this as final seal to the controversy.

37. Before grappling with the crucial issue that has been raised in these petitions, it would be convenient to dispose of what may be regarded as peripheral submissions. Mr. R. K. Jain, learned counsel who led the arguments on behalf of the petitioners referred to us in detail the consideration of justice, morality and usefulness of capital punishment. The counsel also referred to us the opinion expressed by eminent persons like Shri Arvindo (Tales of Prison Life) with regard to torment in the prison life. He also invited our attention to the dissenting opinion of Bhagwati, J., in Bachan Singh ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) where the learned Judge observed that the execution "serves no social purpose". The learned counsel made an impassioned appeal to save the life of these condemned persons by substituting life imprisonment on the ground of inordinate delay in execution. I can really appreciate the compassionate feeling with which the counsel made his submission. The "self" in him came out with every word he uttered. He Seems to belong to a faith where 'non-violence' to every life is a must. Not that we are different underneath the robes. As said by Justice Brennan, while dealing with his opinion in Furman v. Georgia (408 US 238) : "I am not, that we are each not, a human being with personal views and moral sensibilities and religious scruples. But it is to say that above all, I am a judge. "(The Oliver Wendell homes Lecture, delivered in September 5, 1986.) We are flesh-and-blood mortals with normal human traits. Indeed, like all others, we too have some inborn aversions and acquired attractions. But it is not for us while presiding over courts to decide what punishment or philosophy is good for our people. While examining constitutional question, we must never forget Marshall's mighty phrase "that it is a Constitution that we are expounding". We are oath-bound to protect the Constitution. We are duty bound to safeguard the life and liberties of persons. We must enforce the constitutional commands, no matter what the problem. In other issues of constitutional considerations, we must understand the aspirations and convictions of men and women of our time. And we should not be swayed by our own convictions. We must never allow our individuality to overshadow or supersede the philosophy of the Constitution.

38. There are various philosophical ideologies and underpinnings about the purposes of punishment. It includes among others deterrence, retribution, protecting persons, punishing the guilty and acquitting the innocent. Among these objectives deterrence and retribution are prominent. Retribution is often confused with revenge, but there are distinct differences. Retribution embodies the concept that an offender should receive what he rightfully deserves. Deterrence has a two-fold object. The first object relates to specific deterrence. It will deter the individual from committing the same or other offences in the future. The second object is as to general deterrence. It will convince or deter others that "crime does not pay" (see Crime and Punishment by Harry E. Allen et al., at p. 735).

39. The Law Commission of India summarised these aspects as to the capital sentence [35th Report, para 265 (18)] :

> The fact remains however, that whenever there is a serious crime, the society feels a sense of disapprobation. If there is any element of retribution in the law, as administered now, it is not the instinct the feeling prevailing in the public is a fact of which notice is to be taken. The law does not encourage it, or exploit it for any undesirable ends. Rather, by reserving the death penalty for under, and thus visiting this gravest crime with gravest punishment the law helps the element of retribution merge into the element of deterrence

40. Sarkaria, J., after referring to this report speaking for the majority in Bachan Singh ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145) recognises : [SCC p. 721 : SCC (Cri) p. 617,

para 105]

Retribution and deterrence are not two divergent ends of capital punishment. They are convergent goals which ultimately merge into one.

The punishment are provided in order to deter crimes. The punishments are imposed to make the threat credible. Threats and imposition of punishments are obviously necessary to deter crimes. As a venerated British historian, Arthur Bryant writes : "The sole jurisdiction for the death penalty is not to punish murderers but to prevent murder." Professor Earnest Van Den Haag states :

> The murderer learns through his punishment that his fellowmen have found him unworthy of living, that because he has murdered, he is being expelled from the community of the living. This degradation is self-inflicted. By murdering, the murderer has so dehumanised himself that he cannot remain among the living. The social recognition of his self-degradation is the punitive essence of executioni. (See Harvard Law Review, 1986 Vol. 99, p. 1699)

41. Of course, one cannot have any empirical data to prove that capital punishments can be deterrent greater than life imprisonment. It may be that most killers as Professor Jack Greenberg states "do not engage in anything like a cost-benefit analysis. They are impulsive and they kill impulsively". The paradigm of this kind of murderers cannot be properly accounted for. However, many classic experiments on the effects of corporal punishments on dogs, monkeys, pigeons and other animals have been conducted in psychology laboratories. Graeme Newman in his book Just and Painful (at p. 127) refer to such experiments. The learned author states that corporal punishments works and it has been so successful that some animals have starved themselves to death rather than eat the forbidden food. This position with the human beings is said to be not different. Indeed, it cannot be different as we could see from day to day life. As between life and death one loves life. It is the love of life with sensuous joy of companionship that moves the race and not so much the ideals. One views the death with trepidation. In fact, every living being dreads death and it cannot be an exception with those on death row. They like all others want to live and live as long as they can. Because, life has its own attraction, no matter in what from and condition. Death has no such attraction and cannot have any, since it is the most mysterious of all in this world.

42. The criminal law always keeps pace with the development of society. It reflected as Chief Justice Warren said; "the evolving standards of decency that mark the progress of a maturing society" (Trop v. Dulles, (1958) 356 US 86, 101). We have much to learn from the history of every country. The punishment which meets the unanimous approval in one generation, may rank as the most reprehensible from of cruelty in the Take for instance, the punishment of whipping. A search of historical records of sixteenth century England shows that men and women were whipped unmercifully for trial offences as peddling, being drunk on a Sunday, and participating in a riot.

43. Many other instances of ferocious whipping of men and women, both for political and other offences, be sprinkle and blacken English historical records. Rarely did any shred of excuse for human frailty seem to enter into the souls of those sitting in judgment. In the days of Charles the Second, however, the Duke of York did interpose in one such case - he saved Lady Sophia Lindsay from being publicly whipped through the streets of Edinburgh for the crime of assisting at the escape of the Earl of Argyle, he own father-in-law.

44. In the early eighteen hundreds the Australian penal settlements were the scene of floggings of so

serve a nature as to rival, for sheer savagery, the worst that were inflicted in England during the sixteenth century, or in the southern State of America during the days of slavery. In the United States of America whipping was a favourite seventeenth century punishment for various offences, and both male and female culprits came under the lash. Of all the civilized nations, Russia may be considered to be the one which not only used the whip unmercifully, but also as the nation which continued to use it longer by far and for a greater variety of crimes than did any other. Next to Russia, for sheer love of whipping, comes China, and little less formidable than the Russian knot is the Chinese rod of split bamboo. The sharp edges of the bamboo cut into the flesh, inflicting terrible lacerations. Little wonder that deaths, as a result of these floggings, have been frequent, and that those who escape this fate are often so terribly mutilated that they remain crippled for the rest of their lives. (The History of Corporal Punishment by G. R. Scott (1948) pages 39 to 56)

45. Take the history of punishment of death in England. In 1810 Sir Samuel Romilly who asked the Parliament to abolish the death penalty for some of crimes said "there is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England". (A History of English Criminal Law by L. Radzinowich V(1), p. 1)

46. The beginning of the nineteenth century was a period of indiscriminate imposition of capital punishment in England for numerous widely differing offences. There were two hundred or more such offences. There were several legislations providing punishment of death in the reign of George IV. All felonies except petty larceny and mayhem were theoretically punishable with death. From 1827 to 1841 several legislations were passed abolishing the punishment of death in a variety of cases. Burning continued till 1790 to be the punishment inflicted on women for treason, high or petty (which latter included not only the murder by a wife of her husband, and the murder of a master or mistress by a servant but also several offences against the coin). Burning in such cases was abolished by 30 Geo. 3, c. 48. In practice, women were strangled before they were burnt; this, however, depends on the executioner. In one notices case a woman was actually burnt alive for murdering her husband, the executioner being afraid to strangle her because he was caught by the fire. In the reign of George II, an Act was passed which was intended to make the punishment for murder more severe than the punishment for other capital crimes. This was 25 Geo. 2, c. 37, which provided that a person convicted of murder should be executed on the next day but one after his sentence (unless he was tried on a Friday, in which case he was to be hanged on the Monday). He was to be fed on bread and water in the interval of his body, after death, was either to be dissected or to be hung in chains. The judge, however, had power to respite or to remit these special severities. Under this Act murderers were usually anatomized, but sometimes gibbeted. By the 2 & 3 Will. 4, c. 7 s. 16 (for the regulation of school of anatomy), it was enacted that the bodies of murderers should no longer be anatomized, but that the sentence should direct that they should either be hung in chains or be buried in the prison. Several persons were gibbeted under this Act. These provisions distinguish English law in a marked manner from the continental laws down to the end of the last century. In most part of the continent breaking of the wheel, burning in some cases quartering alive and tearing with red-hot pincers were in use, as well as simpler forms of death. (History of the Criminal Law of England, by Stephen Ch. XIII, pp. 477-478)

47. Throughout the reign of Henry the Eighth, there were no fewer than two thousand executions a year. As the stress on the value of property increased, the net was widened. Not alone murderers and traitors; but robbers, coiners, heretics and witches were sent to their death. The shooting of a rabbit; the forgery of a birth certificate; the theft of a pocket-handkerchief; adoption of a disguise; the damaging of a public property were also included in the list of death sentence. In 1814 a man was hanged at Chelmsford for cutting down a cherry tree.

48. The public hanging in England continued until well into the nineteenth century. There were public executions with a large number of people watching. On January 22, 1829, William Burke was hanged at Edinburgh, and the crowd was great beyond all former precedent. The last person to be hanged publicly in England was Michael Barrett, who was executed at Newgate on May 26, 1868. As time went past, the list of death sentence crimes was rapidly reduced and in 1950, it was confined for four crimes only, to wit : (1) murder, (2) treason, (3) piracy with violence, and (4) setting fire to arsenals and dockyards. Later this was also abolished (See The History of Capital Punishment by G. R. Scott, (1950) 38-66)

49. What happened in the United States ? It will be noticed that in the United States, the accused has constitutional right to be tried by a jury, as provided under Sixth Amendment. The accused has a right not to be subjected to "cruel and unusual punishments" as mandated under Eighth Amendment. In Furman (408 US 238), some Judges took the view that death sentence was unacceptable to the evolving standards of decency of the American people. But the American people rejected that view. Since then 35 States have re-enacted laws providing for the death sentence for murder by suitably altering the provisions to comply with Furman (408 US 238).

50. What do we have here ? The representatives of our people are cognizant of the contemporary social needs. The legislative amendments brought about from time to time are indicative of their awareness. Sub-section (5) of Section 367 of the Code of Criminal Procedure, 1898 as it stood prior to its amendment by Act 26 of 1955 provided :

> If the accused is convicted of an offence punishable with death, and the court sentences to any punishment other than death, the court shall in its judgment state the reasons why sentence of death was not passed.

51. This provisions laid down that if an accused was convicted of an offence punishable with death, the imposition of death sentence was the rule and the awarding of a lesser sentence was an exception. The court had to state the reasons for not passing the sentence was an exception. The court had to state the reasons for not passing the sentence of death. There was a change by the amending Act 26 of 1955 which came into force with effect from January 1, 1956. The above sub-section was deleted and it was left to the discretion of the court in each case to pass a sentence of death or life imprisonment. In 1973 there was again a reshaping of the provision regarding the death penalty. In the Code of Criminal Procedure, 1973, Section 354(3) was inserted in these terms :

> When the conviction is for an offence punishable with death, or in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

52. It is now obligatory for the court to state reasons for the sentence awarded for the offence of murder. The court cannot award death sentence without giving special reasons. As earlier noticed that death sentence could be awarded only in exceptional cases and not in the usual run of murders. We have got just six offence carrying death penalty and that too as an alternate sentence (Sections 120-B, 121, 132, 302, 307 and 396 IPC).

53. This is the need and notion of the present day society, Tomorrow's society and the atmosphere in which they live may be quite different. They may not have rapist murderers like Ranga and Billa (See Kuljeet Singh v. Union of India, (1981) 3 SCC 324 : 1981 SCC (Cri) 726). They may not have

any merciless killing and bride-burning. They may have more respect for each other's life. They may be free from criminalisation of politics and elimination of political leaders by muscle power. There then the penal law cannot remain isolated and untouched. It will be profoundly influenced by the philosophy prevailing. Time may reach for the representatives of people to consider that death penalty even as an alternate sentence for murder is uncalled for and unnecessary. There is nothing in our Constitution to preclude them from deleting that alternate sentence. The crusade against capital punishment may, therefore, go on elsewhere and not in this Court.

54. Let me now turn to the pivotal question to which I have referred at the beginning of the judgment. The question is whether the sentence of life imprisonment should be substituted on account of time factor alone, however right and valid the death sentence was at the time when it was awarded. The arguments for the petitioners primarily rested on the common area of agreement in Vatheeswaram ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348) and Sher Singh ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582) cases on the implication of Article 21. The accepted principle according to counsel, is the prolonged delay in execution would be "unjust, unfair and unreasonable". It would be inhuman and dehumanising to keep the condemned person in imprisonment for a long period. It offends the constitutional safeguards under Article 21.

55. Article 21 of the Constitution mandates the State that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The scope and content of this article has been the subject matter of intensive examination in the recent a decisions of this Court. I do not want to add to the length of this judgment by recapitulating all those decisions in detail. I may only highlight some of the observations which are relevant to the present case. In Maneka Gandhi v. Union of India ((1978) 1 SCC 248) this Court gave a new dimension to Article 21. The seven Judge bench held that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot meet the requirements of Article 21. Bhagwati, J., as he then was, while explaining the nature and requirement of procedure under Article 21 observed : (SCC pp. 283-84, para 7)

We must reiterate here what was pointed out by the majority in E. P. Royappa v. State of Tamil Nadu ((1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348), namely, that "from a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is, therefore, violative of Article 14." Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.

56. If one prefer to go yet further back, the procedural fairness in the defence of liberties was insisted upon even in 1952, In the state of West Bengal v. Anwar Ali (1952 SCR 284 : AIR 1952 SC 75 : 1952 Cri LJ 510) Bose, J., remarked : (SCR p. 367)

The question with which I charge myself is, can fair-minded, reasonable, unbiased and resolute men, who are not swayed by emotion or prejudice, regard this with equanimity and call it reasonable, just and fair, regard it as that equal treatment and protection in the defence of liberties

which is expected of a sovereign democratic republic in the conditions which obtain in India today ? I have but one answer to that. On that short and simple ground I would decide this case and hold the Act bad.

57. In Bachan Singh case ((1980) 2 SCC 684 : 1980 SCC (Cri) 580 : (1983) 1 SCR 145), Sarkaria, J., affirming this view said : [SCC p. 730 : SCC (Cri) p. 626, para 136]

No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.

58. In Mithu v. State of Punjab ((1983) 2 SCC 277 : 1983 SCC (Cri) 405) Chandrachud, C.J., said : [SCC p. 284 : SCC (Cri) pp. 412-13, para 6]

... that the last word on the question of justice and fairness does not rest with legislature. Just as reasonableness of restrictions under clauses (2) to (6) of Article 19 is for the courts to determine, so is it for the courts to decide whether the procedure prescribed by a law for depriving a person of his life or liberty is fair, just and reasonable.

59. In Sher Singh v. State of Punjab ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582) Chandrachud, C.J., again explained (at 593) [SCC p. 354 : SCC (Cri) p. 471, para 16]

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 duty and endeavour of this Court to give to the provisions of out 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.

60. Article 21 thus received a creative connotation. It demands that any procedure which takes away the life and liberty of persons must be reasonable, just and fair. This procedural fairness is required to be observed at every stage and till the last breath of the life.

61. In Vatheeswaram ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348) the court thought that the delay of two years would make it unreasonable under Article 21 to execute death sentence. The court did not attach importance to the cause of delay. The cause of delay was immaterial. The accused himself may be responsible for the delay. The court said that the appropriate relief would be vacate the death sentence and substitute life imprisonment instead.

62. The learned counsel for the petitioners argued that if two years period of delay set out in Vatheeswaram ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) does not present favorably, we may fix any other period but we should not disturb the basis of the decision. He invited our attention to a number of authorities where courts have awarded life imprisonment on the ground of delay in disposal of cases.

63. In Vivian Rodrick v. State of West Bengal ((1971) 1 SCC 468 : 1971 SCC (Cri) 453) six years delay was considered sufficient for imposing a lesser sentence of imprisonment for life. In State of U. P. v. Paras Nath Singh ((1973) 3 SCC 647 : 1973 SCC (Cri) 453), the court, while reversing the order of acquittal awarded life imprisonment on the ground that the accused was under sentence of death till he was acquitted by the High Court. Similar was the view taken in State of Bihar v. Pashupati Singh ((1974) 3 SCC 376 : 1973 SCC (Cri) 1026); State of U. P. v. Suresh ((1981) 3 SCC

635, 643 : 1981 SCC (Cri) 774) and State of U. P. v. Sahai ((1982) 1 SCC 352 : 1982 SCC (Cri) 223 : AIR 1981 SC 1442).

64. In State of U. P. v. Suresh ((1981) 3 SCC 635, 643 : 1981 SCC (Cri) 774), the accused was given life imprisonment in view of the fact that seven years had elapsed after the date of murder. In Ram Adhar v. State of U. P. ((1979) 3 SCC 774, 777 : 1979 SCC (Cri) 871), the delay of six years from the date of occurrence was held sufficient to commute the sentence of death to life imprisonment. The court also observed that the accused was not responsible in any manner for the lapse of time that has occurred.

65. In Neti Sreeramulu v. State of A. P. ((1974) 3 SCC 314 : 1973 SCC (Cri) 940) the court while disposing of the appeal in 1973 commuted the sentence of death given in 1971 to life imprisonment. In State of U. P. v. Lalla Singh ((1978) 1 SCC 142 : 1978 SCC (Cri) 70 six years delay from the date of judgment of the trial court was a consideration for not giving the death sentence. In Sadhu Singh v. State of U. P. ((1978) 4 SCC 428 : 1979 SCC (Cri) 49 : AIR 1978 SC 1506) about three years and seven months during which the accused was under spectre of death sentence, was one of the relevant factors to reduce the sentence of life imprisonment.

66. There are equally other decisions where in spite of the delay in disposal of the case, the court has awarded the death sentence. In Nachhittar Singh v. State of Punjab ((1975) 3 SCC 266 : 1974 SCC (Cri) 874), the court referred to consider the question of delay as a mitigating circumstance. In Maghar Singh v. State of Punjab ((1975) 4 SCC 234 : 1975 SCC (Cri) 479), the court said that delay does not appear to be goods ground to commute to life imprisonment in view of the pre-planned, cold-blooded and dastardly murder committed by the accused. In Lajar Masih v. State of U. P. ((1976) 1 SCC 806 : 1976 SCC (Cri) 195), the court while confirming the death sentence observed : [SCC p. 809 : SCC (Cri) p. 198, para 15]

[T]he value of such delay as a mitigating factor depends upon the features of a particular case. It cannot be divorced from the diabolical circumstances of the crime itself, which, in the instant case fully justify the award of capital sentence for the murder of the deceased. We therefore, uphold the award of the capital sentence to the appellant and dismiss his appeal.

67. All these decisions are of little of determine the constitutionality of execution of the death sentence on the relevance of delay. These decisions relate to the sentencing discretion of courts with which we are not concerned. We are concerned with the right of the accused to demand life imprisonment after the final verdict of death sentence with every justification to impose it.

68. The demand for life imprisonment herein is solely based on the ground of prolonged delay in the execution. The delay which is sought to be relied upon by the accused consists of two parts. The first part covers the time taken in the judicial proceedings. It is the time that the parties have spent for trial, appeal, further appeal and review. The second part takes into its fold the time utilized by the executive in the exercise of its prerogative clemency.

69. I start with the first part of the delay. In Vatheeswaram ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348) this part of the delay was expressly taken into consideration. It was observed that the period of two years as prolonged detention would include the time necessary for appeal sentence of death and consideration of reprieve. In Sher Singh ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582), this period has not been accepted as good measure. The court said that the fixation of time limit of two years did not accord with the common experience of time normally

consumed by the litigative process and the proceedings before the government.

70. Mr. Parasaran, learned Attorney General has altogether a different approach and in my opinion very rightly. He argued that the time spent by the courts in judicial proceedings was intended to ensure a fair trial to the accused and cannot be relied upon by the same accused to impeach the execution or the death sentence. The relevant provisions in the Indian Penal Code, the Criminal Procedure Code, the Evidence Act and the Rules made by the High Court and the Supreme Court governing the trial, appeal, execution of sentence, etc., were all highlighted. According to learned Attorney General, these provisions are meant to examine the guilt or innocence of the accused and to have an appropriate sentence commensurate with the gravity of the crime. They constitute reasonable procedure, established by law.

71. I entirely agree. The time taken in the judicial proceedings by way of trial and appeal was for the benefit of the accused. It was intended to ensure a fair trial to the accused and to avoid hurry-up justice. The time is spent in the public interest for proper administration of justice. If there is inordinate delay in disposal of the case, the trial court while sentencing or the appellate court while disposing of the appeal may consider the delay and the cause thereof along with other circumstances. The court before sentencing is bound to hear the parties and take into account every circumstances for and against the accused. If the court awards death sentence, notwithstanding the delay in disposal of the case, there cannot be a second look at the sentence save by way of review. There cannot be a second trial on the validity of sentence based on Article 21. The execution which is impugned is execution of a judgment and not apart from judgment. If the judgment with the sentence awarded is valid and binding, it falls to be executed in accordance with law since it is a part of the procedure established by law. Therefore, if the delay in disposal of case is not a mitigating circumstance for lesser sentence, it would be, in my opinion, wholly inappropriate to fall back upon the same delay to impeach the execution.

72. If the delay in passing the sentence cannot render the execution unconstitutional, the delay subsequent thereof cannot also render it unconstitutional. Much less any fixed period of delay could be held to make the sentence inexecutable. It would be arbitrary to fix any period of limitation for execution on the ground that it would be a denial of fairness in procedure under Article 21. With respect, I am unable to agree with the view taken in Vatheeswaram case ((1983) 2 SCC 68 : 1983 SCC (Cri) 342 : (1983) 2 SCR 348) on this aspect.

73. Under Article 72 of the Constitution, the President shall have the power to "grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence". Under Article 161 of the Constitution, similar is the power of the Governor to give relief to any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. The time taken by the executive for disposal of mercy petitions may depend upon the nature of the case and the scope of enquiry to be made. It may also depend upon the number of mercy petitions submitted by or on behalf of the accused. The court, therefore, cannot prescribe a time limit for disposal of even for mercy petitions.

74. It is, however, necessary to point out that Article 21 is relevant at all stages. This Court has emphasized that "the speedy trial in criminal cases though not a specific fundamental right, is implicit in the broad sweep and contend of Article 21" (See Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81 : 1980 SCC (Cri) 23 : (1979) 3 SCR 169). Speedy trial is a part of one's fundamental right to life and liberty (See Kadra Pahadiya v. State of Bihar, (1981) 3 SCC 671 : 1981 SCC (Cri) 791 and (1983) 2 SCC 104 : 1983 SCC (Cri) 361). This principle, in my opinion, is

no less important for disposal of mercy petition. It has been universally recognised that a condemned person has to suffer a degree of mental torture even though there is no physical mistreatment and no primitive torture. He may be provided with amenities of ordinary inmates in the prison as stated in Sunil Batra v. Delhi Administration ((1978) 4 SCC 494 : 1979 SCC (Cri) 155 : (1979) 1 SCR 392), but nobody could succeed in giving him peace of mind.

Chita Chinta Dwayoormadhya,

Chinta Tatra Gariyasi,

Chita Dahati Nirjivam,

Chinta Dahati Sajeevakam.

75. As between funeral fire and mental worry, it is the latter which is more devastating, for, funeral fire burns only the dead body while the mental worry burns the living one. This mental torment may become acute when the judicial verdict is finally set against the accused. Earlier to it, there is every reason for him to hope for acquittal. That hope is extinguished after the final verdict. If, therefore, there is inordinate delay in execution, the condemned prisoner is entitled to come to the court requesting to examine whether it is just and fair to allow the sentence of death to be executed.

76. What should be done by the court is the next point for consideration. It is necessary to emphasise that the jurisdiction of the court at this stage is extremely limited. If the court wants to have a look at the grievance as to delay, it is needless to state, that there should not be any delay either in listing or in disposal of the matter. The person who complains about the delay in the execution should not be put to further delay. The matter, therefore, must be expeditiously and a on top priority basis, disposed of. The court while examining the matter, for the reasons already stated, cannot take into account the time utilised in the judicial proceedings up to the final verdict. The court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The court may only consider whether there was undue long delay in disposing of mercy petition; whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself. The court has still to consider as observed in Sher Singh case ((1983) 2 SCC 344 : 1983 SCC (Cri) 461 : (1983) 2 SCR 582) : [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.

77. The last contention urged for the petitioners that the accused should not be executed if he has since improved is unavailable since it seeks to substitute a new procedure which the Code does not provide for.

78. We have already considered all these cases in the light of these principles and disposed them of by our earlier unanimous order.

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