INORDINATE DELAY AS A GROUND FOR COMMUTATION OF PUNISHMENT OF CONVICTS ON DEATH ROW IN INDIA: A CRITICAL INQUIRY

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"Life is pleasant. Death is peaceful. It's the transition that's troublesome"

Isaac Asimov

I. INTRODUCTION

The agony caused owing to the oscillation amidst hope and despair for being on death row and the potential it has of giving rise to consequences that would become central to the mainstream legal and political discourse of India was not envisaged until recently when the death row convicts happened to be the persons convicted for conspiring to kill the former Prime Minister of India, Late. Rajiv Gandhi[1]. Legally though, this issue is not new, as this issue has been raised in the past also before the Supreme Court of India on several occasions[2]. One consistent message coming from the Supreme Court in these cases has been that a convict condemned to death by the Court also has the right of procedural fairness flowing from Article 21 till his execution[3], and therefore, if inordinate delay is caused, while he remains on death row, it may entitle the convict on the death row to get his death sentence commuted into life imprisonment.

Stating this principle of law in such a simplistic manner, masks the complexities that one has to confront in applying this principle to a case at hand. For example, what is the nature of delay, i.e. whether the delay is attributable to the convict on death row because of him preferring appeals against the decision which has put him on the death row or whether the time taken in the disposal of clemency petitions by the Governor of the State or the President of India are also relevant for identifying delay attributable to the person on death row. The answer of these questions necessarily depend upon an approximation about the amount of time that the appellate and constitutional courts and the Governor or the President would ordinarily take, which can be said to be reasonable and therefore, not relevant, being attributable to the convict. This necessarily requires a time bound

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[1] *V. Sriharan @ Murugan v Union of India* (2014) 4 SCC 242.

[2] *Piare Dusadh v King Emperor* AIR 1944 FC 1. See also *Nawab Singh v State of UP* AIR 1954 SC 278; *Vivian Rodrick v State of WB* (1971) 1 SCC 468; *Neti Sreeramulu v State of AP* (1974) 3 SCC 314; *Ediga Anamma v State of UP* (1974) 4 SCC 443; *Nachhittar Singh v State of Punjab* (1975) 3 SCC 266; *Maghar Singh v State of Punjab* (1975) 4 SCC 234; *Lajar Masih v State of UP* (1976) 1 SCC 806; *Joseph Peter v State of Goa, Daman and Diu,* (1977) 3 SCC 280; *State of UP v Lalla Singh* (1978) 1 SCC 142; *Bhagwan Bux v State of UP* (1978) 1 SCC 214; *Sadhu Singh v State of UP* (1978) 4 SCC 428; *State of UP v Sahai and Others* (1982) 1 SCC 352; *T V Vatheeswaran v State of Tamil Nadu* (1983) 2 SCC 68; *Sher Singh v State of Punjab* (1983) 2 SCC 344; *Javed Ahmed v State of Maharashtra* (1985) 1 SCC 275; *Triveniben v State of Gujarat* (1988) 4 SCC 574; *Triveniben v State of Gujarat* (1989) 1 SCC 678; *Madhu Mehta v Union of India* (1989) 4 SCC 62; *Jagdish v State of MP* (2009) 9 SCC 495; *Devender Pal Singh Bhullar v State (NCT of Delhi)* (2013) 6 SCC 195; *Mahendra Nath Das v Union of India* (2013) 6 SCC 253; *Shatrughan Chauhan v Union of India* (2014) 3 SCC 1; *V Sriharan @ Murugan v Union of India* (2014) 4 SCC 242.

[3] *Sunil Batra v Delhi Administration* (1978) 4 SCC 494.

disposal of convict's petitions which is so far not known to the criminal procedure related to such matters in India[4]. Another complex issue is whether while trying to figure out the question of delay and its impact on the right of the convict on death row, is it still relevant to take into account the manner of commission and the magnitude of the crime or the nature of crime (for example whether it was a terror attack or a case of gruesome murder), which was found by the Supreme Court to be a rarest of rare case or the fact that all such cases being rarest of rare cases necessarily dispenses the relevancy of such an inquiry and therefore, it is not right to still find degrees of crime within the ambit of rarest of rare cases.

II. THE INDIAN EXPERIENCE

The study of Indian experience related to the issue of inordinate delay and its consequent impact upon the sentence of death can be divided into the period of before and after *Triveniben* case. As before *Triveniben*[5] even the time spent on death row while the appellate proceedings are going on was considered relevant by the courts for deciding on a plea for commutation on the ground of delay caused while the convict remained on death row; whereas, after *Triveniben*, this time became irrelevant and the relevant time for decision on such plea was only limited to delay caused in the disposal of mercy petitions after the conclusion of the judicial process.

A. BEFORE *TRIVENIBEN*

Before *Triveniben* case the issues related to the death row of inmates related to the delay caused in the appellate judicial proceedings along with ancillary judicial proceedings and therefore, the Supreme Court of India examined the effect of remaining on the death row by the convict after the decision of the Sessions Court or High Court handing over death sentence to the convict and the day when the Supreme Court had to pronounce its verdict after upholding the conviction under the provisions of law providing for the death penalty. Therefore, the delay attributable to the disposal of the mercy petitions before the President of India or the Governors of the State was not specifically espoused before the court during this period.

As early as in 1944, Spens CJ writing the judgement of the three judges' bench of the Federal Court in *Piare Dusadh v. King Emperor,*[6] commuted the death sentence to life imprisonment owing to the fact that the condemned inmate was on the death row for more than a year.

But in *Nawab Singh v. The State of U.P.,*[7] Mukherjea J speaking for the three judge bench of the Supreme Court stated that while considering the question of delay in execution other factors associated with the case cannot be ignored. He therefore, held that since the murder was cruel and deliberate no extenuating circumstances whatsoever would justify commutation of the death sentence.

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[4] *Hussainara Khatoon (I) v Home Secy State of Bihar* (1980) 1 SCC 81; *Common Cause v Union of India* (1996) 4 SCC 33.
[5] *Triveniben v State of Gujarat* (1988) 4 SCC 574; *Triveniben v State of Gujarat* (1989) 1 SCC 678.
[6] AIR 1944 FC 1.
[7] AIR 1954 SC 274.

In *Vivian Rodrick v. The State of W.B.*,[8] a three judge bench of the Supreme Court speaking through Sikri CJ commuted the death sentence awarded to the convict on the ground that six years have elapsed after the trial judge had awarded the death sentence to the convict on the ground that the same has caused unimaginable mental agony which would make his execution inhuman.

In *Neti Sreeramulu v. State of A.P.*,[9] the Court while disposing of the appeal in 1973 commuted the sentence of death given in 1971 to life imprisonment.

In *Ediga Anamma v. State of A.P.*,[10] Iyer J writing the judgement of the two judge bench of the Supreme Court, stated that the "extraordinary features in judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate"[11] and taking into account the other supplemental factor that the convict was a young mother of a child who was thrown out from the conjugal home, Iyer J commuted the death sentence into the imprisonment for life.

In *Maghar Singh v. State of Punjab* [12] and *Lajar Masih* v. *State of U.P.*,[13] the Court said that delay does not appear to be good ground to commute to life imprisonment in view of the pre-planned, cold-blooded and dastardly murder committed by the accused.

Again in *Joseph Peter v. State of Goa, Daman and Diu,*[14] Iyer J speaking for the two judge bench of the Supreme Court refused to accept the argument that death has been haunting the convict for six years in the light of the beastly circumstances of the crime committed.

In *State of U.P. v. Lalla Singh,*[15] Gupta and Kailasam, JJ were dealing with a case of gruesome murder of three persons, the head of one of whom was severed. The learned Judges, while of the view that the Sessions Judge was perfectly in order in imposing the sentence of death, thought that as the offences had been committed more than six years ago, the ends of justice did not require the sentence of death to be confirmed.

In *Bhagwan Bux Singh v. State of U.P.*,[17] the sentence of death was commuted to imprisonment for life by Ali and Kailsam JJ having particular regard to the fact that the sentence of death had been imposed more than two and a half years ago.[18]

In the case of *Sadhu Singh v. State of U.P.*,[19] Sarkaria, Sen and Reddy JJ took into account the circumstance that the appellant was "under spectre of the sentence of death for three years and seven

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[8](1971) 1 SCC 468.
[9](1974) 3 SCC 314.
[10](1974) 4 SCC 443.
[11] ibid 453.
[12](1975) 4 SCC 234.
[13](1976) 1 SCC 806.
[14](1977) 3 SCC 280.
[15](1978) 1 SCC 142.
[16]ibid 149.
[17](1978) 1 SCC 214.
[18]ibid 215.
[19](1978) 4 SCC 428.

months to alter the sentence of death to one of imprisonment for life".[20] Though, the court in reaching its conclusion also took into account the fact that "he (convict) was probably instigated directly or indirectly by his father.[21]

In *State of U.P. v. Sahai,*[22] Ali, Islam and Varadrajan JJ while holding that the murders were "extremely, gruesome, brutal and dastardly'[23] nonetheless declined to pass the sentence of death on the ground that more than eight years have elapsed since the occurrence.

In *T. V. Vatheeswaran v. State of Tamil Nadu,*[24] Reddy J speaking for the two judge bench of the Supreme Court held that two years delay in the execution of sentence after the judgement of the trial court will entitle the condemned prisoner to ask for commutation of his sentence of death to imprisonment for life.

But in *Sher Singh v. State of Punjab,*[25] barely a month after the *Vatheeswaran* judgement a three judge bench of the Supreme Court speaking through Chandrachud CJ 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 case of delay. It was held that the court in the context of the nature of offence and delay could consider the question of the commutation of death sentence.

But again Reddy J in *Javed Ahmed v. State of Maharashtra,*[26] writing on behalf of the two judge bench of the Supreme Court held 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.

Thus, an analysis of these judgements very clearly reveals that the Supreme Court was unable to categorically resolve the conundrum of whether to weigh the nature and the manner of crime committed with the period while the convict remained on the death row or to only examine the sufficiency of time warranting commutation of death penalty into life imprisonment. In relation to the time sufficient to warrant commutation also the stand of the Court was equivocal.

B. *TRIVENIBEN* CASE

In *Triveniben v. State of Gujarat,*[27] a constitutional bench constituted to clarify the law because of the confusion created by the *Vatheeswaran, Sher Singh* and *Javed Ahmed* judgements, held that undue

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[20] ibid 435.
[21] ibid 435.
[22] (1982) 1 SCC 352.
[23] ibid 363.
[24] (1983) 2 SCC 68.
[25] (1983) 2 SCC 344.
[26] (1985) 1 SCC 275.
[27] (1988) 4 SCC 574.

long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this is possible only after the conclusion of the judicial process and therefore, at appellate stages the plea of inordinate delay cannot be taken as was happening earlier. The court further held that no fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in *Vatheeswaran* case has not laid down the correct law and therefore to that extent the decision stands overruled.

The bench reserved its reasons to be given later, which was given in *Triveniben v. State of Gujarat,*[28] Oza J writing the judgement of the court on behalf of himself and Singh, Sharma and Dutt JJ (Shetty J concurring) reasoned that the judgement of the court can never be challenged as violative of article 14 or 21 of the Constitution as has been laid down by this Court in *Naresh Shridhar Mirajkar v. State of Maharashtra* [29] and also in *A.R. Antulay v. R.S. Nayak,*[30] 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.

The obvious consequence of this verdict was that after this decision only the delay caused in pardoning process by the President, the Governor or the appropriate Government under section 433 of the Code of Criminal Procedure (Cr.P.C.), 1973 was open to challenge as violative of the fundamental right of the convict on death row with a view to seek the commutation of death penalty into life imprisonment and the delay caused in the judicial process was immune from such challenge.

C. AFTER *TRIVENIBEN*

Six Months after the passing of the *Triveniben* judgement the Supreme Court applied the law laid down in this case in the case of *Madhu Mehta v. Union of India,*[31] and speaking through a two judge bench held that the convict who was on death row in this case, Gyasi Ram, aged more than 65 years cannot be executed owing to the inordinate delay in the disposal of his mercy petitions by the State and the Central Governments and converted the death sentence into the imprisonment for life.

In *Jagdish v. State of M.P,*[32] Bedi and Panchal JJ went back to before *Triveniben* days and entertained a challenge of the death sentence confirmed by the High Court on the ground that the convict has been on the death row for more than three years after the handing over of the death sentence to him by the Sessions Court. Though, the court did not consider this to be a delay sufficient to entitle the convict on the death row to get his death sentence converted into life imprisonment, but the fact that such an issue was entertained after *Triveniben,* wherein, the constitutional bench of the court has categorically ruled out the issue of delay attributable to judicial proceeding while the convict remained on death row, as a ground for challenge to get the death sentence commuted to life imprisonment is disturbing. Interestingly, the court in *Jagdish* case has cited catena of judgements on this issue but forgot to mention the case of *Triveniben.*

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[28](1989) 1 SCC 678.
[29]AIR 1967 SC 1.
[30](1988) 2 SCC 602.
[31](1989) 4 SCC 62.
[32](2009) 9 SCC 495.

In *Devender Pal Singh Bhullar v. State (NCT of Delhi),*[33] Singhvi and Mukhopadhaya JJ added a new dimension to the death row controversy by holding that delay cannot be a ground for commutation of death sentence into life imprisonment, if the person on death row happens to be a convict under TADA like legislation. The Court in saying so, placed explicit reliance upon the concurring opinion of the Shetty, J given in the case of *Triveniben,* wherein Shetty, J had observed that inordinate delay may be a factor but it cannot be divorced from the dastardly and diabolic circumstances of the crime itself and therefore, inordinate delay in itself cannot render the execution unconstitutional.

In *Mahendra Nath Das* v. *Union of India,*[34] Singhvi and Mukhopadhaya, JJ commuted the death sentence of a death row convict on the ground that his mercy petition remained pending for twelve years out of which eight years are completely unexplained. Though, in this case the person was convicted under section 302 of the Indian Penal Code and therefore the bench distinguished the case from that of *Bhullar* as it was not a case of TADA or similar statutes.

The approach adopted by the bench of Singhvi and Mukhopadhaya JJ did not find favour with the three judge bench of the Supreme Court speaking through Sathasivam CJ in *Shatrughan Chauhan* v. *Union of India,*[35] which declared *Bhullar* judgement a judgement *per incuriam*[36] on the ground that the reliance placed by the court in *Bhullar's* case was on the concurring opinion of the Shetty J which was a minority view as it was not consistent with the majority view. Therefore, according to the Court there is no good reason to disqualify the cases of TADA and similar statutes and that every case should be examined on its own facts on the grounds of inordinate and unexplained delay in disposal of the mercy petition, divorcing the nature of crime or the manner of commission of crime from such examination, all such cases are rarest of rare cases and therefore, it is not correct to point to categories of crime within rarest of rare cases which are more grave than rarest of rare cases.

Relying on this, the Court in *Shatrughan Chauhan's* case commuted the death sentence of eight different death row convicts, wherein the delay ranged from five years to eleven years. The Court in this case also held that a convict suffering from mental illness cannot be executed. Acting on this premise the Court commuted the death sentences of two convicts on death row to life imprisonment, even though, the delay in disposal of mercy petition in their case was not considered sufficient to entitle them to get their death sentence commuted to life imprisonment.[37] Though, the President also while rejecting the mercy petitions did not take into accounts the fact of mental illness of the convicts.[38]

In *Sriharan @ Murugan* v. *Union of India,*[39] the same bench of the Supreme Court which decided the *Shatrughan Chauhan* case speaking through Sathasivam CJ commuted the death sentence of three convicts on death rows, who were sentenced to death for conspiring to kill the former Prime Minister of India, Late. Rajiv Gandhi, owing to the fact that their mercy petitions had been rejected by the

[33](2013) 6 SCC 195.
[34](2013) 6 SCC 253.
[35](2014) 3 SCC 1.
[36]ibid 47.
[37]ibid 79, 84.
[38]ibid 84.
[39](2014) 4 SCC 242.

President after the unexplained delay of 11 years. The Court in this case rejected the argument of the Union of India that a petitioner claiming inordinate delay as a ground for commutation must bring before the court the evidence that such incarceration has had a dehumanizing effect.

Finally, in the light of the judgement of the Supreme Court in *Shatrughan Chauhan's* case a four judge bench of the Supreme Court speaking again through Sathasivam CJ in *Navneet Kaur* v. *State of NCT of Delhi,*[40] commuted the death sentence of Bhullar into life imprisonment both on the ground of mental insanity with which he was suffering and the unexplained inordinate delay of eight years in the disposal of his mercy petition by the President of India.

III. THE AFTERMATH

Pursuant to the decision of the Supreme Court in *Sriharan @ Murugan,* the Tamil Nadu State Government decided on the very next day of the verdict, to release the death row convicts whose death sentence was commuted to life imprisonment by the Supreme Court along with those serving life sentences in connection with the assassination of Late. Mr. Rajiv Gandhi.[41] After this decision was announced by the Government of Tamil Nadu the Union of India went to the Supreme Court against this decision and the Supreme Court stayed the order of the Tamil Nadu Government pending final adjudication of the dispute.[42] The case now has been referred to a constitutional bench by the three judge bench hearing the case.[43] Sathasivam CJ writing the judgement on behalf of the bench listed following issues for the consideration of the constitution bench:[44]

(i) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda*[45] a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

(ii) Whether the "appropriate Government" is permitted to exercise the power of remission under Section 432/433 of Cr.P.C. after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

(iii) Whether Section 432(7) Cr.P.C. clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of Union is co-extensive?

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[40](2014) 7 SCC 264.

[41]Gopu Mohan, 'Day after SC reprieve, Jaya says all 7 Rajiv convicts will walk free' *The Indian Express* (Delhi, 20 February 2014) 1.

[42] Utkarsh Anand, 'SC Stops Tamil Nadu from freeing 3 Rajiv convicts' *The Indian Express* (Delhi, 21 February 2014) 1.

[43] *Union of India v V Sriharan @ Murugan* (2014) 5 SCALE 600, MANU/SC/0363/2014.

[44]ibid 48.

[45] *Swamy Shraddananda (2) v State of Karnataka* (2008) 13 SCC 767. See also *Haru Ghosh v State of WB* (2009) 15 SCC 551; *Dilip Premnarayan Tiwari v State of Maharashtra* (2010) 1 SCC 775.

(iv) Whether the Union or the State has primacy over the subject matter enlisted in List III of Seventh Schedule of the Constitution of India for exercise of power of remission?

(v) Whether there can be two appropriate Governments in a given case under Section 432(7) Cr.P.C?

(vi) Whether *suo motu* exercise of power of remission under Section 432(1) Cr.P.C. is permissible in the scheme of the section if, yes whether the procedure prescribed in Sub-clause (2) of the same Section is mandatory or not?

(vii) Whether the term "consultation" stipulated in Section 435(1) Cr.P.C. implies "concurrence"?

The first issue has been framed for the consideration of the constitutional bench in the light of the few recent Supreme Court judgements,[46] wherein it has carved out a new category of offences for the purposes of punishment which falls in between the cases of life imprisonment (wherein executive discretion of releasing life convicts once they have served at least fourteen years in prison exists)[47] and the rarest of rare cases, wherein, death penalty is to be given. This category of offence covers those crimes wherein, the executive will not have the discretion to release the convicts after they have served the minimum of fourteen years in prison as provided by the provisions of the Code of Criminal Procedure. The relevant question to be asked is, as to whether the cases of commutation of death sentence to life imprisonment because of the inordinate delay in the disposal of mercy petition can be said to be cases, wherein, the convicts can be released by the exercise of executive discretion once they have served the minimum of fourteen years in prison or is it the case that every such judicial decision commuting the sentence of death to the imprisonment for life must also determine in each case the nature of the life imprisonment specifically allowing or excluding the executive intervention.

The other issues relate to the controversy regarding the question of appropriate Government for the purposes of the exercise of the power of remission in this case. Whether it can be Tamil Nadu State Government or the Union Government? The issues also relate to the appropriate procedure for the exercise of power of remission by the appropriate governments. The decision of the constitution bench on these issues would probably be able to settle finally all the concomitant issues related to the commutation of death penalty on account of inordinate delay.

IV. CONCLUSION

The executive inaction resulting in the prolonged excruciating wait by the convicts on death row is a very discomforting fact, especially because of the fact that it suggests preference to once ideological concerns or political expediency over the constitutional imperatives. The issue has troubled the conscience of the courts in India and has given rise to several issues emanating from the main one which still remains to be settled finally. The Supreme Court of India has consistently held prolonged wait by the convict on death row to be cruel, unusual and degrading punishment and therefore, violative of Article 21 of the Constitution of India. The actual contour of this principle, nevertheless,

[46] ibid 45.
[47] Code of Criminal Procedure 1973, s 432-435.

remains to be fixed accurately. For example, the exclusion of delay attributable to the judicial proceedings as relevant appears to be problematic. This is owing to the fact that the mental agony of being on death row is not altered qualitatively when the delay is attributable to the judicial proceedings. The technical argument of fundamental rights not being available against the courts appears to be an artificial one, as it allows the argument of expediency trump what is essentially an ethical discourse comprising of *a priori* ideals.

The other unsettling issue stems from the fact that the Supreme Court in *Shatrughan Chauhan* case held that the legal effect of 'rarest of rare' case is exhausted when the case is declared to be a rarest of rare case. But this again is a presumption that the monstrosity behind the act committed gets exhausted by the identification of the crime as rarest of rare. Acceptance of this argument means that the courts in individual cases have to simply find out the period of unexplained delay and decide as to whether it was sufficient to warrant commutation of death penalty into imprisonment for life or not. Such an approach would then militate against the argument of case by case analysis of facts with a view to come to the conclusion about the fitness of a case to warrant interference by the courts with the sentence of death. In this scenario, a general threshold period for the unexplained delay seems more appropriate to streamline the legitimate apprehension of judicial indiscretion as attempted by the Supreme Court in *Vatheeswaran* case.