

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**WRIT PETITION NO.2607 OF 2019
WITH
CRIMINAL APPLICATION NO.314 OF 2019**

Pradeep Yashwant Kokade

Aged about 30 years,

Presently incarcerated at Phansi Yard,

Yerwada Central Prison,

R/o. Gahunje, Taluka Maval,

Dist. Pune

...Petitioner

Vs.

Union of India and Ors.

...Respondents

**ALONGWITH
WRIT PETITION NO.2609 OF 2019**

Purshottam Dashrath Borate,

Aged about 37 years,

Presently incarcerated at Phansi Yard,

Yerwada Central Prison,

R/o. Gahunje, Taluka Maval,

Dist. Pune

...Petitioner

Vs.

Union of India and Ors.

...Respondents

Dr. Yug Mohit Chaudhary a/w Ms. Raghini Ahuja, Ms.

Payoshi Roy and Mr. Siddharth for the Petitioners.

Mr. Anil C. Singh, Additional Solicitor General a/w. Mr. H. S. Venegavkar, x Additional Public Prosecutor, Mr. Aditya Thakkar and Mr. T. V. Dhotre for Union of India.

Mr. A. A. Kumbhakoni, Advocate General a/w. Mrs. Aruna Pai, APP for the State.

**CORAM : B. P. DHARMADHIKARI &
MRS. SWAPNA S. JOSHI, JJ.
RESERVED ON: 25/06/2019
PRONOUNCED ON: 29/07/2019**

JUDGMENT: (Per B. P. Dharmadhikari, J.)

. By these petitions under Article 226 of the Constitution of India the petitioners -convicts pray for declaration that the execution of sentence of death in their respective cases is unconstitutional and bad in law, the directions to commute the same into punishment of imprisonment for life be issued and death warrants be quashed and set aside. There is also challenge to orders passed by Hon'ble the President of India and Hon'ble the Governor of Maharashtra rejecting their mercy petitions.

2. Before proceeding further it will be appropriate to briefly mention the grounds of attack. It is submitted that after judgment of Hon'ble Apex Court dated 8/5/2015, there is huge delay of 1507 days i.e. 4 years 1 month and 6 days till 24/6/2019 when death sentence was to be executed. There is no application of mind by Hon'ble the Governor and Hon'ble the President to their respective mercy petitions. After the judgment of Sessions Court dated 20/3/2012 sentencing them to death, they have continued in solitary confinement and they have thus undergone more than 8 years of solitary confinement. This sentence inflicted upon them is in violation of Article 21 of the Constitution of India. Lastly, it is urged that issuance of death warrant ex-parte without any opportunity to them is bad in law and unsustainable.

3. Dr. Chaudhary appearing for the petitioners state that the judgment of Sessions Court in Sessions

Case No.284/2008 holding them guilty of offence under section 302, 376(ii)(g), 364 and 404 read with 120-B of IPC was upheld by this Court on 25/9/2012 while dismissing Criminal Appeal No.632/2012 filed by both the petitioners in Confirmation Case No.1/2012. On 4/7/2013 Hon'ble Apex Court issued notices confined to sentences in Criminal Appeal No.1439/2013. On 8/5/2015 said Criminal Appeal was dismissed & therefore after 8/5/2015, the sentence of death ought to have been executed within 90 days. Time taken thereafter is unconstitutional.

4. Petitioners were informed of dismissal of their appeal by Hon. Apex Court on 27/6/2015 and thereafter on 10/7/2015, they presented mercy petitions to the Government of Maharashtra through Superintendent of Yerwada Central Prison. On 16/7/2015 that prison forwarded mercy petitions to the Principal Secretary of Home Department of Maharashtra State and it was without complete documents. On 25/1/2016 the Home

Department finalized the process of application of mind to mercy petitions and thus complete documents were not on record. On 27/1/2016 the Yerwada prison forwarded a copy of Sessions Court Judgment and other documents to Home Department of Maharashtra Government. On 1/2/2016 IG prison informed Chief Secretary of Home Department accordingly. On 1/2/2016 Yerwada Central Prison sent a reminder to Talegaon Police Station calling for information as per its letter dated 24/6/2015. Ultimately, on 29/3/2016 Hon'ble the Governor of Maharashtra rejected mercy petitions. According to petitioners this order of rejection is mechanically processed in as much as Hon'ble the Governor has put his signature on note dated 25/1/2016 prepared by Department of State Government. At that time the judgment of learned Sessions Court was not on record. Other documents from Talegaon police were also not received till 25.1.2016 or 1.2.2016 and the kind attention of Hon. Governor was not drawn to these lacunae.

5. Mr. Chaudhary, learned counsel also pointed out that on 24/6/2015 respondent No.4 Superintendent of Jail had called for 5 important documents, but those documents did not form record till 25/1/2016 when Department of State Government finalized the note to be submitted to office of Hon'ble the Governor. Documents forwarded on 16/7/2015 along with mercy petitions were different and then the operative order of Session Court was forwarded. On 17/8/2015, exercise to verify filing of review petition if any, was undertaken and on 26/8/2015 Inspector General of Prison informed State Government that no review petition was filed. Respondent No.3 then informed Respondent No.2 that all material prerequisite relevant for thorough consideration of mercy petitions was already collected and forwarded. Despite this, Respondent No.2 State Government finalized the note on 25/1/2016 i.e. almost after 5 months. Petitioners submit that this delay was avoidable & has not been explained. After 25/1/2016 there is delay

upto 29/3/2016 and that delay has not been explained again.

6. On 1/2/2016 Respondent No.3 informed Respondent No.2 that Respondent No.4-Jail forwarded Sessions Court Judgment and other documents to Home Department. However, before that on 25/1/2016 note was already finalized by State Government. Simultaneously, on 1/2/2016 itself Respondent No.4 sent reminder in relation to its letter dated 24/6/2015 for sending 5 documents. Thus, these documents were not received before 1/2/2016 and even thereafter till 29/3/2016. Learned counsel adds that in these 5 documents short crime history in English was asked for though crime summary was already submitted on 16/7/2015 and thus this shows non application of mind.

7. On 6/4/2016 State Government informed Inspector General of Prison and Respondent No.4 Jail about order of Hon'ble the Governor. On 6/4/2016, the

Respondent No.2 also directed Respondent No.4 to submit nominal roll, medical reports and criminal antecedents etc. ie updated documents for presenting the mercy petitions to Hon'ble the President. Petitioners got intimation of orders of Hon'ble the Governor on 11/4/2016.

8. Respondent No.3 also sent a reminder on 13/4.2016 to Respondent No.4 about updated documents called for vide letter dated 6/4/2016. On 11/4/2016 petitioners were informed about rejection of their mercy petitions. Respondent No.4 asked Talegaon Police Station about criminal antecedents of petitioners on 12/4/2016. According to petitioners this information should have been collected before Hon'ble the Governor decided mercy petitions. On 13/4/2016 respondent No.3 forwarded a reminder to Respondent No.4 demanding updated documents. Reply sent by Talegaon police that petitioners have no criminal antecedents was received by respondent No.4 on 16/4/2016 and then Respondent

No.4 sent the same to Respondent No.2.

9. On 28/4/2016 respondent No.2 forwarded mercy petitions of petitioners to Hon'ble the President along with judgment of Sessions Court, High Court and Hon'ble Supreme Court with order of Hon'ble the Governor rejecting mercy petitions. As per contention of petitioners updated information received on 16/4/2016 was not sent by Respondent No.2 to Respondent No.1. According to the petitioners all these developments are instances of avoidable delay and benefit thereof must inure to them.

10. On 31/5/2016 respondent No.1-Central Government requested Respondent No.2 to supply past criminal history, details of economic condition of family of petitioners and inform whether they had filed/ have filed any review petitions. This information was demanded within 2 weeks. Again, according to Petitioners it is an illustration of non application of mind

because information (regarding the criminal antecedents or part of the judgment) was already received on 16/4/2016 by respondent No.2.

11. On 11/6/2016 mother of Petitioner submitted mercy petitions to Hon'ble the President of India. It was pointed out that petitioner had traumatic and violent childhood as their father happened to be alcoholic and abusive. One of the petitioners was then 19 years of age at the time of offence and there were no criminal antecedents. After conviction, he was taking education and trying to reform himself in prison. His mother pointed out extreme abuses and ostracization of his family after the offence.

12. On 15/6/2016 Respondent No.1 Union of India sent its reminder to Respondent No.2 in relation to documents/data demanded on 31/5/2016 and sought compliance urgently. Mr. Chaudhary, learned counsel submits that sending of reminder itself shows avoidable

delay. He also pointed out that non filing of review petition was on record since 26/8/2015 and the note submitted by Respondent No.2 to Hon'ble the Governor on 25/1/2016 also pointed out that no review petition was filed. Thus, time was being spent unnecessarily without verifying the records. On 22/7/2016 Respondent No.1 forwarded 2nd reminder. On 9/8/2016, the Respondent No.2 wrote to Respondent Nos.3 and 4 seeking information demanded by Respondent No.1. This communication therefore shows non application of mind even by Respondent No.2 as necessary data was already with it. On 9/9/2016 Respondent No.4 sent a letter and informed Respondent No.2 that no review petition was filed by petitioners. On 17/9/2016 Respondent No.2 sent letter to Talegaon Police Station inquiring about criminal antecedents though about 5 months back (on 16/4/2016) this information was already given. On 20/9/2016 Talegaon Police Station informed Respondent No.2 about antecedents of the petitioners again. On 30/9/2016 Respondent No.2

forwarded the information received to Respondent No.1 about criminal antecedents, economic status of family and on review petition. Thus, from 31/5/2016 period of about 4 months was taken in collecting data which was already on record. On 26/12/2016 Respondent No.1 asked respondent No.2 to clarify whether Petitioners had filed any SLP/Review petition. According to petitioners this communication ignores intimation supplied on 30/9/2016 by Respondent No.2 and demonstrates non application of mind by respondent No.1. It added to avoidable delay & plight of the petitioners.

13. On 16/1/2017 Respondent No.2 asked Respondent No.4 to furnish details regarding the Petitioners Review Petition though the same was already supplied. On 22/2/2017 Respondent No.2 informed Respondent No.1 that no Review/SLP was pending and petitioners disclosed that they had decided to file Curative/SLP petition after the decision of Hon'ble the President. Because of this treatment and anxiety one of

the petitioners developed chest pain and he was admitted in prison hospital for few days. On 4/5/2017 Respondent No.1 Union of India sent its recommendation to office of Hon'ble the President. Though Respondent No.1 had all details, it took almost 7 months even after 10/10/2016 for forwarding the same and learned counsel Shri Chaudhary submits that there is no explanation for this delay. On 26/5/2017, Hon'ble the President rejected mercy petitions of petitioners and its knowledge was received by the petitioners more than three weeks thereafter. Respondent No.1 sent a letter to Respondent No.2 in this respect on 6/6/2017 and on 19/6/2017, petitioners were served with said intimation.

14. Mr.Chaudhary, learned counsel thereafter pointed out delay in carrying out further process towards actual execution from 19/6/2017 till 27/12/2018. Respondent No.4 forwarded on 19.06.2017 a letter to Sessions Court pointing out rejection of mercy petitions and requested that Court to pass necessary orders on

death sentence. Mr. Chaudhary, Learned counsel submits that no application seeking any judicial orders was filed by Respondent Nos.2 to 4 before the Sessions Court and sending letters or reminders on administrative side has no sanctity in law. Application under section 413 of Cr.P.C. ought to have been moved by Respondents. He relies upon section 413 and 414 of Cr.P.C. for this purpose. Our attention is invited to Rule 18 of Chapter XLII of Maharashtra Prison Manual which requires State Government to take steps for fixing date of execution.

15. We may here mention that after the argument of parties, learned counsel for the petitioners has placed on record a comprehensive chart incorporating the dates and steps taken by Respondents. As the document came on record as part of arguments, we inquired from learned Advocate General and learned Additional Solicitor General about correctness of facts mentioned therein. Both of them accepted that they have received

this chart and dates mentioned therein are correct. However, while going through the matter, we found that in it, from Sr. No.46 onwards there is reference to correspondence between advocate of petitioners and jail authorities with grievance that the said Advocate did not receive requisite co-operation as also documents and other details. As while arguing, our attention was not invited to this aspect of matter & the respondents also did not counter it, we are not taking it into account.

16. On 30/10/2018 Respondent No.2 State Government asked its Law and Judiciary Department whether the date of execution should be fixed. On 12/11/2018 Law and Judiciary Department advised Respondent No.2 and pointed out that it was for the Sessions Court to issue further orders on execution. Petitioners state that this advise does not consider above mentioned Rule 18 of Maharashtra Prison Manual. The Sessions Court at Pune ultimately issued death warrant on 10/4/2019 scheduling the petitioners'

execution on 24/6/2019. Petitioners were not given any notice of this proceeding or of date scheduled, before Sessions Court issued the warrant. According to learned counsel, ex-parte proceedings are unconstitutional as observed in the case of **PUDR Vs. Union of India reported at 2015 Cri. L.J. 4141** by Allahabad High Court confirmed by Hon'ble Apex Court in the case of **Shabnam Vs. Union of India and Others reported at (2015) 6 SCC 702**. The execution warrant was served upon the petitioners on 17/4/2019. Petitioners thereafter filed present petitions on or about 2/5/2019. Petitions were placed before the Court for orders on 6/6/2019 after summer vacation when notice was issued and made returnable on 14/6/2019.

17. Mr. Chaudhary, learned counsel urges that thus there are several instances of avoidable delay, non application of mind and resultant solitary confinement suffered by the petitioners render the execution of death sentence itself unconstitutional as it is in violation of

Article 21 of the Constitution of India. Moreover the process of issuing execution warrant ex-parte and fixing date 24/6/2019 therefor is also unconstitutional. He has relied upon some precedents to substantiate his arguments. We will look into those judgments at appropriate stage.

18. Mr.Kumbhakoni, learned Advocate General with Mrs. Pai has opposed the petitions on behalf of Respondent Nos.2, 3 and 4. He relies upon the reply affidavit on behalf of Yerwada Central Prison sworn by Superintendent Umaji Pawar to urge that the petitioners were not in solitary confinement and there is nothing like Fansi Yard in Yerwada Central Prison. The prisoners not on death roll, are also kept in high security yard where petitioners were kept. He explains that 'Fansi Yard' is antiquated and colonial description of this security yard. He has also invited our attention to description of said security yard in paragraph Nos.28 and 29 of affidavit to show that the rooms therein are always occupied by

more than one prisoner and solitary confinement is not possible therein. Prisoners mix with each other, can play in courtyard and interact with each other either in courtyard or in corridor or *varanda* in front of their rooms. He submits that claim of petitioners that after judgment of Sessions Court, they are undergoing solitary confinement is factually incorrect. Without prejudice to this factual aspect, he contends that even in law, in present facts solitary confinement by itself is not sufficient to commute death penalty. He has shown to Court photographs and copies of certain registers to support above contention.

19. On procedure to be followed by executing Court for issuing execution warrant, he submits that Sessions Court was moved on very same day on which the Superintendent received knowledge of rejection of mercy petitions by Hon'ble the President. Thus, Respondent No.4 took necessary steps on 19/6/2017 itself and requested the Sessions Court to proceed

further in the matter of hanging of petitioners. Time of 2 years taken thereafter by the Sessions Court cannot be therefore used against the Respondents. He attempts to distinguish judgment of Hon'ble Apex Court in Shabnam Vs. Union of India (supra) and press into service judgment in Yakub Abdul Razak Memon Vs. State of Maharashtra reported at (2015) 9 SCC 552. Our attention is also invited to judgment in Review Petition No.591/2014 Jagdish vs. State of Madhya Pradesh decided by Hon. three Judges Bench of the Apex Court to show issue of the delay has been appreciated & relief came to be granted only on account of unexplained delay of exceeding 4 years by the State of Madhya Pradesh. Taking point of delay and alleged non application of mind, he relies upon the judgment in Bikas Chatterjee Vs. Union of India and Ors reported at (2004) 7 SCC page 634 to submit that there is always a presumption of application of mind by High Constitutional Authorities like Hon'ble the Governor, Hon'ble the President of India. He relies upon observation in paragraph No.10 and 13 therein. He

submits that after the two very High Constitutional Authorities reject mercy petitions, scope of interference at the hands of this Court in the matter is extremely narrow. The petitioners were informed of rejection of their appeal by Hon'ble Apex Court on 29/5/2015 itself and still they have filed their mercy petitions on 10/7/2015. The procedure prescribed expected them to tender mercy petitions within 7 days. He has also relied upon the judgment in Shatrughan Chauhan & Anr. Vs. Union of India and Ors. reported at (2014) 3 SCC 1. This is the judgment on which petitioners have also placed heavy reliance. He submits that this judgment shows that when delay is/was avoidable, extraordinary or unexplained, then only Court of Law can interfere not otherwise. He pointed out that in the present matter there is no delay either by office of the Hon'ble Governor or by the office of Hon'ble the President. Respondent Nos.1 and 2 have attempted to place upto date material for consideration of these authorities, and as such efforts made by them for that purpose or then reminders sent cannot be

sighted as instances of delay. He also argued that consideration of mercy petitions cannot be dissected into stages as attempted by the Petitioners. After mercy petitions are received, application of mind begins and relevant data looked into is also requisitioned. There is no question of any preparatory stage and stage of hearing or consideration thereafter. Various dates mentioned on record show continuous application of mind and hence it cannot be said that there is undue or extraordinary delay. He has also invited our attention to observation in the judgment of Hon'ble Apex Court to show how previous mercy petitions remained pending for over 4-5 years. He states that in present situation decision on mercy petitions by office of Hon'ble the Governor and thereafter by Hon'ble the President after their respective offices received the same cannot be said as unduly delayed. It is within reasonable time.

20. Dealing with contention that even after orders of Hon'ble the President there is delay in actual

execution, he invited our attention to the fact that on 19/6/2017 itself deponent Shri Pawar sent necessary communication to District and Sessions Court at Pune and pointed out all relevant facts and sought necessary further orders on death sentence. He submits that thus after writing this letter, time taken by Sessions Court and fixing of 24/6/2019 as the date for execution of death sentence are not the events controlled by Respondent No.1 and therefore there is no delay. He submits that it is not necessary to point out date-wise correspondence in this respect and last reminder issued on 27/12/2018 which contains reference to all previous correspondence speaks for itself.

21. He adds that thus respondent nos. 2, 3 and 4 have taken required steps and complied with the communication received from respondent no. 1. The period after 19/6/2017 therefore, cannot be used by the petitioners at all.

22. While dealing with the contention that while deciding the mercy petitions, there has been inordinate delay, learned Advocate General states that the period required to collect material cannot be viewed in isolation. The function is to be discharged in terms of Constitution by highest Constitutional Authorities and the data required therefore, must be updated and resent. The justification or explanation for the time taken by the Constitutional Authorities therefore, cannot be strictly subjected to judicial review. To drive home the submission, support is also taken from article 74(2) and article 163(3) of Constitution of India.

23. The delay as alleged does not exist in the present matters. The test to be applied is whether the period taken by the high constitutional authorities is extraordinary, there is no explanation whatsoever for it and whether the delays were avoidable. All three factors must be cumulatively applied and then steps taken by these Authorities and their offices need to be

considered.

24. Our attention is invited to affidavit of Mr. Narayan Karad, Deputy Secretary, Home Department to urge that the judgment of Sessions Court convicting the petitioners forwarded by Superintendent of Yerawada Central Prison was not an essential requirement since the evidence on record was not only referred to in detail but also thoroughly discussed by other equally important constitutional functionary like High Court. The Judgment of the High Court and the judgment of the Sessions Court are further confirmed by the Hon'ble Apex Court. Hence, there was no lapse in not placing the judgment of Sessions Court before the Hon'ble Governor and the objection raised by the petitioners is too technical. The Judgment of Hon'ble Apex Court in Shatrughan Chavan (supra), paragraphs 55 and 57 are relied upon to show that the courts of law have while selecting the punishment and upholding the death penalty already looked into the interest of the victim. Hence, the

contention that the individual facts are not considered by the office of the Hon'ble Governor or the office of the Hon'ble President, while rejecting the mercy petitions is erroneous and misconceived.

25. Our attention is invited to the fact that the criminal antecedents, financial position of family of accused persons have been verified from time to time. Not only this, before taking the decision, up-to-date position about filing of any review petition has also been seen.

26. Learned Advocate General submits that the highest constitutional authorities have discharged the functions in accordance with the constitutional mandate and there is no scope for its review.

27. Learned Additional Solicitor General Mr. Singh in addition to the arguments of learned Advocate General submits that the time taken by the office of the Hon'ble President in the present matters is about 1 year and 9

days. He states that when this period is compared with the time taken in other similar matters, it cannot be seen as exorbitant or unreasonable. Respondent no. 1 has received mercy petition on 18/5/2016 and the Hon'ble President has taken the decision upon it on 26/5/2017. The decision was communicated to the State Government on 6/6/2017. After receipt, the process of application of mind began and updated information was demanded from respondent no. 2. He further states that the judgments delivered by the Hon'ble Apex Court, High Court and Sessions Court were made available for the use by the Hon'ble President. Again judgment in Shatrughan Chauhan (supra) para 20 has been relied upon.

28. Because of reference by the learned ASG to the notings dated 15/11/2016 and 22/12/2016 and mention of four dates and documents dated 03/03/2017, 29/03/2017, 29/03/2017 and 02/05/2017 this Court was required to adjourn the hearing on 21/6/2019 to

25/6/2019. This has been done by a speaking order and the execution of both the petitioners then scheduled on 24/06/2019 came to be suspended until further orders of the court in the matter. Hearing thereafter resumed again on 25/6/2019. On that day, reply affidavit tendered by ASG in relation to the above mentioned dates was taken on record. An immunity was also claimed in relation to the notings dated 15/11/2016 and 22/12/2016 urging that the documents termed as "Recommendation" are the documents that constitutes the aid and advice of the Council of Ministers to the Hon'ble President of India.

29. After hearing resumed, learned Advocate General briefly addressed the Court and submitted that the judgment of the Sessions Court was very much forming part of record when the Hon'ble President applied mind. He further states that in so far as the office of the Governor is concerned, a note was prepared by the State Government on 25/01/2016 and on 27/01/2016

respondent no. 4 Superintendent sent copy of the Sessions Court Judgment. The order rejecting the mercy petition was passed by the Governor thereafter on 27/03/2016. He submits that the judgment of the Sessions Court therefore was looked into by the office of the Hon'ble Governor. However, upon court question, he fairly stated that there is no record with respondent no. 2 to demonstrate that the said judgment of the Sessions Court was forwarded to Hon'ble Governor after 27/1/2016.

30. In connected matter i.e. Writ Petition No. 2607 of 2019, an affidavit has been filed by Shri Karad that the additional documents received thereafter have been looked into.

31. He relies upon the judgment of the Hon'ble Apex Court reported at **Kehar Singh Vs. Union of India reported at (1989) 1 SCC 204** to show that the procedure to be followed while deciding the mercy petition is in the

domain of the Hon'ble President or the Hon'ble Governor and hence, in the present facts no case for intervention is made out. He points out that in the case of Keharsing (supra), the Hon'ble President did not go through the merits of the matter and hence, Hon'ble Apex Court took a particular view.

32. In reply, Advocate Chaudhary submits that by not making available the judgment of Sessions Court to the Hon'ble Governor, respondent no. 2 has prohibited him from looking into the relevant material. As such, Hon'ble Governor did not get the opportunity to look into the material which could have prompted him to take a particular view. This itself is sufficient to vitiate the consideration of mercy petition.

33. He submits that the jurisdiction to be exercised in the mercy petition by the Hon'ble Governor or the Hon'ble President is distinct and the high constitutional authorities could arrive at different finding of facts. The

finding of facts recorded and maintained by the courts of law or then punishment or its choice are therefore, not determinative and all relevant material must be placed before these authorities. He contends that the judgment of the High Court and Sessions Court did not point out role of petitioners at all and as per guidelines which regulate exercise of jurisdiction, it is incumbent upon the office of the Governor to find out that role. He relies upon paragraph 103 and 104 in judgment in the case of Shatrughan Chauhan (*supra*).

34. He further submits that though the respondents claim that rejection of appeal before the Apex Court was communicated to respective petitioners on 27/6/2015, there is no material on record to show that they were informed about their right to file mercy petition on that date. In the petition respective petitioner has stated that they got the legal aid demanded by them in July, 2015 and thereafter mercy petitions were filed as per paragraph 241.2 in the judgment in the case

of Shatrughan Chauhan (supra). It is the duty of the State Government to provide legal assistance.

35. Affidavit tendered by the petitioner Pradip is relied upon by him to show that the economic condition of the petitioner was well within the knowledge of Central Government as the communication dated 30/9/2016 containing it sent by the State Government was received by the Ministry of Home Affairs of the Respondent no.1 on 10/10/2016. He reiterates that in this situation observations in paragraph 65 of the judgment in Shatrughan Chavan (supra) are squarely attracted and by demanding unnecessary information, time was killed thereby unconstitutionally inflicting additional incarceration on both the petitioners. He invites attention to the guideline to argue that whenever mercy petition remains pending for more than three months, rebuttable presumption of avoidable delay arises.

36. Pointing out the communication dated 19/6/2017

sent by the Superintendent of Jail, Mr. Chaudhary relies upon paragraph 16 of the judgment of Division Bench of this Court dated 21/07/2009 in the case of **Mr. Saeed Sohail Shaikh Vs. The State of Maharashtra & Ors. In Criminal Writ Petition No. 1377 of 2008** deprecating the practice of writing letters. He also draws support from the judgment in the case of **State of Mahartasthra and Ors. Vs. Saeed Sohail Sheikh and Ors. reported at (2012) 13 SCC 192** paragraphs 22, 25, 26 and 35.

37. Learned counsel adds that the petitioners have unequivocally informed that they were waiting for the decisions on their mercy petitions and were to consider filing of writ petition thereafter. The undue verification again and again in the matter therefore, has added to unconstitutional detention or imprisonment.

38. He submits that in the letter dated 19/06/2017 and reminders sent thereafter, the State Government did not

communicate to the Sessions Court the desire of the petitioners to file writ petition. Their desire in second mercy petition to file review was also not communicated to Sessions Court. Paragraph 242.11 in the case of Shatrughan Chauhan (supra) upholds the right of the petitioners to other remedies and had the petitioners been given opportunity of hearing, they could have requested the Sessions Court accordingly and also could have sought necessary documents and guidance. The process of issuing death warrant *ex parte* has therefore, caused serious prejudice to them.

39. To demonstrate how the consideration of interest of victim is irrelevant, he relies upon paragraph 57, 60 and 64 in the case of Shatrughan Chavan (supra). He submits that there the Hon'ble Apex Court has considered the case of victim also and still given relief to all convicts.

40. Issuance of *ex parte* death warrant must result in

commutation as held by the Division Bench of Allahabad High Court in the judgment in the case of **Peoples Union Democratic Rights Vs. Union of India and Ors. reported at 2015 Cri.L.J. 4141** by Allahabad High Court.

41. The conclusions reached in the judgment of Division Bench of Rajasthan High Court in the case of **Sawai Singh Vs. State of Rajasthan** reported at **(1988) 1 WLN 649** are also relied upon to buttress the contention that all four grounds raised by the petitioners need to be appreciated and their impact jointly and severally must be evaluated.

42. Lastly it is pointed out that the material on record does not show that correct age of the petitioner Pradip was put before the Hon'ble President. His correct age was 19 years on the date of commission of the offence and as such look into the wrong age by the Authorities, has resulted in vitiating the orders refusing the mercy

petition. He adds that Hon'ble Governor as also Hon'ble President have refused to exercise jurisdiction only because the conviction and sentence was maintained by the Hon'ble Apex Court. He draws attention to relevant pages in writ petition for this purpose.

43. Learned Advocate General at the end adds that the Hon'ble Apex Court has devoted almost 5 pages of its judgment to justify the punishment of death in the present matter. Hence, even if there be some delay, the same needs to be balanced and interest of society at large cannot be allowed to be undermined.

44. Perusal of the Maharashtra Prison Manual is necessary to understand the legal provisions which regulate confinement of such convicts in prison and also their execution. Chapter XXVII in the Prison manual is about punishment and it contains Maharashtra Prison (Punishment) Rules, 1963 made under clause 3, 4, 28 of section 59 read with section 6 and 7 of Section 46 of the

Prisons Act, 1894. This chapter deals with the punishment to be inflicted on the prisoner through separate confinement for not more than fourteen days and cellular confinement for not more than seven days has to be under the heading minor punishment under rule 5(a). Rule 15 deals with the discipline in cells and as per rule 15(ii), strict silence is to be maintained among all the prisoners in confinement there. As per rule 20, a prisoner in separate confinement shall not be out of sight of other prisoners and he has to be given one hour per day for exercise and to have his meals in association with one or more other prisoners. Section II of chapter XXVII contains non-statutory rules. There while pointing out uses to which cell may be put, vide clause (f) it is stipulated that this can be used for confinement of prisoners condemned to death.

45. Chapter XXIX is on petitions and appeals of prisoners. Section (1) therein contain statutory rules. As per rule 11 (I) the Superintendent of Jail has to at

once repeat back to the State Government by telegrams communicating orders regarding petitions of mercy by way of acknowledgment of their receipt. All such acknowledgments where sent by telegram or by express letters are to be addressed to Secretary to Government in Home Department. Sub rule (iii) mandates insertion of words "death sentence" before addressing any telegram and express letters relating to capital sentence.

46. Chapter XXII in the Prison Manual is on prisoners sentenced to death. Section (1) therein contains statutory rules. These rules are called as Maharashtra Prisons (Prisoners sentenced to death) Rules, 1971. As per rule 5, every convict from the date of his elevation to prison has to be confined in the cell in physical yard apart from all other prisoners as required by section 30 of the Prisons Act, 1894. As per rule 18, the date of execution of the convict is to be fixed by the State Government if mercy petition is rejected. As per rule 21

in case the convict is physically unfit to receive the punishment, execution cannot be carried out. Rule 22 is on subject of delay in capital sentence. This rule 22 reads as under :

“Should any extraordinary or unavoidable delay occur in carrying out a capital sentence into execution from any cause other than the submission of an appeal or application, the Superintendent shall immediately report the circumstances to the Sessions Judge and return the original warrant either for the issue of a fresh warrant, or for an endorsement upon the same warrant, of an order containing a definite date for carrying the postponed sentence into effect.”

47. Section (2) contain non-statutory rules. As per rule (4) therein if the mercy petition is forwarded to the Secretary to Government in Home Department and no reply is received within 15 days of its despatch, the

concerned Superintendent of Jail has to telegraph to the Secretary drawing his attention to the said fact. However, in no case he can carry out the execution before receipt of reply from the State Government. Non-statutory rule (7) stipulates that where mere act of moving the prisoner from his bed in hospital and placing him in an erect position on the scaffold .might in itself be sufficient to cause death, execution of death sentence shall be postponed on medical grounds.

48. Though respective counsel have invited our attention to various judgments, we find that the judgment of Hon'ble Apex Court in the case of Shatrughan Chavan (supra) contains necessary law on the subject. We may also point out that the Hon'ble three Judges of Apex court while deciding Criminal Appeal No. 804 of 2019 on 24/4/2019 have reiterated this position. Attention can also be invited to the judgment dated 21/2/2019 delivered by Hon'ble three Judges of Apex Court in the case of **Jagdish Vs. State**

of Madhya Pradesh in Review Petition No. 591 of 2014.

49. In Review Petition No. 591 of 2014, Jagdish Vs. State of M.P., the mercy petition was filed on 13/10/2009 and it was rejected by the President of India on 16/7/2014. Because of this long period, petitioners requested for commutation of death sentence to life imprisonment. They also sought review of the judgment of the Hon'ble Apex Court dated 18/09/2009 upholding the judgment of the trial court and the judgment of High Court.

50. Hon'ble Apex Court has from paragraph 5 onwards considered the issue of delay in dealing with the mercy petition. The judgment of constitution Bench in **v. Sriharan @ Murugan Vs. Union of India reported at (2014) 4 SCC 242** and other judgment in case of **Ajaykumar Pal Vs. Union of India and another reported at 2015 (2) SCC 478** are considered. Hon'ble Apex Court found that the

applicants before it filed mercy petition addressed to the President of India and the Governor of M.P. through jail authorities on 13/10/2009. This application was forwarded by the State of M.P. to Ministry of Home Affairs on 15/10/2013 i.e. after more than 4 years. The Ministry of Home Affairs called for some records from the State of M.P. on 20/11/2013 which were supplied on 12/12/2013. The file was then forwarded to Hon'ble President of India on 02/04/2014. It was returned to Ministry of Home Affairs for reconsideration and resubmitted to the President of India on 07/07/2014. Finally the mercy petition was rejected on 16/7/2014, Hon'ble Apex Court in Paragraph 8 finds that in so far as Government of India or the Secretariat of the President of India is concerned, there was no delay and the mercy petition was dealt with expeditiously. However, State of M.P. gave no explanation for the delay of more than 4 years in forwarding the mercy petition. This delay was unexplained as Madhya Pradesh Government did not file any counter affidavit in that respect. Hon'ble Apex Court

therefore, found the delay unacceptable and in paragraph 12 found that it was not a fit case where the death sentence should be executed and accordingly commuted it to that of life. However, as six innocent lives were lost and the crime was brutal, Hon'ble Apex Court directed that life imprisonment would run for the entire remaining life of the petitioner and he shall not be released till his death.

51. In **Criminal Appeal No.804 of 2019 (Union of India and Ors. Vs. Dharam Pal)** decided on 24/4/2019, the High Court had commuted the death sentence to life imprisonment and appeal before the Hon'ble Apex Court was preferred by Union of India against it. Respondent Dharmpal was in relation to earlier incident convicted under section 376/452 IPC and sentenced to rigorous imprisonment for ten years. As the appeal against it was admitted by the High Court, he was released on bail. While on bail, on 10/6/1993 at about 3.30 at morning, Dharampal and his

brother murdered 5 persons who happen to be family members of prosecutrix in earlier matter.

52. In the trial for these murders, Sessions Court sentenced both the brothers to death on 5/5/1997. High Court confirmed it on 29/9/1998. Accused then approached Hon'ble Apex Court and Hon'ble Apex Court commuted brother's death sentence into one for life imprisonment and maintained death sentence of respondent Dharampal. This judgment of the Hon'ble Apex Court is dated 18/3/1999.

53. Respondent Dharampal then sent mercy petition before the Governor of State of Haryana which came to be rejected and on 2/11/1999 he sought pardon from the President of India. President of India rejected the same on 25/3/2013. Thus there was delay of about 13 years and 5 months in it. In the meanwhile Dharampal's appeal in the High Court challenging his conviction under section 376/452 IPC was allowed and he was

acquitted on 19/11/2003. Dharampal then approached the High Court for commuting his death sentence pointing out the changed circumstances. High Court found that the fundamental right of Dharampal was violated and hence, commuted his death sentence to life imprisonment.

54. The findings of Hon'ble Apex Court in Paragraph 8 show that Dharampal remained in solitary confinement for a period of 18 years and had undergone imprisonment for a total period of more than 25 years. Hon'ble Apex Court also found that his acquittal by High Court on 19/11/2003 was not brought to the notice of the President while deciding the mercy petition. Hon'ble Apex Court found in paragraph 11 that out of total period of 25 years spent in jail, for about 18 years, he was in solitary confinement and such confinement prior to disposal of the mercy petition was per se illegal and it amounted to separate and additional punishment not authorized by law. Hon'ble Apex Court pointed out

section 30 of the Prisons Act, 1894 and paragraph 89 to 91 and 110 to 113 of its constitution bench judgment in the case of **Sunil Batra Vs. Delhi Administration (1978) 4 SCC 494**. The words “Prisoners under the sentence of death” employed under section 30(1) have been interpreted in the later judgment. Hon’ble Apex Court found that till mercy petition before the Governor or the President is rejected, such convict cannot be said to be “under the sentence of death”. It also points out the judgment in the case of Shatrughna Chavan Vs. Union of India mentioned supra. This judgment takes a note of the Constitution Bench Judgment in the case of Sunil Batra (supra) and then in **Triveniben Vs. State of Gujarat, 1989 (1) SCC 678**. In Triveniben’s case, Hon’ble Apex Court finds that the solitary confinement is contrary to law laid down in Sunil Batra Vs. Delhi Administration (supra) and amounts to inflicting additional and separate punishment not authorized by law.

55. In paragraph 13 in this judgment, challenge to unexplained and inordinate delay in disposing of the mercy petition by the President has been looked into. The important observations contained in paragraph 19, 45, 47, 48, 49, 244 and 245 in Shatrughna Chauhan's case (supra) are reproduced and in paragraph 14, Hon'ble Larger Bench found that the delay coupled with the non-submission of fact of acquittal of Dharampal before the President necessitated commuting the death sentence into life imprisonment. It held that on receipt of mercy petition, the department concerned has to call for all records and material connected with the conviction and the judgments of the courts as well as other relevant material needed to be placed before the Hon'ble President. Hon'ble Apex Court found that while commuting death sentence of brother of Dharampal to life imprisonment and upholding death sentence of Dharampal on 18/3/1999, it had looked into conviction of Dharampal in rape case by the Sessions Court in Sessions Case No. 11 of 1991. Hon'ble Apex Court

therefore, considering the facts and circumstances, upheld the order of High Court commuting the death penalty of the respondent to life imprisonment and in the circumstances before it, directed his release after completion of 35 years of actual imprisonment including the period already undergone by him. In the light of these judgments, we find that the consideration of length of all other judgments cited by the respective counsel before us is not necessary.

56. Coming back to the judgment of Hon'ble Apex Court in *Shatgughan Chauhan* (supra), it can be seen that this judgment considers delay, insanity, solitary confinement, judgments declared *per incuriam* and the procedural lapses as the supervening circumstances. Hon'ble Apex court discussed them distinctively to arrive at the conclusion whether the circumstances exclusively or together warrant the commutation of death sentence into life imprisonment. Delay is supervening circumstances as discussed in paragraphs

30 to 78 of this judgment. In Paragraph 31, the Hon'ble Apex Court points out that the petition rejected by the Government is then preferred before Hon'ble President as mercy petition. The mercy petition received by the President's office is then forwarded to Ministry of Home Affairs. Such mercy petition consisted of one or two pages giving grounds for mercy. The other documents like copy of judgments of the trial court, High Court and the Supreme Court are then requested from the State Government. The documents giving details of the decision taken by the Governor under Article 161, copy of records of the case, nominal role of the convict, his health status and relied documents are gathered by the Ministry of Home Affairs. In Paragraph 55, Hon'ble Apex Court observes that though guidelines to define the contours of power under Articles 72/161 cannot be laid down in the form of a circular, the Union Government has set out certain norms which are as under :

"55.1 Personality of the accused (such as age,

sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);

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

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

55.4 Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;

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

55.6 Consideration of evidence in fixation of responsibility in gang murder case;

55.7 Long delays in investigation and trial etc.”

57. In Paragraph 34, the contention of convict that he is entitled to approach the Hon'ble Apex Court in writ petition under Article 32 of Constitution, when he is aggrieved by the action on his mercy petition, various earlier judgments have been looked into including the judgment in the case of **Shersingh Vs. State of Punjab reported at (1983) 2 SCC 344**. In the said decision, Hon'ble three Judges held that the condemned prisoner has a right to fair procedure at all the stages, trial, sentence and incarceration then delay alone is not good enough for commutation. Hon'ble Larger Bench in Shatrughna Chavan in paragraph 43 clarified that except the ratio relating to delay exceeding two years in execution of sentence of death, all other propositions in the case of **T.V. Vatheeswaran Vs. State of Tamil Nadu (1983) 2 SCC 68** still hold good. In Paragraph 44 Hon'ble Apex Court states that undue delay entitles the condemned prisoners to approach Hon'ble Supreme Court. The Apex Court may consider the question of inordinate delay to examine whether the punishment

need to be altered. In paragraph 45, adverse physical conditions and psychological stress on the convict because of agonizing delay has been pointed out. In paragraph 47, Hon'ble Apex Court observes that it is incumbent on the authorities to dispose of the mercy petitions expeditiously. Though no time limit can be fixed for the Governor or the President, it is the duty of the executive to expedite the matter at all stages namely calling for records, orders and the documents filed in court, preparation of note for approval of the Minister concerned and ultimate decision of the constitutional authority which invites attention to the judgment in the case of Triveniben Vs. State of Gujarat (supra) to point out that the prolonged delay is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not. In Paragraph 48, this Larger Bench holds that if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as constitutional authorities have

failed to take note of the relevant aspects, it can under Article 32, hear the grievance of the convict and commute the death sentence into life imprisonment on that ground alone. However, such delay must not be caused by or at the instance of the convict. In Paragraph 49, Hon'ble Apex Court holds that the procedure prescribed by law which deprives a person of his life and liberty, must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. Article 21 protection does not come to an end with pronouncing of punishment but extends to the stage of execution and prolonged delay in execution of death sentence has a dehumanizing effect. It emphatically observes that the delay caused by certain circumstances beyond prisoner's control, mandates the commutation of death sentence. The appropriate relief is to vacate the death sentence and it again relies upon and draws support from its earlier judgment in the case of T.V. Vatheeswaran (*supra*). In paragraph 50, it considers the argument of Union of

India that when the delay caused seems undue, the matter be remanded back to the executive and the decision of commutation of sentence must not be taken in the judicial side. Hon'ble Apex Court observes that the concept of supervening events judicially evolved does not in any way depend upon the concept or power of judicial review and the death sentences have been commuted merely on the basis of supervening events when article 21 has been found to be breached. It mentions that there was no question of resorting to power of judicial review, but protection of fundamental rights and as such there is no scope for remanding the matter for consideration as the court is the custodian and enforcer of fundamental rights and final interpreter of the constitution.

58. In Paragraph 54, it reiterates that no time limit can be set for the President or the Governor while observing that the mercy petitions can be disposed of at much faster pace. In Paragraph 56 it is reiterated that the

guidelines and scope of power set out by it show that it has extraordinary power not limited by judicial determination of the case and is not to be exercised lightly or as a matter of course. In paragraph 57, rights of victim or family of the deceased have also taken a note of and it is stated that the same form part of sentencing process. Hon'ble Apex Court observes that Article 21 is the paramount principle on which rights of the convict are based and it needs to be considered along with the elements which form part of sentencing process. In paragraph 60, Hon'ble Apex Court states that there are two distinct backgrounds and in scenario before punishment, petitioners before it were the persons accused of the offence. In this proceeding, sentence of death was imposed upon them. In the latter scenario, petitioners approached it as victims of violation of guaranteed fundamental rights. It points out that under Article 32, their cases on merits could not have been reopened but then undue, inordinate and unreasonable delay in execution of death sentence

certainly results in torture which is violation of Article 21 and entails as the ground for commutation of sentence.

In paragraph 64, Hon'ble Apex Court observes as under :

“64. From the analysis of the arguments of both the counsel, we are of the view that only delay which could not have been avoided even if the matter was proceeded with a sense of urgency or was caused in essential preparations for execution of sentence may be the relevant factors under such petitions in [Article 32](#). Considerations such as the gravity of the crime, extraordinary cruelty involved therein or some horrible consequences for society caused by the offence are not relevant after the Constitution Bench ruled in [Bachan Singh vs. State of Punjab](#) (1980) 2 SCC 684 that the sentence of death can only be imposed in the rarest of rare cases. Meaning, of course, all death sentences imposed are impliedly the most heinous and barbaric and rarest of its kind. The legal effect of the

extraordinary depravity of the offence exhausts itself when court sentences the person to death for that offence. Law does not prescribe an additional period of imprisonment in addition to the sentence of death for any such exceptional depravity involved in the offence. “

59. It then proceeds to point out unconstitutionality of additional incarceration is itself inexorable and must not be treated as dispensable through a judicial decision.

60. In Paragraph 100, after referring to the procedure of Ministry of Home Affairs of Government of India, Hon'ble Apex Court takes a note of the fact that at every stage, mercy petition has to be expedited and there cannot be any delay at the instance of the officers, particularly, the Superintendent of Jail. In paragraph 103, Hon'ble Apex Court points out that after receipt of mercy petition, the department concerned has to call for all the records/material connected with the conviction and

calling for piecemeal records instead of all the materials connected with the conviction should be deprecated. It is incumbent on the part of the Home Ministry to place all the material before the President/Governor.

61. Hon'ble Apex Court thereafter proceeds to apply above legal principle to various writ petitions presented to it. In paragraph No.117 Hon'ble Apex Court has given details of time taken and stages in a chart. In paragraph 111 it finds that there was no explanation for delay of about 5 months in sending the papers to Respondent No.1 and it found that Respondent No.2 sent letter to respondent No.1 seeking details about stages of mercy petition. 12 reminders between 17/1/2003 to 14/1/2005 were sent. Chronology therefore shows that the question whether there is inordinate delay or not must be considered in facts and circumstances of each case. It is found that for certain periods there was no explanation. The relevant charts case wise in this respect are contained in subsequent part of the

judgment. In paragraph 223 delay of about 1 year by office of the Hon'ble the President in disposal of mercy petition is not found excessive.

62. In paragraph 240 Hon'ble Apex Court pointed out that protection of Article 21 is available to every prisoner including death roll prisoners till the very last breath of their lives and in paragraph No.26, the Hon'ble Apex Court declares that it would protect that right even if noose is being tied on such prisoners neck.

63. In matter at hand, dispute about date on which the order of Hon'ble Apex Court was communicated to the petitioners is not very relevant. Though Petitioners claim that the same was communicated to them belatedly, in mercy petition forwarded to Hon'ble the Governor on 10/7/2015 they mention that the copy of judgment delivered by Hon'ble Apex Court on 8/5/2015 was received by them on 29/5/2015. They sought legal aid on 2/7/2015 and on 6/7/2015 advocate (appointed)

visited them in jail. Copy of judgment of Hon'ble Apex Court was given to them on 7/7/2015 mercy petitions were then drafted and sent on 10/7/2015 to Hon'ble the Governor.

64. Actual forwarding of mercy petition is on 16/7/2015. Respondent No.4 Superintendent of Jail however then did not forward the judgment of Sessions Court. He sent it on 27/1/2016. Such piecemeal forwarding is in breach of the law as laid down by the Hon. Apex Court.

65. Before receipt of mercy petitions i.e. 24/6/2015 respondent No.4 Superintendent asked Talegaon Police Station to sent English translation of police diary, short crime history in English, first information report, dying declaration and the charge and reasons for commitment. It appears that these documents were not received till 1/2/2016 and on 1/2/2016 i.e. almost after 8 months, Respondent No.4 sent reminder to Talegaon Police

Station in this respect. This again shows piecemeal collection of the papers.

66. In forwarding letter dated 16/7/2015 the Superintendent has informed Home Department of Maharashtra Government that mercy petitions were sent with 7 documents. Document at Sr. No.5 is a copy of warrant of conviction and operative order. He has mentioned there that after receipt of copy of judgment, the same would be supplied. He does not there mention the documents sought for by him on 24/6/2015.

67. Reminder sent by him to Senior Police Inspector of Talegaon Police Station dated 1/2/2016 is the first or last reminder thereafter. It pointed out mercy petitions and need to send requisite information to the State Government. It also mentions that information received from Court was already furnished to the State Government. It again reiterates & describes the information/documents sought for. The information

sought for is English translation of police diary, short crime history in English, First Information Report, dying declaration and charge and reasons for commitment.

68. The Ministry of Home of State Government has in the meanwhile proceeded further and prepared a note. Note prepared by Desk Officer is of 25/1/2016. It is signed by various officers in hierarchy and then is signed by the Chief Minister on 28/1/2016. It is signed by Hon'ble the Governor on 20/3/2016 and this rejection is intimated to Home Department by office of Hon'ble the Governor on 29/3/2016.

69. Thus, papers which were not received till 1/2/2016 but felt necessary by State Government for consideration of mercy petitions, were never presented to the office of Hon'ble the Governor.

70. The relevant material which needs to be looked into by the office of Hon'ble the Governor shows the age

of mercy petitioner (convict) as one of the relevant consideration. The documents received by Home Ministry by hand delivery from respondent No.4-Superintendent are mentioned in letter dated 27/1/2016 at Annexure-IV with the petition. In this document age of petitioner Pradeep is mentioned as 24 years and age of Petitioner Purshottam is mentioned as 30 years This age is as on date of communication. It is not in dispute that Pradeep was 19 years 2 months old on the date of commission of crime.

71. Hon'ble the Governor of Maharashtra rejected Petitioners mercy petitions on 29/3/2016. Department of Home of State informed this to the Superintendent of Jail on 6/4/2016. By this communication Respondent No.2 also asked said superintendent (Respondent No.4) to furnish updated nominal roll, medical reports and criminal background reports of the petitioners for presenting the mercy petitions to Hon'ble the President. The order of Hon'ble the Governor was communicated to

the petitioners on 11/4/2016.

72. Petitioners claim that documents like nominal roll, medical report and criminal antecedents were relevant even when Hon'ble the Governor decided mercy petitions and that information was not sought for then. According to them this information was supplied by Talegaon Police Station for the first time on 16/4/2016 i.e. after decision of Hon'ble the Governor.

73. In this respect perusal of affidavits in reply by the State Government and by Superintendent of Prisons is important. Reply on behalf of the State Government is sworn by Shri Narayan Karad, Deputy Secretary Home Department (Prison). In paragraph 3 of the said reply State Government pointed out that mercy petitions forwarded by Superintendent of Jail to the Principal Secretary of Home Department were received by State Government on 20/7/2015. On 17/8/2015 a letter was sent to Additional Director General (Prison), Pune and to

Superintendent of Jail seeking information whether Review Petitions were filed by the Petitioners before Hon'ble Supreme Court or not. Thus, first date on which mercy petitions were taken up is after about 4 weeks. Reason for seeking said information is statement given by both the petitioners in writing on 1/6/2015 that they intended to file again a writ petition in the Supreme Court. According to Respondent No.2, petitioners wanted to express that they were filing Review Petitions. On 26/8/2015 Additional Director General (Prison), Pune addressed a letter to Home Department and it was received on 28/8/2015 informing that no review petition was filed till 22/8/2015 by the convicts. All the papers and material was then thoroughly examined at various levels as per hierarchy and the same were then submitted to Hon'ble the Governor for appropriate consideration. This date has not been disclosed.

74. It is submitted that on 29/3/2016 the Governor rejected those mercy petitions. The fact of

Superintendent of Yerwada Prison submitting more details is not relevant at this stage when delay only is to be examined. However, furnishing of details on 16/4/2016 by him has not been disputed.

75. Thus, mercy petitions received by Superintendent of Jail on 10/7/2015 have been decided by Hon'ble the Governor on 29/3/2016.

76. Perusal of affidavit of Superintendent of Yerwada Central Prison reveals that his affidavit is on behalf of Respondent Nos.3 and 4. He asserts that decision of Hon'ble Apex Court dismissing Criminal Appeal of the Petitioners was received by him on 28/5/2015 and it was communicated to the petitioners on 29/5/2015. Receipt of mercy petitions on 10/7/2015 and its forwarding to Home Department on 16/7/2015 is not in dispute. It is submitted that this letter was received by the State Government on 20/7/2015. The letter dated 17/8/2015 seeking updated information and

reply by the Superintendent thereto is again admitted.

77. Superintendent pointed out that judgment of Sessions Court along with other documents pertaining to said proceeding before Trial Court were received by him and without making any assessment about relevancy thereof Superintendent swiftly forwarded judgment of Sessions Court to Home Department on 27/1/2016. This judgment ought to have accompanied the mercy petitions only. It shows that there is time gap of 4 months & 10 days in the matter. It is further stated that because of need to ensure that all documents are forwarded by his office, on 1/2/2016 he requested Talegaon Police to send copy of police diary, short crime history and other material to Home Department of Government of Maharashtra directly. He then states that communication of rejection of mercy petitions was received on 9/4/2016 by him and it was communicated on 11/4/2016 to both the convicts/petitioners.

78. About letter dated 6/4/2016 on need to furnish updated nominal roll, medical report and criminal antecedents, he choose to rely upon records and submitted that details of updated information were supplied on 16/4/2016 and the same were received by the Home Department of State on 26/4/2016. His affidavit thereafter is on events which transpired during pendency of mercy petitions before Hon'ble the President of India.

79. Discussion undertaken by us supra shows that no time limit can be prescribed for taking of decision by Hon'ble the Governor. Affidavit submitted by the Respondent Nos.2, 3 and 4 are conspicuously silent about the exact date when mercy petitions were actually placed before Hon'ble the Governor by the Home Department. It is vaguely mentioned that the mercy petitions were then processed at various levels as per hierarchy and it is obviously after 28/8/2015.

80. Document dated 25/1/2016 submitted by the Home Department to Hon'ble the Governor is placed at Annexure-F with the petition. It is a note on mercy petition filed on 10/7/2015 by convicts. This note starts from brief mentioning of facts, result in Sessions Trial, result in Confirmation Case No.1/2012 and then judgment of Hon'ble Apex Court dated 8/5/2015. In paragraph 5, it mentions opinion expressed by Superintendent of Jail and additional DIG (Prison) not to commute death sentence. It then mentions Article 161 of the Constitution of India and then need to present mercy petitions to Hon'ble the President in case it is rejected by Hon'ble the Governor. The procedure stipulated in guidelines of the Central Government is pointed out in paragraph No.7 and, thereafter Article 72 has been reproduced. In paragraph thereafter the note states that looking into what Hon'ble Apex Court has said in the matter it would not be appropriate to commute death sentence. The Desk Officer therefore states that with this opinion of the Government, there

should be no objection to place the matter before Hon'ble the Governor under Article 161 of the Constitution of India. This note dated 25/1/2016 is signed by the Principal Secretary (Appeals and Security) on 27/1/2016. The said Authority upon taking into consideration what Hon'ble Apex Court has said, finds that it would not be appropriate to commute death sentence.

81. Section Officer has placed this note before the Principal Secretary. Who on 27/1/2016 marks it to Additional Chief Secretary (Home) for approving portion 'A'. Additional Chief Secretary (Home) on 28/1/2016 marks it to the Hon'ble Chief Minister and after signature of Hon'ble Chief Minister, it is submitted to office of Hon'ble the Governor on 28/1/2016. Thus, the mercy petition received by Department of Home of State of Maharashtra on 20/7/2015 is placed before the Hon'ble the Governor on 28/1/2016 for the first time after almost 6 months.

82. After communication of order of Hon'ble the Governor dated 29/3/2016 to Petitioners on 11/4/2016, the other segment of alleged "delay" begins. The next period to be looked into is in deciding mercy petitions preferred under Article 72 of the Constitution of India. The order of Hon'ble the Governor is informed to Respondent Nos.3 and 4 by the State Government on 6/4/2016 and simultaneously they also seek updated documents in relation to nominal roll, medical report and criminal background form Respondent No.4. Respondent No.3 forwarded a remainder for the purpose on 13/4/2016 to Respondent No.4. Respondent No.4 had on 12/4/2016 itself sought details from Talegaon Police Station. Reply is submitted by Talegaon Police Station on 16/4/2016 and the Respondent No.4 immediately sent it to the Home Department of Government of Maharashtra. Home Department received it on 26/4/2016.

83. Petitioners state that on 28/4/2016 Respondent

No.2 State Government forwarded their mercy petitions to Union of India and this fact is admitted in reply affidavit by respondent No.2. He also states that their letter dated 28/4/2016 was received by the Minister of Home Affairs Department of India on 13/5/2016. It is not in dispute that on 31/5/2016 Respondent No.1 sought past criminal history, economic condition of family and information about filing of Review Petition by convicts. Home Department of Government of Maharashtra received this letter on 22/6/2016. In the meanwhile the Minister of Home Affairs Central Government sent remainder dated 15/6/2016 and according to Respondent No.2 this reminder is dated 17/6/2016 which is received on 22/7/2016. Union of India however has submitted that this first reminder is dated 15/6/2016. It forwarded second reminder on 22/7/2016 and thereafter third reminder on 6/9/2016. State Government has pointed out that reminder dated 22/7/2016 was received by it on 9/8/2016.

84. State Government on affidavit discloses that it proceeded to inquire and on 9/8/2016 it requested Respondent No.4 Superintendent for information pertaining to past criminal history, economic condition of the family and about filing of Review Petition. Thus, from 22/6/2016 till 9/8/2016 Ministry of Home, Government of Maharashtra has not taken any action on communicated dated 31/5/2016 sent by Respondent No.1. It had received the remainder thereafter and when it received second reminder, it proceeded to ask for information.

85. Reply affidavit of State Government shows that on 9/9/2016 Superintendent of Yerwada Central Prison wrote to State Home Department pointing out that no Review Petition was filed before Hon'ble Apex Court. In paragraph No.11 of reply affidavit the State Government has disclosed that the information regarding past criminal history and economic condition of family was called for from Sr. Police Inspector vide letter dated 17/9/2016. That information was sent by Talegaon Police

on 20/9/2016 and it was communicated to the Government of India on 30/9/2016. State Government therefore has asserted that the Home Department of Government of Maharashtra provided all the necessary details as requested by Government of India by 30/9/2016. Thus, after 4 months (delay) the request made by the Central Government on 31.5 2016 was met with.

86. After this date "30/9/2016" the next date pointed out by Respondent No. 1 is 26/12/2016. There is gap (delay) of more that 2 months & 25 days in the meanwhile. Other Respondents also pointed out 26/12/2016 as the date on which request was made to clarify the position regarding intention of convicts to file Review/SLP before Hon'ble Apex Court. Annexure V is that document. On it under secretary of Respondent 1 Union has put date 26/12/2016 while on top on right hand side, month printed is November 2016. The State Government received it on 2/1/2017 and on 16/1/2017

sent a letter to Superintendent of Yerwada Central Prison (Respondent No.4) and Additional Director General of Prison (Respondent No.3) seeking information. Respondent No.4 forwarded that information on 7/2/1017 to the Home Minister, Government of Maharashtra who communicated the same to Central Home Minister on 22/2/2017 confirming that the convicts have decided to file Curative/Review Petition after decision of Hon'ble the President on their mercy petitions. Thus the State machinery has taken time of about 1 month & 20 days for this. Had entire information been demanded by the respondent 1 in one stroke & not piecemeal, the entire period from 31/05/2016 could have been avoided.

87. Concept like telegram or express letters used years ago show the need of utmost speed & hence use of fastest mode of communication then available. Now it has to be E-mail, Fax or Telephone. Not resorting to these devises in digital era would be to deliberately

delay the exercise or to derail it. It would be an instance of avoidable delay.

88. Here we have to consider a convict to be hanged & he is not concerned with the constitutional functionary which has caused delay or contributed to it. When the protection accorded by Art. 21 of the Constitution of India is at stake, the Executive, Court of Law or the Governor/President stand at same pedestal. Shatrughan Chauhan's case (supra) lays down "*Long delays in investigation and trial etc.*" also as one of the norms relevant for commutation. Thus Delay by any arm of the State would be against his fundamental right. Extra or additional punishment resulting from avoidable delay can not be legalized because it is on account of undue time taken by the Constitutional Functionary. Such additional punishment is unconstitutional in all circumstances & contingencies. Quantum or period thereof is also not very material.

89. Respondent no. 1 Union of India has during the hearing filed additional affidavit and in it has pointed out three dates. First of these dates is 3/3/2017 when the Under Secretary signed the recommendation and marked it to the Joint Secretary (Judicial). The next date is 29/3/2017 when the Joint Secretary prepared self contained recommendation and forwarded it to the Minister of States (Home) and the Home Minister for Government of India. On 04/05/2017, the Home Minister after agreeing with the recommendations cleared it. The summary was then prepared for the Hon'ble President of India and it was also signed by the Hon'ble Home Minister. As these events are after the information forwarded by the State Government on 22/2/2017, the same are only relevant. This development shows that the note to be placed along with the Mercy Petition before the Hon'ble President was prepared on 4/5/2017. In the affidavit filed on record earlier, respondent no.1 has not given these three developments. However,

forwarding of proposal to the Hon'ble President of India on 04/05/2017 is very much mentioned there in paragraph no. 6.

90. Thus the mercy petition of petitioners sent by respondent no. 2 on 28/4/2016 goes to Hon'ble President only on 04/05/2017. The Hon'ble President has taken the decision upon it on 26/5/2017 and rejected it. This rejection has been communicated to the petitioners on 19/6/2017. The file after rejection is received by the Ministry of Home Affairs on 30/5/2017 and then the decision is communicated to the State Government on 6/6/2017. Respondent no.2 in paragraph 14 and 15 of the affidavit states that this rejection was intimated to respondent no.4 on 19/6/2017 who in turn communicated it to the petitioners on the same day.

91. The other part of delay is after this rejection in actual execution of the penalty. Respondent nos.2 to 4 state that time and again they informed and reminded to

the Sessions Court the fact that the convicts have exhausted all their remedies and hence, further orders to be issued in regard to the death penalty. They point out that these communications have been sent on 19/6/2017, 10/08/2017, 29/08/2017, 05/10/2017, 18/07/2018, 29/08/2018 and 27/12/2018. These respondents also show that the copies of these letters are given to Sessions Court, Registrar of Bombay High Court, Registrar of Supreme Court, Principal Secretary, Home Department (Prison), Additional Director General of Prisons and Deputy Inspector General of Prisons. The first letter dated 19/6/2017 and last one dated 27/12/2018 are also annexed with the reply affidavit. In the last letter, reference is also made to the informal instructions issued by the L & J.D. department and request is made to pass appropriate orders for execution of death sentence.

92. The discussion and development noted supra show that when note dated 25/1/2016 was prepared and

placed before Hon'ble the Governor, the judgment delivered by Sessions Court was not part of record of mercy petitions. The documents like English translation of police diary, short crime history in English, First Information Report, dying declaration and the charge and the reasons for commitment. which were demanded on 24/6/2015 again did not form part of it.

93. The records to be submitted to the Hon'ble the President was not complete till 6/3/2017 and information was demanded by Respondent no. 1 on 31/5/2016 itself. This information is furnished and communication is complied with by Respondent No.2 State on 22/2/2017. These events & developments have been rightly pressed into service to urge that there has been avoidable delay.

94. In most of the letters exchanged between respondents, the words "most urgent" or "death penalty" are printed at top. However, it appears that the matter was not given attention which it deserved. Before

us, it has been demonstrated that age of Pradeep on the date of commission of offence was 19 years and 2 months. This age on the date of commission of offence is not expressly pointed out either to Hon'ble the Governor or Hon'ble the President.

95. Procedure regulating mercy petitions in case of death sentence prescribed by Ministry of Home Affairs states that the mercy petitions need to be forwarded expeditiously along with records and observations of the Secretary of Government of India with comments of forwarding authorities in respect of grounds, If any mercy petition was previously rejected by Hon'ble the Governor, brief reasons therefor are also to be communicated. As per clause (vi), upon receipt of the orders of Hon'ble the President, acknowledgment shall be sent to the Secretary of Government of India and if petition is rejected, the rejection has to be communicated by express letter. Instructions relating to duties of Superintendent of jail in connection with mercy

petitions show that the petitions preferred by convicts are to be forwarded to the State Government at once and simultaneously telegraph containing its substance, requesting order whether execution should be postponed is also to be sent. Pending reply to this telegraph, sentence is not to be carried out. If said mercy petition is received by noon of day preceding the day fixed for execution, the same also has to be forwarded at once. State Government has to forward telegraph stating that execution can be carried out unless orders contrary are sent. This procedure therefore show the precedence and priority given to consideration of mercy petition.

96. In facts before us though mercy petition came to be filed more than 7 days after communication of orders of Hon'ble Apex Court, the same was forwarded on 16/7/2015 with the documents like nominal roll, physical and mental health report and crime summary. The documents demanded by Respondent No.4 from

Talegaon Police are not argued to be irrelevant, and infact those documents including judgment of Sessions Court did not enter the process of consideration by Hon'ble the Governor. Period from 16/7/2015 till 27/1/2016 to complete the preliminary exercise cannot be viewed as reasonable period taken by Respondent No.2 in the matter.

97. Respondent No.2 has on 6/4/2016 called for updated documents from Respondent No.4 as mercy petitions of convicts were to be forwarded to Hon'ble the President. These updated documents are forwarded on 16/4/2016 by Respondent No.4 to Respondent No.2. On 31/5/2016, Respondent No.1 demanded documents on three points from Respondent No.2. Said demand of three documents/ information was fulfilled on 22/2/2017.

98. The convicts before us are not concerned with finding out whether it is Respondent No.1 or then Respondent No.2 who are at fault. Mercy petitions filed

by them have remained pending from 10/7/2015 till 26/5/2017. The procedure contained in instructions issued by Ministry of Home Affairs Union of India or then under Maharashtra Prison Manual has thus not been followed expediently. The time taken by Hon'ble the Governor or by Hon'ble the President of India after the papers were actually submitted to them is small. After receipt of note dated 27/1/2016, Hon'ble the Governor has rejected the mercy petitions within a period of 2 months. Similarly, after receipt of recommendation by Home Minister on 2/5/2017 file was sent to Hon'ble the President on 9/5/2017 and Secretariat of Hon'ble the President received it on 12/5/2017. Hon'ble the President of India rejected the mercy petitions on 26/5/2017. Thus, Hon'ble the President has taken decision in period of less than one month after receipt of mercy petitions.

99. Even if the exercise of the consideration or application of mind is presumed to have commenced on dates on which the respective departments got

necessary papers to draft an advisory, still the period spent in making available those documents can not be seen as the just period. The authorities are/were aware of the prescribed procedural norms & the importance of time & can not indulge into avoidable correspondence.

100. The procedural delay noted by us (*supra*) till actual presentation of mercy petitions before High Constitutional Authorities therefore show disregard to its own instructions by Respondent No.2 as also by Respondent No.1. Judgment of Hon'ble Apex Court in case of Shatrughan Chauhan (*supra*) is therefore squarely attracted. We find that there has been undue and unexplained delay both by Respondent No.3 and Respondent No.1 in processing the mercy petitions.

101. We have also taken note of the criteria which Hon'ble Apex Court has mentioned in paragraph 55 of its judgment. The age and health of convict is therefore one of the criteria to be looked into by the Constitutional

Authorities. Long delays in investigation and trial is also a relevant circumstance. The incident of crime has occurred on 1/11/2007. Sessions Court had delivered judgment in Sessions Case No.284/2008 on 20/3/2012 which was maintained by this Court by its judgment delivered in Confirmation Case No.1/2012 and connected Appeals on 25/9/2012. Thus, there was period of about 5 years taken in imposing of death sentence. Mercy petitions was filed on 10/7/2015 and again period of about 5 years has expired thereafter.

102. We therefore find the delay in execution of death penalty in the present matters undue, inordinate and unreasonable. Out of this period of 5 years mercy petitions were pending for about 2 years and for period thereafter no proceedings were pending. We find that delay in the present matters could have been easily avoided and the mercy petitions and the final execution could have been dealt with in sense of urgency.

103. The decision of Hon'ble the President rejecting the mercy petitions was communicated to the petitioners on 19/6/2017. Steps taken thereafter by Respondent No.4 for actual implementation of the sentences are also mentioned by us supra. Letters were sent from 19/6/2017 upto 27/12/2018. Attention of Punishing Court was invited to rejection of mercy petitions for passing/seeking further order on death sentences.

104. Section 413 of Cr.P.C. states that after the death sentence has attained finality and becomes executable the Court of Sessions shall cause its punishment order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. Whether procedure followed in the present matter was as envisaged by this section has been the bone of contention between the parties. In Chapter XLII in Jail Manual Section One, Rule 18(i) stipulates that the State Government shall fix the date of execution of convict if

mercy petition is rejected. It also points out further procedure. Rule 19 stipulates that execution has to take place at the prison to which the execution warrant is directed. The execution has to be carried out in a special enclosure attached to or within walls of prison. In present proceedings other rules are not relevant.

105. It is therefore clear that actual execution of death penalty is at the hands of State Government. It has therefore to fix a date and place therefor and obtain death warrant. Accordingly, mere writing a letter in this respect therefore cannot be seen as compliance with Rule 18. The date by which & jail fixed where the necessary arrangements were made or were to be made has not been pointed out by the State in any of the letters mentioned supra to the Sessions Court.

106. Our attention has been invited to Judgment delivered by Division Bench of this Court on 21/7/2009 in the case of **Mr. Saeed Sohail Sheikh vs. State of**

Maharashtra (supra) – Cr. W.P. 1377 of 2008 decided on 21/7/2009 at Bombay. There the issue involved was regarding transfer of prisoners in MCOC case from one prison to another. Superintendent of Jail stated that she submitted a letter requesting the court to permit such transfer. This letter was addressed to Registrar of Sessions Court and reason for transfer was stay of trial given by Hon'ble Apex Court and the number of occupants in jail more than the permitted capacity. Learned Sessions Judge responded to this letter. Division Bench finds that no authority was shown to it which permitted jail authorities to write such letter in pending matters.

107. High Court found that the learned Sessions Judge only gave liberty to jail authority to take action in accordance with Rules and Regulations. Superintendent of Jail therefore transferred prisoners. Division Bench found that in pending matter, if any party wants any order from Court. it has to be by way of application and

a copy of that application should be made available to other side.

108. This judgment of High Court is considered in **(2102) 13 SCC 192- State of Maharashtra vs. Mr. Saeed Sohail** by Hon'ble Apex Court. In paragraph No.25. Hon'ble Apex Court held that power exercisable by Court permitting or refusing transfer is judicial and not ministerial. In paragraph No.35 Hon'ble Apex Court reiterates the same and holds that Trial Court could not have passed order on administrative side.

109. We may here point out that insofar as issuance of warrant for execution of death penalty is concerned, the judgment delivered by Allahabad High Court in ***PUDR v. Union of India (supra)*** that such warrant cannot be issued ex-parte finds appreciation in Judgment of Hon'ble Apex Court reported at ***Shabnam V. Union of India (supra)***. The observations of Hon'ble Allahabad High Court regarding essential procedural safeguard to

be adhered to under Article 21 are looked into and in paragraph No.20 the Hon'ble Court has observed that execution of death sentence cannot be carried out in an arbitrary and secret manner. In paragraph No.21 view expressed by Allahabad High Court is found to be in consonance with Article 21 of the Constitution of India.

110. Respondents have invited our attention to a larger Bench judgment which finds that issuance of said warrant ex-parte is not fatal and adherence to principles of natural justice need not be insisted upon if it is going to be only an empty formality. This judgment of Hon'ble Apex Court in the case of ***Yakub Abdul Razak Memon (supra)*** takes note of the judgment of Allahabad High Court and also judgment of Hon'ble Apex Court mentioned by us supra.

111. In present facts the contention that convicting Court fixed "24/6/2019" as date of execution ex-parte has been specifically raised before us. Considering the

fact that there has been delay of about 5 years after final judgment of Hon'ble Apex Court in the matter, we find that convicts could have very well raised this ground of delay before the Sessions Court to oppose issuance of death warrant.

112. The limited scope of judicial review available to Courts of Law is also explained by Hon'ble Apex Court in ***Shatrughan Chauhan (supra)*** In paragraph 22 Hon'ble Apex Court has pointed out that the Executive powers under Article 72 and 161 should be subject to limited judicial review based on rationale that the power under this Article is per-se above judicial review, but the manner of exercise of power is certainly subject to it. In paragraph 23 grounds on which judicial review may be open are enumerated. Said paragraph reads as under:-

“23. Though the contours of power under Articles 72/161 have not been defined, this Court, in Narayan Dutt v. State of Punjab, para 24 has held that the exercise of power is subject to challenge on the following grounds:(SCC p.361)

- a) If the Governor had been found to have exercised the power himself without being

advised by the Government,
(b) If the Governor transgressed his jurisdiction in exercising his power,
(c) If the Governor had passed the order without applying his mind,
(d) the order of the Governor was mala fide, or
(e) the order of the Governor was passed on some extraneous considerations.”

113. In this judgment, in paragraph 24 Point No.1 and Point No.2 again the grounds for seeking judicial review are reproduced. Non- consideration of relevant material is one of grounds accepted there. Respondent have invited our attention to judgment in the case of ***Bikas Chatterjee (supra)***. There it is observed in paragraph No.10, 11, 13 that when power is vested in very high authority, it must be presumed that said authority would act properly and carefully after objective consideration of all aspects of the matter. In paragraph No.13, the constitution Bench finds no reason to assume that Hon'ble the President of India has not applied his mind to all relevant facts and aspects of the case. It also holds that there was nothing to show material found relevant by Hon'ble the President was not before him. In

present facts, records before us show that the copy of Sessions Court judgment was not before the Hon. Governor & there is nothing to demonstrate that its absence was noted & pointed out. Similarly, correct age of convict Pradeep was not pointed out to these high constitutional authorities.

114. In present matter we have already taken note of fact that judgment delivered by Sessions Court did not form part of record of Hon'ble the Governor at all. We have also taken note of fact that correct and tender age of one of the petitioners (Pradeep) was not before either Hon'ble the Governor or Hon'ble the President. Thus, material judicially held relevant was not placed before the High Constitutional Authorities. The argument of presumption based on Constitutional Bench Judgment in case of *Bikas Charterjee vs. Union of India* is therefore not binding here.

115. Judgment in the case of ***Shatrughan***

Chauhan (supra), in paragraph No.13 relies upon the judgment in case of ***Kehar Singh v. Union of India***, and pointed out that other Constitutional Bench has found that Hon'ble the President can, in exercise of the power under Article 72 of the Constitution, scrutinize the evidence on record and come to a different conclusion. Paragraph No.10 in Kehar Singh has been reproduced here by Hon'ble Apex Court. In paragraph 10 the Constitution Bench in Kehar Singh has explained that the President does not amend or modify or supersede the judicial record. He acts wholly in a different plane than the Court of Law. The Constitution Bench finds that Hon'ble the President is entitled to go into merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by Hon'ble the Apex Court.

116. Learned Advocate General has invited our attention to the Constitution Bench Judgment in case of Kehar Singh to urge that the facts in the said matter

reveal that in mercy petition sent by son of convict, reference was made to evidence on record and effort was made to establish that Kehar Singh was innocent. Extract of oral evidence accompanied mercy petition. Mercy petition was refused by Hon'ble the President because of opinion that he cannot go into merits of the case which is finally settled by Highest Court. With due respect, we do not find anything to distinguish the law as laid down by the Constitution Bench and reiterated in ***Shatrughan Chauhan (supra)*** in these facts.

117. The facts at hand therefore show that correct age of one of convicts was not before both the High Constitutional Authorities. Not only this the judgment of Sessions Court did not form part of record of mercy petitions before Hon'ble the Governor. Other material sought for by Superintendent of Jail on 16/7/2015 also did not enter the process of consideration by Hon'ble the Governor. The fact that said material could not have been looked into by Hon'ble the Governor has not been

pointed out to Hon'ble the President. The presumption of application of mind by High Constitutional Authorities is therefore not attracted here. Said presumption of due application of mind shall follow only when the entire relevant material is made available by the Administrative machinery to High Constitutional Authorities and Hon'ble the President or then, the records show a finding that it was/is not relevant.

118. This brings us to contentions based on solitary confinement. The impact of solitary confinement finds consideration in ***Shatrughan Chauhan (supra)***. In paragraph No.65, Hon'ble Apex Court observes that when legislature has not provided any fixed period of imprisonment in addition to sentence of death, the said additional sentence cannot be imposed and sustained by judicial decision alone. Hon'ble Apex Court observes that the unconstitutionality of this additional incarceration is itself inexorable and must not be treated as dispensable through a judicial decision. It is observed that solitary

confinement even if mollified and modified marginally, is not sanctioned by section 30 of the Prisons Act for prisoners under sentence of death. The convict is not under sentence of death even if Sessions Court has sentenced him to death subject to confirmation by High Court. He is not under sentence of death even if High Court confirms it so long as appeal to Hon'ble Supreme Court is pending. Hon'ble Apex Court relies upon its earlier Constitution Bench Judgment reported at *Sunil Batra v. Delhi Admn.* (supra) and holds that even if it awards death sentence, section 30 does not cover the convict so long as his petition for mercy to the Hon'ble the Governor and to Hon'ble the President is not disposed of. Hon'ble Apex Court states that to be under sentence of death means to be under a finally executable death sentence. When this law is applied to the petitioners before us, it is apparent that they were not under the finally executable death sentence till rejection of their mercy petitions by Hon'ble the President on 26/5/2017.

119. The petitioners on affidavit claim that they were subjected to solitary confinement and placed in *phansi yard* after Sessions Court convicted them i.e. on 20/3/2012. Though respondent/State has denied existence of any *phansi yard* as such, in medical documents produced by Respondent/State there is reference to *phansi yard*. Our attention has been drawn to medical case records of convict Pradeep in which on top the words *phansi yard* are mentioned. Even in case of convict Purshottam, in Discharge Card issued by Sasoon General Hospital, on top words *phansi yard* convict are mentioned.

120. The arguments have been advanced by learned counsel for the petitioners and by learned Assistant General in effort to oppose or to show that in a separate yard where petitioners are kept, there are several other prisoners. The petitioners can mix with them and they can also move freely in common

varanda and play in open yard opposite the barrack. Respondents pointed out that after judgment of Sessions Court, petitioners have been shifted to security yard where 20 other convicts were also confined. They state that the prisoners who are not death roll convicts, are also placed in same security yard. That security yard is not a closed space and it is physically impossible to use same for solitary confinement. He mentions that there are three units in it. Unit No.1 has 20 rooms out of which 19 are in use. Unit No.2 has 12 rooms and Unit No.3 has 8 rooms. Respondents thereafter has given description of the security yard. It is mentioned that Petitioners are not confined to their rooms during day time. Their rooms are open at 6.00 a.m. and are finally closed at 6.30 p.m. In the afternoon for brief period, they have to go back to their respective rooms for security check. They also mention that on most of the occasions, each of these rooms is occupied by more than one convict.

121. In unit No.1 about 20-25 prisoners, in Unit No.2

about 12-15 prisoners and Unit No.3 about 8-12 prisoners are housed. When this number of prisoners on an average as disclosed on affidavit is compared with number of rooms in each unit, it is apparent that in some rooms there can not be more than one or single occupant. Respondent No.4 could have pointed out to this Court from records, number of occupants co-habiting in the room with convicts at any point of time and that has not been done. This position therefore lends credence to statement on affidavit that after 20/3/2012 the petitioners before this Court are subjected to solitary confinement. Moreover, here the fact that after judgment of Hon'ble Apex Court dismissing their appeals on 8/5/2015, they are made to suffer additional unconstitutional incarceration cannot be disputed.

122. Means of communication like telegram or express letters used years ago in Manual or Guide Lines highlight the need of utmost speed & hence use of fastest mode of communication then available. In 21st

century, it has to be E-mail, Video conferencing, Fax or Telephone/ mobile. Not employing these devices in digital era would be to deliberately delay the exercise or to derail it. It would be an instance of avoidable delay.

123. Here we have to consider the rights of a convict to be hanged & he is not concerned with the constitutional functionary which has caused delay or contributed to it. When the protection accorded by Art. 21 of the Constitution of India is at stake, the Executive, Court of Law or the Governor/President stand at same pedestal. Shatrughan Chauhan (supra) lays down that the unconstitutionality of the additional period of incarceration is itself inexorable & must not be treated as dispensable through a judicial decision. Thus we find that undue or avoidable delay in execution of death penalty by any arm of the State would be against his fundamental right. Extra or additional punishment resulting from avoidable delay is unconstitutional in all circumstances & contingencies. Quantum or period

thereof is also not material. Moreover the convicts before us have been undergoing solitary confinement also from 20/3/2012.

124. Taking over all view of the matter we find convicts before us entitled to relief of commutation of their respective death penalties. We, in this situation commute their death sentence to life imprisonment for period of 35 years including the period already put in by them. Death warrants issued in their matters on 10/4/2019 are quashed and set aside.

125. Writ Petitions are accordingly partly allowed and disposed of.

126. Parties to act on authenticated copy of this Judgment.

(MRS. SWAPNA S. JOSHI,J.) (B.P. DHARMADHIKARI,J.)