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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 02.02.2020

Pronounced on: 05.02.2020

+ ***CRL.REV.P. 104/2020 with CRL.M.A. 2478/2020***

UNION OF INDIA & ANR.

..... Petitioners

Through: Mr.Tushar Mehta, Solicitor General
with Ms.Maninder Acharya, ASG
with Mr.Amit Mahajan, Ms.Swati
Ghildiyal & Mr.Viplav Acharya,
Advs. for UOI.
Mr.Jitendra Kr. Jha, Adv .with
Ms.Seema Kushwaha, Adv. for
Victim.

versus

VINAY SHARMA & ORS.

..... Respondents

Through: Dr. A.P. Singh, Ms. Geeta, Mr. V.P.
Singh, Ms. Pratima Rani, Ms. .Richa
Singh, Advocates for R-1
Mr.Kirtiman Singh, CGSC with
Mr. Rohan Anand and Mr. Waize Ali
Noor, Advs. for R-2.

+ ***CRL.REV.P. 105/2020 and CRL.M.A. 2480/2020***

UNION OF INDIA & ANR.

..... Petitioners

Through: Mr.Tushar Mehta, Solicitor General
with Ms.Maninder Acharya, ASG
with Mr.Amit Mahajan, Ms.Swati
Ghildiyal & Mr.Viplav Acharya,
Mr. Krishnesh Bapat and Mr. Shikhar
Kishore, Advs. for UOI.
Mr.Jitendra Kr. Jha, Adv. with
Ms.Seema Kushwaha, Adv. for
Victim.

versus

AKSHAY KUMAR SINGH & ORS. Respondents

Through: Dr. A.P. Singh, Ms. Geeta, Mr. V.P. Singh, Ms. Pratima Rani, Ms. .Richa Singh, Advocates for R-1 and 2
Mr. Kirtiman Singh, CGSC with
Mr. Rohan Anand and Mr. Waize Ali Noor, Advs. for R-3.

+ ***CRL.REV.P. 106/2020 and CRL.M.A. 2482/2020***

UNION OF INDIA & ANR. Petitioners

Through: Mr.Tushar Mehta, Solicitor General with Ms.Maninder Acharya, ASG with Mr.Amit Mahajan, Ms.Swati Ghildiyal & Mr.Viplav Acharya, Mr. Krishnesh Bapat and Mr. Shikhar Kishore, Advs. for UOI. Advs. for UOI.
Mr.Jitendra Kr. Jha, Adv .with
Ms.Seema Kushwaha, Adv. for Victim.

Versus

MUKESH & ORS. Respondents

Through: Ms. Rebecca M. John, Senior Advocate with Ms. Vrinda Grover, Mr. Harsh Bora, Mr. Soutik Banerjee, Mr. Maulshree Pathak, Ms. Praavita Kashyap, Mr. Siddhartha, Ms. Payoshi, Ms. Megha Bahl and Mr. Aakarsh Kamra, Advs. for R-1
Mr.Kirtiman Singh, CGSC with Rohan Anand and Mr. Waize Ali Noor, Advs. for R-2 and 3.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. These criminal revision petitions have been filed under section 397 read with section 482 of the Code of Criminal Procedure, for setting aside the common order dated 31.01.2020 passed by learned Additional Sessions Judge, Patiala House Court, New Delhi in Sessions Case no.114/2013.
2. The Petitioner department-Ministry of Home Affairs ("*MHA*") is the Nodal Agency to maintain law and order in the State of Delhi. The Delhi Police comes under the administration control of Lieutenant Governor of Delhi. The present case was investigated and prosecuted by the Delhi Police and is represented in the present petition through Lieutenant Governor of Delhi.
3. By way of the impugned order, the Ld. ASJ has postponed the execution of death warrant dated 17.01.2020 issued against the Respondents/convicts namely Akshay Kumar Singh, Pawan Gupta, Mukesh and Vinay Sharma, in Sessions Case No.114/2013.
4. Mr.Tushar Mehta, learned Solicitor General of India has submitted that Ld. ASJ acted beyond its jurisdiction in postponing the death warrants issued against the said four death convicts and more specifically against the

convict-Mukesh, whose mercy petition has already been rejected by the Hon'ble President of India on 17.01.2020.

5. On 13.09.2013 death sentence was awarded against the convicts mentioned above by learned ASJ, Patiala House Courts, New Delhi (hereinafter referred as the "*Ld. Trial Court*") in FIR No.413/2012, U/s 365/366/376(2)(G)/377/302/386/396 IPC r/w Section 397/201/412 r/w 120B IPC in Sessions Case No. 114/2013 also known as the gruesome "*Nirbhaya Rape case*".

6. On 13.03.2014, the aforesaid order of conviction and death sentence was confirmed by this Court in Criminal Appeal No. 1398/2013 filed by the convict Pawan Gupta & Crl. Appeal No. 1414/2013 filed by the other three convicts and thereafter confirmed by the Supreme Court vide common judgment and order dated 05.05.2017.

7. Learned Solicitor General further submitted that considering the evidence including CDR's, it is clear that there was a meeting of mind before the accused / convicts embarked on their spree of crime on that fateful evening. There was a clear meeting of mind with relation to the 2 incidents namely:

(i) incident relating to PW-82 Ram Adhar;

(ii) incident relating to the Complainant and the deceased.

All the Respondents were complicit in the act of abducting the victims by deceit, robbing, causing injuries, act of pinning the Complainant while others took turn in committing rape/unnatural sex, while one continuously drove the bus, throwing the victims out of the moving bus, attempt to run over them, sharing booty and destroying the evidence. The acts of all the convicts thoroughly show an illegal agreement between them to commit such illegal acts and they had knowledge of the same.

8. Undisputed facts are that the convict Mukesh filed review petition of order dated 05.05.2017 passed by the Supreme Court on 06.11.2017 (after 186 days) and the same was dismissed on 09.07.2018. Thereafter, on 09.01.2020, he filed curative petition (after 550 days) and the same was also dismissed on 14.01.2020. Thereafter, he filed a mercy petition under Article 72 of the Constitution of India before the Hon'ble President of India on 14.01.2020 and the same was rejected on 17.01.2020. Thereafter, above-named convict challenged the order dated 17.01.2020 passed by Hon'ble President of India under Article 32 of Constitution of India on 28.01.2020 and the same was rejected by the Supreme Court on 29.01.2020.

9. In case of Akshay Kumar Singh, he filed review petition of order dated 05.05.2017 on 10.12.2019 (after 950 days) before the Supreme Court and the same was dismissed vide order dated 18.12.2019. Thereafter, he filed curative petition on 28.01.2020 (after 42 days) and the same was dismissed on 30.01.2020. Thereafter on 31.01.2020, he filed mercy petition under Article 72 of Constitution of India before the Hon'ble President of India, however, till date, the said petition is pending for decision.

10. As far as the convict Vinay Kumar is concerned, he filed review petition before the Supreme Court on 15.12.2017 (after 225 days) and the same was dismissed vide order dated 09.07.2018. Thereafter, on 08.01.2020, he filed curative petition (after 549 days), however, same was dismissed on 14.01.2020. Thereafter, he filed mercy petition before the Hon'ble President of India on 29.01.2020 and the same was rejected on 01.02.2020.

11. As far as the convict - Pawan Gupta is concerned, he filed review petition before the Supreme Court on 15.12.2017 (after 225 days) and the same was dismissed vide order dated 09.07.2018. Thereafter, till date, neither curative petition nor mercy petition has been filed by the said convict

under Article 72 of the Constitution of India before the Hon'ble President of India.

12. It is pertinent to mention here that above-named Pawan Gupta's claim of juvenility was dismissed by the Trial Court on 21.12.2018 and revision petition was dismissed on 19.12.2019 by this court. Thereafter, SLP was dismissed on 20.01.2020 and review petition of the same was also dismissed by the Supreme Court vide its order dated 31.01.2020.

13. Learned Solicitor General submits that on 07.01.2020, in the failure of filing of any curative petition or a mercy petition, Ld. ASJ, Patiala House Courts, New Delhi, issued a warrant of execution of sentence of death ("*1st death warrant*") against all the four death convicts fixing the date & time of execution as 22.01.2020 at 7:00 am. Despite death warrants being issued against all the four convicts, one of the convicts- Vinay Sharma, presumably, with a view to further delay the process of execution of sentence filed a Curative Petition (Crl.) vide Diary No. 994 of 2020 before the Supreme Court at a belated stage. Co-convict Mukesh also filed a Curative Petition (Crl.) vide Diary No.1177 of 2020 before the Supreme Court on 09.01.2020. However, vide a detailed order dated 14.01.2020, the

Supreme Court dismissed both the aforesaid curative petitions filed by co-convict Vinay Sharma and Mukesh.

14. On dismissal of his Curative Petition, convict Mukesh, on 14.01.2020 filed a mercy petition before the Hon'ble President of India, which was immediately forwarded to Home Department, Govt. of NCT of Delhi and co-convict-Mukesh through his counsel Ms. Vrinda Grover, Advocate, also filed an application before Ld. ASJ, for setting aside the date of execution. It further sought a detailed report from Prison Department, Delhi, in view of Delhi Prison Rules, 2018. The said application was adjourned to 17.01.2020 at 3:00 pm. The Home Department, Govt. of NCT of Delhi, vide letter dated 17.01.2020 of MHA, Govt. of India, informed the Prison Department, Tihar Jail that *"the Hon'ble President of India in exercise of the powers under Article 72 of Constitution of India has REJECTED the mercy petition of the convict Mukesh Kumar s/o Shri Mange Lal presently confined at Tihar Central Jail, Delhi."* It further stated that the decision of the Hon'ble President of India on his mercy petition shall be conveyed to the co-convict Mukesh Kumar. Accordingly, the aforesaid decision was duly served to above-named convict. On the same day i.e. 17.01.2020 a report was also submitted by jail authorities before the Trial Court informing about the

rejection of the mercy petition of the co-convict Mukesh Kumar. Considering the aforesaid, the Trial Court, vide order dated 17.01.2020 (“*2nd death warrants*”) revised and fixed the date of execution of sentence of death in respect of all the four convicts on 01.02.2020 at 6:00 a.m. Pertinently, the aforesaid order was served on all the convicts. Despite fresh death warrants being issued against all the four convicts, convict-Pawan Gupta filed SLP(Crl.) No. 547/2020 before the Supreme Court challenging the dismissal of his revision petition by this Court vide order dated 19.12.2019 with respect to his plea of juvenility. However, the same was also rejected by the Supreme Court vide order dated 20.1.2020 stating that the same issue can't be raised repeatedly.

15. Being aggrieved by the dismissal of his mercy petition, the co-convict-Mukesh, on 27.01.2020, challenged the same in Writ Petition (Crl.) vide Diary No.3334/2020 under Article 32 of the Constitution of India, before the Supreme Court, however, the same was also dismissed vide order dated 29.01.2020.

16. Learned Solicitor General further submitted that while the death warrants are pending execution, Convict-Akshay Kumar Singh, on

29.01.2020 filed a Curative Petition No 10-11/2020 before the Supreme Court, which was dismissed on 30.01.2020.

17. Being aggrieved by dismissal of his SLP(Crl.) No. 547/2020 with respect to his plea of juvenility, Convict-Pawan Gupta filed a Review petition vide Diary No. 59/2020 before the Supreme Court, however, the same was also dismissed vide order dated 31.01.2020.

18. Learned Solicitor General further submits that despite death warrants having been issued on 17.01.2020 and sufficient time being available to all the convicts to avail all the possible legal remedies available to them, all the four convicts, in order to delay the process of execution of death sentence filed an application before the Trial Court seeking stay on the execution of death warrants dated 17.01.2020, inter-alia on the ground that mercy petition of one of co-convicts namely Vinay Sharma has been filed on 29.01.2020 and the same is pending adjudication. However, the Trial Court vide impugned common order dated 31.01.2020, in the light of pendency of mercy petition of one of the co-convicts namely Vinay Sharma, stayed the execution of death warrants qua all the other convicts as well, including the co-convict-Mukesh, whose mercy petition has already been rejected by the Hon'ble President of India.

19. He further submitted that the impugned common order dated 31.01.2020 is passed without jurisdiction, based on the wrong interpretation of Rule 836 read with Rules 850 and 854 of the Delhi Prison Rules, 2018 and the same deserves to be set aside.

20. Mr.Tushar Mehta further submitted that the Trial Court erred in law in holding that Rule 840 of the Prison Rules, does not confer any power on the executive authority to cause the order of the death sentence to be carried out. Rule 837 of the Prison Rules, provides that immediately on receipt of intimation of the confirmation by the High Court of a sentence of death on a prisoner or of the dismissal by the Supreme Court of the appeal or the application for special leave to appeal, in case the prisoner sentenced to death has made no previous petition for mercy, the Jail Superintendent shall forthwith inform him (the prisoner sentenced to death) that if he desires to submit a petition for mercy, in writing within seven days of such intimation. In case, the prisoner sentenced to death submits a petition within the period of seven days prescribed above, Rule 839 provides that the Superintendent of the Jail shall forthwith dispatch it to the Home Secretary to the Government of NCT of Delhi, and stay the execution proceedings. Rule 840, however, provides that in case the mercy petition is filed beyond the period

of seven days, the Superintendent of the Jail shall at once forward it to the Government by fax/letter/e-mail/special messenger and at the same time the substance of it, requesting orders whether the execution should be postponed and stating that pending a reply, the sentence will not be carried out. It further provides that if such petition is received by the Superintendent later than noon on the day preceding that fixed for the execution, he shall at once forward it to the Government of NCT of Delhi and at the same time by fax/email/special messenger letter inform the substance of it, giving the date of execution and stating that the sentence will be carried out unless orders to the contrary are received. Rule 840, therefore, categorically empowers the State Government to consider "*whether the execution should be postponed*" in case the mercy petition is filed beyond the stipulated period of seven days.

21. He further submitted that the Trial Court erred in law in completely misconstruing Rule 836 r/w Rule 850 and 854 of the Prison Rules in holding that the execution of sentence shall in all cases be postponed pending receipt of orders of the Hon'ble President of India under Article 72 of the Constitution of India.

22. Rules 836 of the Prison Rules is reproduced herein for ready reference:

“836. Whenever a sentence of death has been passed by any Court or Tribunal, the sentence shall not be executed until after the dismissal of the appeal or of the application or, in case no such appeal has been preferred, or no such application has been made, until after the expiry of the period allowed for an appeal or for making of such application:

Provided that, if a petition for mercy has been submitted by or on behalf of a prisoner sentenced to death, the execution of the sentence shall further be postponed, pending the orders of the President thereon:

Provided further that, if the sentence of death has been passed on more than one person in the same case, and if an appeal or an application is made by or on behalf of only one or more but not all of them the execution of the sentence shall be postponed in the case of all such persons (prisoners sentenced to death) and not only in the case of the person or persons by whom, or on whose behalf, the appeal or the application is made.”

23. Rule 854 of the prison Rules is pari-materia with Rule 836. The same is also reproduced hereunder:

“Whenever a sentence of death has been passed by any Court or Tribunal, the sentence shall not be executed until after the dismissal of the appeal to the Supreme Court or of the application for special leave to appeal to the Supreme Court or, in case no such appeal has been preferred or no such application has been lodged, until

after the expiry of the period allowed for an appeal to the Supreme Court.

Provide that if a petition for mercy has been submitted by or on behalf of the prisoner sentenced to death, execution of the sentence shall further be postponed pending, the orders of the President thereon.

Note: If the sentence of death has been passed on more than one person in the same case and if an appeal to higher Court or an application for special leave to appeal to the Supreme Court is lodged by, or on behalf of, only one or more but not all of them the execution of the sentence shall be postponed in the case of all such persons and not only in the case of the person or persons by whom, or on whose behalf, the appeal or the application is lodged.”

24. Learned Solicitor further submitted that a joint reading of the aforesaid provisions makes it clear that it is only in case of pendency of the "mercy petition" of the concerned prisoner/convict, that execution of his/her death warrant would remain stayed during the aforesaid period. Pendency of the mercy petition of the other co-convicts would have no bearing on the mercy petition of the concerned prisoner/convict, as the same is decided in the peculiar facts and circumstance of the concerned prisoner/convict.

25. He also submitted that the Trial Court erred in law in holding that word "Application" as mentioned in Rule 836 is a "generic term" and would include the word "Petition" also and thus, pendency of even mercy petition of one of the convicts would automatically stay the execution of the death

sentence qua all the other co convicts. Rules 836 and 854 categorically provides that the sentence shall not be executed until after the dismissal of the "*appeal*" i.e. a statutory appeal or of the "*application*" seeking "*leave to appeal*" i.e. an SLP before the Supreme Court. The second proviso to Rules 836 and *Note* appended to Rule 854 further provides that if the sentence of death has been passed on more than one person in the same case, and if an "*appeal*" or an "*application*" is made by or on behalf of only one or more but not all of them, the execution of the sentence shall be postponed in the case of all such persons (prisoner sentenced to deaths). The aforesaid provision makes a reference to the pendency of proceedings only on the judicial side and not with respect to a mercy petition which is on the executive side. Pendency of proceedings on the judicial side qua any of the co-convicts in the same case is a legitimate benefit given to the other co-convicts with respect to keeping their execution in abeyance till such time, however, with the rejection of such criminal appeal/application seeking leave to appeal of the co-convict on the judicial side, every convict is to be heard on his/her own facts and circumstances with respect to their mercy petitions.

26. Learned Solicitor General submitted that Ld. Trial Court, while postponing the execution of death warrants *"till further orders"*, failed to consider that the said four convicts have been found to be guilty of a horrible, dreadful, cruel, abominable, ghastly, gruesome and heinous offence of rape coupled with a bone chilling murder of a young girl which shocked the conscience of the entire nation. The said four convicts by filing their respective review petitions or curative petitions or mercy petitions, one after another and that too at such a belated stage i.e. after the issuance of death warrants are in fact being permitted to play with the majesty of law leading to unnecessarily prolonging the execution of the death sentence awarded to them in accordance with the law, thereby taking the judicial process for a ride. Ld. Trial Court failed to appreciate that there being multiple convicts in the present case, considering the chronology of events, it appears that the convicts are deliberately filling their respective Review Petition/curative petition/mercy petition, or any other judicial proceedings one after another, right at the fag end of execution of death warrants causing delay in the execution of the sentence of other co-convict, whose mercy petition has already been rejected.

27. Learned Solicitor General further submitted that Ld. Trial Court failed to appreciate Delhi Prison Rules, 2018 which do not prohibit execution of death sentence of co-convicts, one by one, on the rejection of their respective mercy petitions. However, the impugned order deferring the execution of the death sentence of the said four convicts "*till further orders*", specifically when the mercy petition of the convict -Mukesh has also been rejected has resulted in a grave miscarriage of justice not only to the victim's family but has also shaken the confidence of the society as a whole on the judicial process, while the Respondent/convicts are taking judicial process for a ride.

28. Learned Solicitor General submits that since no other alternate and efficacious remedy is available to the Petitioner, Petitioner is approaching this Court to set aside the Impugned Order dated 31.01.2020 passed by the Ld. ASJ in Sessions Case No. 114/2013.

29. On the other hand, Ms. Rebecca John, learned Senior Counsel appearing on behalf of convict – Mukesh and learned counsel Dr. A.P. Singh appearing on behalf of the remaining convicts, namely, Akshay Kumar Singh, Vinay Sharma, Pawan Gupta have drawn attention of this Court to the Writ Petition (Crl.) No. 110/2020 titled "***Mukesh Kumar vs. Union of***

India and Others”, challenging the order dated 07.01.2020 passed by Ld. Trial Court, whereby 22.01.2020 has been fixed as the date for execution of the convicts. While learned Senior Counsel for the above named convict stated that the order dated 07.01.2020 has not been impugned, only the date of execution i.e. 22.01.2020 has been sought to be set aside, whereas learned counsel for Union of India and Others stated that the said petition was premature. Accordingly, Division Bench of this Court was of the view that there is no error in the order dated 07.01.2020 as till the date the impugned order was passed, the convict – Mukesh had neither filed a curative nor mercy petition. If the convict is of the view that the date of execution mentioned in the impugned order needs to be set aside in view of any subsequent event, then he must approach the Court which passed the impugned order. Division Bench further opined that once the Supreme Court has dismissed the convicts’ Criminal Appeal confirming the death sentence as well as the review and curative petitions, the convicts cannot challenge the Ld. Trial Court’s order dated 07.01.2020 fixing the date of hanging before the High Court as the said order is nothing but carrying the orders passed by the Apex Court to its logical conclusion. In the event, the convict is aggrieved by any such order, he shall have to approach the Apex Court.

At that stage, learned senior counsel for the convict stated that the convict would file an appropriate application before the trial Court bringing the subsequent events to its attention. With the aforesaid liberty and observations, the Criminal Writ Petition was disposed of.

30. Ms. Rebecca, learned Senior Counsel appearing on behalf of the convict – Mukesh Kumar submits that in view of order dated 15.01.2020 passed by Division Bench of this Court in W.P.(Crl.) No. 110/2020, the Petitioner herein (Union of India) has no locus as Petitioner has never been a party to the proceedings before the Trial Court, High Court and the Supreme Court. Thus, the present petitions deserve to be dismissed.

31. Further submits, *Rule VIII A of Procedure Regarding Petitions for Mercy in Death Sentence Cases issued by Ministry of Home Affairs, Government of India*, provides that if there is a change of circumstances or if any new material is available in favour of the convict, the condemned person himself or anyone on his behalf may make a fresh application to the President for reconsideration of the earlier order. Once the President has rejected a mercy petition, all future applications in this behalf should be addressed to and would be dealt with by the President of India. Thus, the aforesaid rule does not prohibit in making even second mercy petition before

the Hon'ble President of India. Thus, the submission of learned Solicitor General that once mercy petition has been rejected, then the death warrant of the said convict can be executed, is contrary to Rule VIII (A) of the aforesaid guidelines.

32. Learned Senior counsel further submits that first death warrants were issued on 07.01.2020 to be executed on 22.01.2020. On 07.01.2020, it was informed to the convict – Mukesh that his mercy petition has been rejected by the Hon'ble President of India. Thereafter, the death warrants were directed to be executed on 01.02.2020. Thus, Union of India was not a party from 2018 to 01.01.2020 in any of the proceedings. Therefore, the present petitions deserve to be dismissed as Union of India is not a necessary party in the present petitions. She further submits that neither the Supreme Court of India nor the President of India dismissed the petition (review or curative) or mercy petition respectively on delay, however, decided on merits of each case. Moreover, the Petitioner herein, had not moved any application earlier to issue death warrants, therefore, what is the occasion or hurry in filing the present petition, when the convicts are taking shelter of proceedings available under the law.

33. Even otherwise, order dated 17.01.2020 has not been challenged by anybody and mercy petition was dismissed on 17.01.2020, therefore, 14 days are required to be given to the convicts. On 31.01.2020, when order was to be passed, mercy petition filed on 29.01.2020 by convict Vinay was rejected on 01.02.2020. Convict Akshay filed mercy petition on 31.01.2020 and same is still pending with the Hon'ble President of India. Thus, convict Vinay has to be given 14 days from 01.02.2020. The fate of the convicts shall be decided as and when Akshay's mercy petition is either accepted or rejected by the Hon'ble President of India. She further submits that in ***Crl. M.P. No. 265/2020 in W.P. (Crl.) No. 55/2013*** titled as ***Shatrughan Chauhan and Anr. Vs. Union of India and Others***, it was submitted that in case of multiple accused being awarded death penalty in the same case, it often happens that one accused files the review petition/mercy petition which gets rejected and the other co-convicts are either advised to or independently choose not to file any further application or initiate other proceedings. This is for the simple reason that though many jail manuals or prison rules do not prohibit execution of death sentence of co-convicts, one by one, there may be some States where the execution of death sentence with regard to all the co-convicts may be simultaneous. It was further

submitted that the application is being filed bonafide praying before the Supreme Court to lay down further guidelines without prejudice to implementation of execution of death sentence in all pending cases in the country in accordance with the law. By prayer (iii) in the said application, the applicant sought to mandate all the competent courts, State Governments, prison authorities in the country to issue death warrant of a convict within seven days of the rejection of his mercy petition and to execute death sentence within seven days thereafter irrespective of the stage of review petition/curative petition/mercy petition of his co-convicts.

34. Ms.Rebecca John further submitted that to the prayer mentioned above, the Supreme Court has already issued notice. Thus, the issue raised in the present petition is pending adjudication. Hence, there was no necessity to challenge the impugned order before this Court.

35. In case of *Sher Singh &Ors. vs. State of Punjab: (1983) 2 SCC 344*, the Supreme Court held that the true implication of Article 21 of the Constitution and to that extent, they express their broad and respectful agreement with their learned Brethren in their visualisation of the meaning of that article. The horizons of Article 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so

long shall it be the duty and endeavour of the Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Article 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable.

36. Learned senior counsel submits that no one has moved any application to expedite the proceedings including the death warrants to be executed till filing of the present petitions.

37. I have heard learned counsel for the parties at length and perused the material available on record.

38. In the case of *Kehar Singh &Anr. vs. Union of India &Anr.: (1989) 1 SCC 204*, the Constitution Bench of the Supreme Court considered whether the President can, in exercise of the power under Article 72 of the Constitution, scrutinise the evidence on record and come to a conclusion different than the one arrived at by the court and had held that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and

come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The president acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. Accordingly, opined that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by the Court.

39. In case of *Shatrughan Chauhan (supra)*, the Supreme Court held that both the Articles 72 and 161 repose the power of the people in the

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

40. In paragraph 243 of the judgment, the Supreme Court held that certainly, a series of Constitution Benches have upheld the Constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the Constitutional mandate and not in violation of the constitutional principles.

41. In case of *Sher Singh (supra)*, it is held that Article 21 stands like a sentinel over human misery, degradation and oppression. It reverberates

through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence must be just, fair and reasonable. So even if the question of sentence is finally settled by the Supreme Court, Article 21 will not cease to operate at subsequent stages, even though sentence of death was justified, the delay in its execution in the case may not be justified, by reason of unduly long lapse of time since the confirmation of that sentence by the court. The inordinate delay in the execution of the sentence is one circumstance which has to be taken into account while deciding whether the death sentence ought to be allowed to be executed in a given case. The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional, and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman and degrading punishment in circumstances of a given case. In appropriate cases, therefore, the Supreme Court, either while disposing of Special Leave Petitions and Appeals or while dealing with Writ Petitions filed after the unsuccessful termination of the normal processes of litigation, has jurisdiction to exercise its power to direct *ex debito justitiae*, then the death sentence shall not be executed by reasons of supervening circumstances.

42. In above cited case, the sentence of death was imposed upon the Petitioners by learned Sessions Judge, on 26.11.1977, it was upheld by the High Court on 18.07.1978 and the Special Leave Petition filed by the Petitioners was dismissed by the Supreme Court on 05.03.1979. The matter was kept on pending in the Supreme Court since then, in one form or another, by reason of some proceeding or the other. The last of the writ Petitions filed by the Petitioners was dismissed by the Supreme Court on 24.08.1981.

43. The Petitioners therein, Sher Singh, Surjit Singh and Kuldeep Singh were convicted under section 302 read with 34 of the IPC and were sentenced to death by the learned Sessions Judge, Sangrur, on 26.11.1977. By a judgment dated 18.07.1978, the High Court of Punjab and Haryana reduced the sentence imposed upon Kuldeep Singh to life imprisonment but upheld the sentence of death imposed upon the Petitioners. Special Leave Petition (Crl.) No. 1711 of 1978 which was filed by the Petitioners against the judgment of the High Court was dismissed by the Supreme Court on 05.03.1979. The Petitioners then filed a Writ Petition in Supreme Court challenging the validity of section 302 of the IPC. That petition was dismissed on 20.01.1981. Review Petition No. 99 of 1981 filed by the

Petitioners against the dismissal of their S.L.P. was dismissed on 27.03.1981. The Petitioners filed yet another petition under Article 32 of the Constitution, this time challenging the validity of section 34 of the IPC. That petition was dismissed on 24.08.1981. After failing in these seemingly inexhaustible series of proceedings, the Petitioners filed two writ petitions on 02.03.1983, basing themselves on the decision rendered by Justice Chinnappa Reddy and Justice R.B. Misra on 16.02.1983 in the case of ***T.V. Vatheeswaran vs. The State of Tamil Nadu: 1983 AIR 361.***

44. In ***Piaradusadh vs. Emperor***, it was urged before the Federal Court that in England, when cases in which death sentence has been imposed are allowed to be taken to the House of Lords on account of some important legal point, the consequential delay in finally disposing of the case was treated as a ground for the commutation of the death sentence and that a similar course might well be adopted in India in cases in which substantial questions of law as to the interpretation of the Constitution Act had to be considered by the Federal Court. This argument was rejected on the ground that these were matters primarily for the consideration of the executive. It is further observed that in Case No. XLVII, which was one of the cases before the Federal Court, the appellant was convicted by a Special Judge for the

offence of murder and was sentenced to death on 30.09.1942. The Allahabad High Court confirmed the sentence of death but the Federal Court commuted that sentence to transportation of life. As is evident from the parenthetical portion of the passage extracted above, this was done "*largely for other reasons*", that is to say, for reasons other than that a long delay had intervened after the death sentence was imposed. The Federal Court commuted the death sentence on the ground that the sentence of transportation for life was more appropriate in the circumstances of the case. They added that the appellant was awaiting the execution of his death sentence for over a year.

45. In the case in hand, it would be unjust to allow the death sentence to be executed qua convict Mukesh, however, in case, if the mercy petition of similarly placed convict Akshay Kumar Singh is considered by the Hon'ble President of India, the change of circumstances would entitle convict Mukesh to move a fresh mercy petition.

46. As per *Rule VIII (A) of Instructions regarding procedure to be observed by the States for dealing with petitions for mercy petitions issued by Ministry of Home Affairs* to highlight the points that even if the Hon'ble

President of India has rejected the mercy petition, a fresh mercy petition can be moved due to change of circumstances.

47. Rule 834 of Delhi Prison Rules 2018 reads as under:

“Immediately on receipt of a warrant of execution from the convicting court, consequent upon the confirmation by the High Court of the sentence of death, the Superintendent shall inform the prisoner sentenced to death that if he wishes to appeal to the Supreme Court or to make an application for special leave to appeal to Supreme Court under any of the relevant provisions of the Constitution of India (hereinafter referred to as “appeal and application” respectively), he may do so within period prescribed by the Supreme Court Rules.”

48. In the said rule, “appeal” to the Supreme Court or an “application” for Special Leave to Appeal to the Supreme Court under any of the relevant provisions of the Constitution of India has been mentioned. Hence, the rule confines only to “appeal” and “application”.

49. Rule 836 of the Delhi Prison Rules, 2018 reads as under:

“Whenever a sentence of death has been passed by any Court or Tribunal, the sentence shall not be executed until after the dismissal of the appeal or of the application or, in case no such appeal has been preferred, or no such application has been made, until after the expiry of the period allowed for an appeal or for making of such application:

Provided that, if a petition for mercy has been submitted by or on behalf of a prisoner sentenced to death, the

execution of the sentence shall further be postponed, pending the orders of the President thereon:

Provided further that, if the sentence of death has been passed on more than one person in the same case, and if an appeal or an application is made by or on behalf of only one or more but not all of them the execution of the sentence shall be postponed in the case of all such persons (prisoner sentenced to deaths) and not only in the case of the person or persons by whom, or on whose behalf, the appeal or the application is made.”

50. As per the said provision, if a petition for mercy has been submitted by him or on behalf of “a Prisoner” sentenced to death, the execution of the sentence shall further be postponed, pending the orders of the President thereon. Further provided that if the sentence of death has been passed for more than one person in the same case, and if an appeal or an application is made by or on behalf of only one or more but not all of them the execution of the sentence shall be postponed in the case of all such persons (prisoner sentenced to deaths) and not only in the case of the person or persons by whom, or on whose behalf, the appeal or the application is made. Thus, it is clear that if the appeal or application is pending of one of the convicts, the death sentence shall be postponed pending the order of the appeal/application but the sentence of all the convicts shall be postponed. In first proviso, it is mentioned that if a petition for mercy has been submitted,

the execution of the sentence shall further be postponed pending the orders of the President thereon. In said proviso, it is nowhere mentioned that if mercy petition of one convict is pending, the death sentence of other co-convicts shall be executed. Thus, I do not agree with the opinion of the learned Trial Court that the word “*application*” is a generic term which includes petition also. In Rule 834 of Delhi Prison Rules, 2018, “*appeal*” and “*application*” are specifically mentioned but that does not include any petition other than that petition pending before the Supreme Court.

51. It is pertinent to cite the case of ***Harbans Singh vs. State of Uttar Pradesh & Ors.: (1982) 2 SCC 101***, therein the Petitioner and three other persons i.e. Mohinder Singh, Kashmira Singh and Jeeta Singh were involved in the murder of Jindi Singh, Surjeet Singh, Bira Singh and Gurmeet Singh. Mohinder Singh died in an “*encounter*” with the police. The Petitioner and the other two accused Kashmira Singh and Jeeta Singh, were committed to stand their trial for the murder of the aforesaid four persons. By a judgment dated 01.05.1975 the learned Additional Sessions Judge, Pilibhit, convicted all of them for the murder of Jindi Singh, Surjeet Singh and Bira Singh and sentenced them to death. On 20.10.1975, the High Court of Allahabad affirmed the judgment of the Trial Court in Criminal Appeal No. 1080 of

1975. Jeeta Singh filed Special Leave Petition No. 343 of 1976 in the Supreme Court which was dismissed on 15.04.1976. Kashmira Singh filed Special Leave Petition No. 104 of 1976 from jail and obtained leave on the question of sentence. By an order dated 10.04.1977 his appeal (No. 172 of 1977) was allowed by a Bench consisting of their Lordships Bhagwati and Fazal Ali who commuted his sentence of death into imprisonment for life. The Petitioner, Harbans Singh, filed Special Leave Petition No. 658 of 1978 from jail which was dismissed by Justice Sarkaria and Justice Shinghal, on 16.10.1978. His Review Petition (No. 140/79) was dismissed by Justice Sarkaria and Justice A.P. Sen, on 09.05.1980. Though the Registry of the Supreme Court had mentioned in its Office Report that Kashmira Singh's death sentence was already commuted, that fact was not brought to the notice of the Court specifically when the Petitioner's Special Leave Petition and his Review Petition were dismissed. The Petitioner had filed a petition to the President of India for commutation of his sentence, which was dismissed on 22.08.1981. Upon the dismissal of that petition, the execution of the death sentence imposed upon the Petitioner was fixed for 06.10.1981, whereupon he filed this petition before the Supreme Court.

52. However, the Supreme Court observed that the course which this case has taken makes a sad reading. Three persons were sentenced to death by a common judgment and, regrettably, each one has eventually met with a different fate. One of those three persons, Jeeta Singh, who did not file any Review Petition or Writ Petition in the Supreme Court was executed on 06.10.1981. The other person, Kashmira Singh, succeeded in having his death sentence commuted into life imprisonment. The Petitioner was to be executed on the same day on which Jeeta Singh was executed but, fortunately, he filed this Writ Petition on which the Supreme Court passed an order staying the execution of his death sentence.

53. As stated above, the Petitioner and the two other co-accused were sentenced to death by a common judgment. The facts from which it is clear that no distinction at all can be made between the part played by Kashmira Singh on the one hand and the Petitioner on the other. Since Kashmira Singh's death sentence was commuted by the Supreme Court, it would be unjust to confirm the death sentence imposed upon the Petitioner. That will involve the Court as well as the authorities concerned in the violation of rudimentary norms governing the administration of justice.

54. Further observed that it is unfortunate that Jeeta Singh could not get the benefit of the commutation of Kashmira Singh's sentence. Were he to approach the Court like the Petitioner, the sentence imposed upon him would have been commuted into life imprisonment because no distinction could have been made between his case and that of Kashmira Singh whose sentence was commuted prior to the execution of Jeeta Singh.

55. Accordingly observed, in view of the background of the case, it would not be wrong if they were themselves to commute the sentence of death imposed upon the Petitioner to imprisonment for life. But in the interest of comity between the powers of the Supreme Court and the powers of the Hon'ble President of India, it will be more in the fitness of things if they were to recommend that the Hon'ble President of India may be so good as to exercise his power under Article 72 of the Constitution to commute the death sentence imposed upon the Petitioner into imprisonment for life. This is so because the President of India has already considered the mercy petition of the Petitioner once and has rejected it. Therefore, their Lordships recommended that for reasons aforesaid, which could not have been before the President of India when he rejected the mercy petition, he may commute the death sentence imposed upon the Petitioner.

56. It is further observed that the fate of Jeeta Singh has a posthumous moral to tell. He cannot profit by the direction which their Lordships propose to give because he is now beyond the processes of human tribunals. Accordingly, it was directed that prior to the actual execution of any death sentence, the Jail Superintendent should ascertain personally whether the sentence of death imposed upon any of the co-accused of the prisoner who is due to be hanged, has been commuted. If it has been commuted, the Superintendent should apprise the superior authorities of the matter, who, in turn, must take prompt steps for bringing the matter to the notice of the Court concerned.

57. In Para 18 of the afore cited judgment, it is observed that it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the Petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the co-accused is spared. The case of the Petitioner Harbans Singh appears, indeed, to be unfortunate, as neither in his special leave petition and the review petition in the Supreme Court nor in his mercy petition to the President of India, this all important and significant fact that the life sentence imposed on

his co-accused in respect of the very same offence has been commuted to one of life imprisonment has been mentioned. Had this fact been brought to the notice of the Court at the time when the Court dealt with the special leave petition of the Petitioner or even his review petition, the Supreme Court would have commuted his death sentence to one of life imprisonment. For the same offence and for the same kind of involvement, responsibility and complicity, capital punishment on one and life imprisonment on the other would never have been just. Had the Petitioner in his mercy petition to the President of India made any mention of this fact of commutation of death sentence to one of life imprisonment on his co-accused in respect of the very same offence, the President might have been inclined to take a different view on his petition.

58. The Petitioner department-Ministry of Home Affairs("MHA") is the Nodal Agency to maintain law and order in the State of Delhi. The Delhi Police comes under the administrative control of Lieutenant Governor of Delhi. The present case was investigated and prosecuted by the Delhi Police and is represented in the present petition through Lieutenant Governor of Delhi. Thus, in my considered view, the Petitioner herein is competent to file the present petitions.

59. As per Rule 834 and 836 of the Delhi Prison Rules, 2018, if a petition for mercy has been submitted by him or on behalf of “*a Prisoner*” sentenced to death, the execution of the sentence shall further be postponed, pending the orders of the President thereon. Further provided that if the sentence of death has been passed for more than one person in the same case, and if an appeal or an application is made by or on behalf of only one or more but not all of them the execution of the sentence shall be postponed in the case of all such persons (prisoner sentenced to deaths) and not only in the case of the person or persons by whom, or on whose behalf, the appeal or the application is made. Thus, it is clear that if the appeal or application is pending of one of the convicts, the death sentence shall be postponed pending the order of the appeal/application but the sentence of all the convicts shall be postponed. In first proviso, it is mentioned that if a petition for mercy has been submitted, the execution of the sentence shall further be postponed pending the orders of the President thereon. In said proviso, it is nowhere mentioned that if mercy petition of one convict is pending, the death sentence of other co-convicts shall be executed.

60. In Rule 834 of Delhi Prison Rules, 2018, “*appeal*” and “*application*” are specifically mentioned but that does not include any petition other than

that pending before the Supreme Court. A perusal of all relevant rules of Delhi Prison Rules make it clear that the said manual/prisoner rules have no such embargo mandating only simultaneous execution. The embargo against individual conviction is created only by the impugned order by erroneously writing the term “*appeal*” or “*application*” as including “*mercy petition*” also. The said words which are used in second proviso to Rule 836 has to be read with Rule 834 which makes it clear that the second proviso to Rule 836 can operate only during the pendency of the Special Leave Petition before the Supreme Court and not thereafter. There cannot be any other interpretation. However, any other interpretation will frustrate the very object of the sentence. Thus, I do not agree with the opinion of the learned Trial Court that the word “*application*” is a generic term which includes any type of petition also.

61. It is not in dispute that the Trial Court convicted all the accused by common judgment and was confirmed by this court vide common judgment and the Supreme Court thereafter confirmed vide common judgment. Thus, from Trial Court upto the Supreme Court, all the convicts/accused were dealt by common order and judgment.

62. It cannot be disputed that all convicts have been found to be guilty of a horrible, ghastly, gruesome and heinous offence of rape coupled with a bone chilling murder of a young girl which shocked the conscience of the society at large. However, so long as life lasts, so long shall it be the duty and endeavour of the Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Article 21 is as much relevant at the stage of execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable.

63. Therefore, it is understandable that a convict sentenced to death will take recourse to every remedy which is available to him under the law, to ask for the commutation of his sentence, even after the death sentence is finally confirmed by the Supreme Court by dismissing Special Leave Petition or Appeal. But, it is, at least relevant to consider whether the delay in the execution of the death sentence is attributable to the fact that he has resorted to a series of untenable proceedings which have the effect of defeating the ends of justice. It is not uncommon that a series of review

petitions and writ petitions are filed in the Court to challenge judgments and orders which have assumed finality, without any seeming justification.

64. In the present case, Criminal Appeals of all the convicts were dismissed by the Supreme Court on 05.05.2017. Thereafter, review petitions were filed by convicts, namely, Mukesh, Akshay, Vinay Sharma and Pawan Gupta after 186 days, 950 days, 225 days and 225 days respectively. I have no hesitation to say that after dismissal of criminal appeals on 05.05.2017 by the Supreme Court, nobody had bothered to execute the death warrants. They waited for the reasons best known to them, till convict Mukesh filed review petition before the Supreme Court on 06.11.2017 after 186 days and the same was dismissed on 09.07.2018. Thereafter convict Vinay Sharma and Pawan Gupta filed review petitions on 15.12.2017 and same were dismissed vide order dated 09.07.2018. Even thereafter, all authorities concerned were sleeping and waited till Akshay Kumar Singh filed petition, with 950 days delay, on 10.12.2019 and the same was dismissed on 18.12.2019. However, convicts are taking shelter of the Article 21 of the Constitution of India which is available to them till their last breathe.

65. In *Yakub Abdul Razak Memon vs. State of Maharashtra &Ors.*: *MANU/SC/0825/2015* it was observed by the Supreme Court that the law permits the convict to move a subsequent mercy petition even after dismissal of mercy petition case of change in circumstances.

66. Thus, convict Mukesh cannot be adversely segregated from the similarly placed convicts simply because he has been sincerely and earnestly pursuing his legal remedies.

67. Since upto the Supreme Court, their fate has been decided by a common order and judgment, therefore, in view of the facts of *Sher Singh (Supra)* discussed above, I am of the considered view that death warrants of all the convicts be executed together but not separately.

68. It cannot be disputed that the convicts have adopted all the delay tactics to frustrate the warrants. One of the convict, namely, Pawan Gupta has not filed curative petition and mercy petition, after review petition filed by him was dismissed by the Supreme Court on 09.07.2018. Therefore, in the interest of justice, I hereby direct the convicts to take steps if they wish to make any type of petition before any institutions/authorities available under law within one week from today, failing which this Court expects

from the institutions/authorities concerned to deal, as per the law applicable on delay, if any, without further delay.

69. In view of above, I find no ground to set aside the order dated 31.01.2020 as the common execution of death warrants is concerned.

70. The present petitions are, accordingly, disposed of.

CRL.M.A. 2478/2020 in CRL.REV.P. 104/2020

CRL.M.A. 2480/2020 in CRL.REV.P. 105/2020

CRL.M.A. 2482/2020 in CRL.REV.P. 106/2020

71. In view of the order passed in the present petitions, these applications have been rendered infructuous and are accordingly, disposed of.

72. Order *dasti* to counsel for the parties, under signatures of the Court Master.

(SURESH KUMAR KAIT)
JUDGE

FEBRUARY 05, 2020

PB/ab