

SHABNAM

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v.

UNION OF INDIA & ORS.

(Writ Petition (Criminal) No. 88 of 2015)

B

MAY 27, 2015

[A.K. SIKRI AND UDAY UMESH LALIT, JJ.]

Sentence/Sentencing:

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Murder case – Death sentence – Conviction and sentence upheld by Supreme Court – Within a week death warrants issued by Sessions Judge – Writ petition challenging same – Held: Death warrant was signed by the Sessions Judge in haste without exhaustion of remedies available to the convicts – This is impermissible and unwarranted.

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Death sentence – Procedure to be followed before execution of death sentence – Essential safeguards – Sufficient notice to be given to convict before issuance of death warrant – Warrant must specify exact date and time for execution – Reasonable period of time must elapse between the date of order on the execution warrant and date fixed – Copy of execution warrant to be immediately supplied to the convict – Where a convict is not in a position to avail legal assistance, legal aid must be provided.

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Rights of convicts who are imposed death penalty – Held: Convicts have judicial and administrative remedies – Right to file review petition is a valuable right given to the convicts who are imposed death penalty – Convict also has a right to file mercy petitions to the Governor of the State as well as the

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- A *President of India – Such right cannot be snatched by executing the death sentence before even giving such convicts a chance or opportunity to avail the same – For this purpose, the State has to wait for reasonable period even after such convicts fail in the review petition if they so file –*
- B *Constitution of India, 1950 – Article 21.*

Peoples' Union for Democratic Rights (PUDR) v. Union of India & Ors. PIL No. 57810 of 2014 decided on 28.01.2015; Shatrughan Chauhan v. Union of India & Ors.

- C *(2014) 3 SCC: 2014 (1) SCR 609; Mohd. Arif @Ashfaq v. Registrar, Supreme Court of India & Ors. (2014) 9 SCC 737; V. Sriharan @ Murugan v. Union of India & Ors. (2014) 4 SCC 242; Maneka Gandhi v. Union of India (1978) 1 SCC 248: 1978 (2) SCR 621 – relied on.*

- D *Constitution of India, 1950:*

Article 21 – Right to life – Right to Human dignity – Elements of – Discussed.

- E *Article 21 – Right to Human dignity – Held: Condemned prisoners also have a right to dignity and execution of death sentence cannot be carried out in arbitrary, hurried and secret manner without allowing the convicts to exhaust all legal remedies – Sentence/Sentencing.*

- F *National Legal Services Authority v. Union of India & Ors. (2014) 5 SCC 438; Furman v. Georgia 408 US 238 (1972); Gregg v. Georgia 428 US 153 (1976); Bachan Singh v. State of Punjab (1980) 2 SCC 684; Deena v. Union of India (1983) 4 SCC 645:1984 (1) SCR 1; Sunil Batra v. Delhi Administration & Ors. (1978) 4 SCC 494: 1979 (1) SCR 392 – referred to.*

Case Law Reference**A****2014 (1) SCR 609 relied on. Para 12****(2014) 9 SCC 737 relied on. Para 13****(2014) 4 SCC 242 relied on. Para 13 B****1978 (2) SCR 621 relied on. Para 13****(2014) 5 SCC 438 referred to. Para 13****(1980) 2 SCC 684 referred to. Para 17 C****1984 (1) SCR 1 referred to. Para 18****1979 (1) SCR 392 referred to. Para 19****CRIMINAL ORIGINAL JURISDICTION: Writ Petition (Criminal) No. 88 of 2015 D****Under Article 32 of the Constitution of India.****WITH E****W. P. (Crl) No. 89/2015****Anand Grover, Raju Ramachandran, Shadan Farasat, Lubhyathi R., Shreya Rastogi, Nishant Gokhale, for the Petitioner. F****Pinky Anand, ASG, V. Mohan, Binu Tamta, Karan Seth, Rajesh Ranjan (For Sushma Suri), Pragati Neekhara, Ameet Singh, for the Respondents. G****The Order of the Court was delivered by****A.K. SIKRI, J. 1. Rule.****2) Ms. Pinky Anand, learned ASG, accepts notice on H**

- A behalf of Union of India and Ms. Pragati Neekhara, learned
 counsel, accepts notice on behalf of State of Uttar Pradesh.

- 3) With the consent of the learned counsel appearing for
 the parties, we have taken up these petitions for final hearing
B and propose to dispose of these writ petitions by this order.

- 4) Writ Petition (Criminal) No. 88 of 2015 is filed by
 Shabnam and Writ Petition (Criminal) 89 of 2015 is filed by
 National Law University, Delhi, espousing the cause of Salim.
C Both Shabnam and Salim (hereinafter referred to as, "the
 convicts") were co-accused in a murder case, that was tried
 against them on the allegations that they had committed
 murders of seven persons who were the members of
 Shabnam's family during the intervening night of 14th and 15th
D April, 2008. They were tried together and after the trial, the
 learned Sessions Court returned with the finding holding them
 guilty of the said murders, for which they were charged and
 pronounced death sentence on both these convicts vide
 Judgment and Sentence dated 15.07.2010, subject to
E confirmation by the High Court.

- 5) The High Court of Allahabad confirmed the death
 sentence of both the convicts vide Judgment and order dated
 26.04.2013. The Judgment of the High Court was challenged
F in this Court and on 15.05.2015, the appeals of the convicts
 were dismissed by this Court as well, thereby confirming the
 conviction as well as sentence of death imposed on them.

- 6) The present writ petitions are filed on the allegations
G that on 21.05.2015, death warrants have been issued by the
 learned Sessions Judge, which are impermissible inasmuch
 as various remedies which are available to the convicts, even
 after the dismissal of the appeals by this Court, are still open
 and yet to be exercised by them. It is submitted that these
H convicts can file review petition seeking review of the judgment

dated 15.05.2015. They also have the right to file mercy A
petitions to the Governor of Uttar Pradesh and to the President
of India. In these circumstances, the execution of the death
warrants within six days of the dismissal of the Criminal
Appeals is challenged as illegal and contrary to the provisions
of Article 21 of the Constitution of India. B

7) Notice of these petitions was issued to the Union of
India as well as to the State of Uttar Pradesh on 25.05.2015.
Ms. Pinky Anand, learned ASG, has appeared on behalf of the
Union of India and Ms. Pragati Neekhara, learned counsel, has C
appeared on behalf of the State of Uttar Pradesh.

8) Ms. Pinky Anand, learned ASG, has brought to our notice
the instructions issued by the Ministry of Home Affairs,
Government of India, which delineates the procedure regarding D
petitions for mercy in death sentence cases. She has referred
to the following portion from the said instructions which impose
certain duties on the Superintendent of Jail in connection with
petitions for mercy from or on behalf of the convicts in sentence
of death, paragraph (II) thereof reads as under: E

"On receipt of the intimation of the dismissal by the
Supreme Court of the appeal or the application for special
leave to appeal to it lodged by or on behalf of the convict,
in case the convict concerned has made no previous F
petition for mercy, the Jail Superintendent shall forthwith
inform him (the convict) that if he desires to submit a
petition for mercy it should be submitted in writing within
seven days of the date of such intimation."

9) She fairly stated that the death warrants would not be G
executed immediately and the procedure laid down as per the
aforesaid instructions of the Ministry of Home Affairs shall be
followed. The learned counsel for the State of Uttar Pradesh
also informed this Court that after the death warrants dated H

- A 21.05.2015 issued by the learned Sessions Judge were received by the Superintendent of Jail, the Superintendent of Jail sent these death warrants back to the learned Sessions Judge pointing out that the warrants were defective as the date and time of execution of the death sentence was not affixed thereupon.

- B 10) The learned senior counsel appearing for the petitioners, on the other hand, submitted that merely following the procedure as contained in the instructions issued by the Ministry of Home Affairs would not suffice. It was the submission of Mr. Anand Grover, learned senior counsel, that this procedure is applicable in respect of petitions for mercy.

- D 11) On the other hand, in so far as the present case is concerned, the stage of petition for mercy has not yet come inasmuch as the convicts have right to file an application for review in this Court seeking review of the Judgment dated 15.05.2015, vide which, the appeals of both the convicts were dismissed. He has also drawn our attention to the Judgment of the Division Bench of the Allahabad High Court in a matter titled as ***Peoples' Union for Democratic Rights (PUDR) v. Union of India & Ors.***¹ He has submitted that in the said case, the High Court has mandated the following procedure which has to be followed before the execution of the death sentence. The said portion from the judgment is extracted below:

- G "We are affirmatively of the view that in a civilized society, the execution of the sentence of death cannot be carried out in such an arbitrary manner, keeping the prisoner in the dark and without allowing him recourse and information. Essential safeguards must be observed. Firstly, the principles of natural justice must be read into

H ¹ PIL No. 57810 of 2014 decided on 28.01.2015

the provisions of Sections 413 and 414 of Cr. P. C. and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the sessions court that would enable the convict to consult his advocates and to be represented in the proceedings. Secondly, the warrant must specify the exact date and time for execution and not a range of dates which places a prisoner in a state of uncertainty. Thirdly, a reasonable period of time must elapse between the date of the order on the execution warrant and the date fixed or appointed in the warrant for the execution so that the convict will have a reasonable opportunity to pursue legal recourse against the warrant and to have a final meeting with the members of his family before the date fixed for execution. Fourthly, a copy of the execution warrant must be immediately supplied to the convict. Fifthly, in those cases, where a convict is not in a position to offer a legal assistance, legal aid must be provided. These are essential procedural safeguards which must be observed if the right to life under Article 21 is not to be denuded of its meaning and content."

12) He also pointed out that this Court has laid down several guidelines to govern cases involving capital punishment in the case of *Shatrughan Chauhan v. Union of India & Ors.*²

13) In the present case, we find that this Court pronounced the judgment dated 15.05.2015 confirming the death penalty and within six days of the dismissal of the criminal appeals filed by these convicts, the learned Sessions Judge issued the death warrants on 21.05.2015. This is clearly impermissible and unwarranted for various reasons, as discussed hereinafter:

(i) First and foremost reason is that the convicts have not exhausted their judicial and administrative remedies, which

- A are still open to them even if their appeals in the highest Court have failed affirming the imposition of death penalty. Those appeals were filed via the route of Article 136 of the Constitution. However, law gives such persons another chance, namely, to seek review of the orders so passed, by means of
- B filing of review petition. It is to provided under Article 137 of the Constitution. The limitation of 30 days is prescribed for filing such review petitions. We have to emphasize at this stage that in case of convicts facing death penalty, the remedy of review has been given high procedural sanctity.

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- In the case of ***Mohd. Arif @Ashfaq v. Registrar, Supreme Court of India & Ors.***³, the Constitution Bench of this Court has laid down that the review petition in a case of death sentence shall be heard in the open court by giving an
- D opportunity to the review petitioner to make oral submissions, unlike other review petitions which are decided by the Court by circulation in Chambers. Not only this, such a review petition is to be heard by a Bench consisting of minimum three Judges. Following discussion from the said Constitutional Bench
- E judgment will bring home the importance which we are attaching to these review petitions:

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“30...A sentence is a compound of any factors, including the nature of the offence as well as the circumstances extenuating or aggravating the offence. A large number of aggravating circumstances and mitigating circumstances have been pointed out in *Bachan Singh v. State of Punjab*, (1980) 2 SCC 684, SCC at pp. 749-50, paras 202 & 206, that a Judge should take into account when awarding the death sentence. Again, as pointed out above, apart from the fact that these lists are only illustrative, as clarified in *Bachan Singh* itself, different judicially trained minds can apply different aggravating and

mitigating circumstances to ultimately arrive at a conclusion, on considering all relevant factors that the death penalty may or may not be awarded in any given case. Experience based on judicial decisions touching upon this aspect amply demonstrate such a divergent approach being taken. Though, it is not necessary to dwell upon this aspect elaborately, at the same time, it needs to be emphasized that when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of "reasonable procedure".

31. We are of the opinion that "reasonable procedure" would encompass oral hearing of review petitions arising out of death penalties. The statement of Justice Holmes, that the life of law is not logic; it is experience, aptly applies here.

32. The first factor mentioned above, in support of our conclusion, is more fundamental than the second one. Death penalty is irreversible in nature. Once a death sentence is executed, that results in taking away the life of the convict. If it is found thereafter that such a sentence was not warranted, that would be of no use as the life of that person cannot be brought back. This being so, we feel that if the fundamental right to life is involved, any procedure to be just, fair and reasonable should take into account the two factors mentioned above. That being so, we feel that a limited oral hearing even at the review stage is mandated by Art. 21 in all death sentence cases."

A Therefore, the right to file Review Petition is a valuable right given to the convicts who are imposed death penalty.

(II) That apart, right to file mercy petitions to the Governor of the State as well as to the President of India also remains in
B tact. These remedies are also of substance and not mere formalities. This remedy is again a constitutional remedy as Executive Head is empowered to pardon the death sentence (this power lies with the President under Article 72 and with the Governor of the State under Article 161 of the Constitution).
C Thus, power to pardon is a part of the constitutional scheme which has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. In exercise of their powers, the President or the Governor, as the case may be, may examine the evidence afresh and this exercise of
D power is clearly independent of the judiciary. It is clarified by this Court that while exercising such a power, the Executive is not sitting as a Court of Appeal. Rather power to grant remission of sentence is an act of grace, humanity in appropriate cases, i.e. distinct, absolute and unfettered in
E nature (See *Shatrughan Chauhan* (supra)). Even this Court in *V. Sriharan @ Murugan v. Union of India & Ors.*⁴ observed that clemency procedure under Articles 72/161 of the Constitution provides a ray of hope to the condemned
F prisoners and his family members for commutation of death sentence into life imprisonment. Of course, in a given case, it would be for the convict to make out a justifiable case for remission of death sentence. However, what is emphasized in the present context is that this is again a constitutional
G remedy provided to the convicts of death sentence and they have a right to avail this remedy which cannot be snatched by executing the death sentence before even giving such convicts a chance or opportunity to avail the same. For this purpose,

State has to wait for reasonable period, even after such A
convicts fail in the review petition, if they so file.

Otherwise, there would be violation of the famous rhetoric
of Emperor Ashoka who said '*State should not punish with
vengeance*'. B

(III) Article 21 of the Constitution lays down that nobody
shall be deprived of his life and liberty except according to the
procedure established by law. After long judicial debate, it
now stands settled that the procedure established by law has C
to be '*due procedure*' (See ***Maneka Gandhi v. Union of
India***⁵). By judicial interpretation, this Court has read the
principle of reasonableness into the said procedure
contemplated by Article 21, holding that it must be '*right and
just and fair*' and not arbitrary, fanciful or oppressive. Even as D
per the statute book, this procedure does not culminate with
the dismissal of appeals of the convicts by the final Court. No
doubt, when an accused is tried of an offence by a competent
court of law and is imposed such death penalty and the said
death penalty is upheld by the highest Court, the procedure E
that is established by law has been followed up to this stage.
However, in the statutory framework, further procedural
safeguards in the form of judicial review as well as mercy
petitions are yet to be traversed. This would also be covered F
by the expression '*procedure established by law*' occurring in
Article 21. Therefore, till the time limitation period for filing the
review petition and thereafter reasonable time for filing the
mercy petition has not lapsed, issuing of death warrants would
be violative of Article 21. G

(IV) There is another facet of right to life enshrined in Article
21 of the Constitution which needs to be highlighted at this
juncture, namely, '*human dignity*'. Article 21 has its traces in

A the dignity of human being. It has been recognized as part of Article 21 of the Constitution. We would like to extract the following passage from ***National Legal Services Authority v. Union of India & Ors.***⁶:

B “106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by
C which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to
D recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human
E dignity.”

14) Once we recognize this aspect of dignity of human being, it does not end with the confirmation of death sentence, but goes beyond and remains valid till such a convict meets
F his/her destiny. Therefore, the process/procedure from confirmation of death sentence by the highest Court till the execution of the said sentence, the convict is to be treated with human dignity to the extent which is reasonable and permissible in law.
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15) This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being ‘as a human being’. Another element, which needs to be

highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is harmed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity. It is in this context many rights of the accused derive from his dignity as a human being. These may include the presumption that every person is innocent until proven guilty; the right of the accused to a fair trial as well as speedy trial; right of legal aid, all part of human dignity. Even after conviction, when a person is spending prison life, allowing humane conditions in jail is part of human dignity. Prisons reforms or Jail reforms measures to make convicts a reformed person so that they are able to lead normal life and assimilate in the society, after serving the jail term, are motivated by human dignity jurisprudence.

16) In fact, this principle of human dignity has been used frequently by Courts in the context of considering the death penalty itself. Way back in the year 1972, the United States Supreme Court kept in mind this aspect in the case of *Furman v. Georgia*⁷. The Court, speaking through Brennan, J., while considering the application of Eighth Amendment's prohibition on cruel and unusual punishments, summed up the previous jurisprudence on the Amendment as 'prohibit(ing) the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual', therefore, if it does not comport with human dignity'. In *Gregg v. Georgia*⁸, that very Court, again through Brennan, J., considered that 'the fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as non-humans, as objects to be toyed with and discarded. (It is), thus, inconsistent with the fundamental

7 408 US 238 (1972)

8 428 US 153 (1976)

A *premise of the clause that even the vilest criminal remains a human being possessed of common human dignity'. The Canadian Supreme Court, the Hungarian Constitutional Court and the South African Supreme Court have gone to the extent of holding that capital punishment constitutes a serious*
B *impairment of human dignity and imposes a limitation on the essential content of the fundamental rights to life and human dignity and on that touchstone declaring that dignity as unconstitutional.*

C 17) In this country, however, since the death penalty has been held to be constitutionally valid (See ***Bachan Singh v. State of Punjab***⁹), we do not have to travel to that extent. At the same time, even if death sentence is to be awarded, it has to be in accord with due dignity. In fact, this element of human
D dignity is well recognized in choosing the mode of execution of death sentence with general consensus that method of execution of death sentence should be such which is ***certain, humane, quick and decent***. This was so stated in the 35th
E Report of the Law Commission on Capital Punishment way back in the year 1967. Thereafter, the Law Commission of India brought out a consultation paper on '*Mode of Execution of Death Sentence and Incidental Matters*' and made comparative analysis of hanging, intravenous lethal injection and shooting as the mode of execution. While undertaking
F this study, the Law Commission also recognized and emphasized standards of human decency in the following words:

G "The execution of the death sentence by hanging by rope has to be judged with reference to the objective factors such as the international standards or norms or the climate of the international opinion, modern penological theories and evolving standards of human decency. The standards

of human decency with reference to death punishment is required to be judged with reference to various aspects which vary from society to society depending on the cultural and spiritual tradition of the society, its history and philosophy and its sense of moral and ethical values. To take an example, if a sentence of cutting off the arm for the offence of the theft or a sentence of stoning to death for the offence of adultery were prescribed by law, as practiced in South Africa, there can be no doubt that such punishment would be condemned as barbaric and cruel in our country, even though it may be regarded as proportionate to the offence and hence reasonable and just in some other countries. So also the standards of human decency vary from time to time even within the same society. In an evolutionary society, the standards of human decency are progressively evolving to higher levels and what was regarded as legitimate and reasonable punishment proportionate to the offence at one time may now according to the evolving standards of human decency, be regarded as barbaric and inhuman punishment wholly disproportionate to the offence."

18) United Nations Economic and Social Council (ECOSOC), in its Economic and Social Council Resolution 1984/50, annex. General Assembly Resolution 29/118, 1984, described one of the important standard and safeguards against the death penalty enunciated in safeguard No.9 as "*where capital punishment occurs it shall be carried out so as to inflict minimum possible suffering*". Even this Court, more than quarter century ago, laid down fourfold test that is to be satisfied in the execution of death penalty in **Deena v. Union of India**¹⁰. This quadruple test is:

(i) The act of execution should be as quick and simple as

A possible and free from anything that unnecessarily sharpens the poignancy of the prisoner's apprehension.

(ii) The act of the execution should produce immediate unconsciousness passing quickly into the death.

B (iii) It should be decent.

(iv) It should not involve mutilation.

19) We can also draw sustenance from another judgment of this Court in the case of **Sunil Batra v. Delhi Administration & Ors.**¹¹ Though in the context of jail conditions for those prisoners sentenced to death, the Court held that putting them in solitary confinement was impermissible and provision to this effect was unconstitutional and violative of a prisoner's fundamental rights under Article 21, 20(2), 19 and 14 of the Constitution. The Court held that prisoner in jail still retains his fundamental rights. In the eternal words of Justice V.R. Krishna Iyer in the said judgment:

E "And in our constitutional order it is axiomatic that the prison laws do not swallow up the fundamental rights of the legally unfree, and, as sentinals on the qui-vive, courts will guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by executive echelons. The policy of the law and the paramountcy of the Constitution are beyond purchase by authoritarians glibly invoking 'dangerousness' of inmates and peace in prisons". It is so obvious that the aforesaid ageless message has its root in human dignity which has to be preserved even when a prisoner is sentenced to death."

20) Thus, we hold that condemned prisoners also have a right to dignity and execution of death sentence cannot be

carried out in a arbitrary, hurried and secret manner without allowing the convicts to exhaust all legal remedies. A

21) We find that the procedure prescribed by the High Court of Allahabad in *PUDR's* case (supra) is in consonance with Article 21 of the Constitution. While executing the death sentence, it is mandatory to follow the said procedure and it is also necessary for the authorities to keep in mind the guidelines contained in the judgment of this Court in *Shatrughan Chauhan's* case (supra). B

22) Since we find that the death warrants were signed by the Sessions Judge in a haste, without waiting for the exhaustion of the aforesaid remedies on the part of the convicts, the same are hereby quashed and set aside. C

23) We direct the respondents to follow the procedure, particularly the five steps, which are already extracted above, as contained in *PUDR's* case (supra) passed by the High Court of Allahabad, for executing the death sentence. D

24) We make the Rule absolute. These writ petitions are allowed in the aforesaid terms. E