ASIAN CENTRE FOR HUMAN RIGHTS

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INDIA: DEATH DESPITE DISSENTING JUDGEMENTS

1. Preface

Justice P N Bhagwati in his minority judgement in the *Bachan Singh*[1] case held that the "*only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting enbanc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated*".

The vice of arbitrariness on imposing death penalty has come to haunt Indian justice system. The Supreme Court in *Sangeet & Anr Vs State of Haryana*[2] of 20 November 2012 admitted "*judge centric*" character in death sentencing, a euphemistic term to describe the vice of the arbitrariness.

The lack of unanimity in death sentencing is a serious issue of concern. The ratio of differences of opinion

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Abbreviations

CrPC	Code of Criminal Procedure
FIR	First Information Report
IPC	Indian Penal Code
JJB	Juvenile Justice Board
MHA	Ministry of Home Affairs
NHRC	National Human Rights Commission
TADA	Terrorist and Disruptive Activities (Prevention) Act

whether somebody convicted for offences punishable with death should die or live in most cases is 2:1. The differences of opinion are not usual one of whether to impose death penalty or life imprisonment, but ranges between acquittal and death sentence. In exceptional cases, there are differences on the issue of determining juvenility while for terror capital crimes, death sentencing is the rule.

The experiences of the United States on the need for unanimity of judges for death sentencing are instructive. In 2002, the United States Supreme Court in Timothy Ring (*Ring v. Arizona*) ruled Arizona's death penalty statute as unconstitutional because it allowed "*a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty*."[3] A study in the US in 2005 had shown that if there is no unanimity for imposition of death penalty, in 20 states of the United States, courts must impose a lesser penalty when the jury cannot agree on whether to impose the death penalty, in four states the jury can continue to deliberate on penalties other than the death penalty before the court imposes a sentence, in one State the judge has the option of imposing a sentence of life imprisonment without parole or impaneling a new jury, and in two states, statutes authorise the court to impanel a new jury if the first jury cannot reach a verdict.[4]

The "differences of opinion at the level of High Court" is recognised as a ground for commutation of death sentences under the broad guidelines on consideration of mercy pleas adopted by the Ministry of Home Affairs (MHA), Government of India.[5] However, the MHA regularly flouts its own guidelines including on 'the differences of opinion at the level of High Court' while advising the President of India on mercy pleas.

Considering the miscarriage of justice and admitted judge-centric character of death sentencing, the time has come for India to make imposition of death penalty solely based on unanimous decisions of a constitutional bench of the Supreme Court. The President of India too ought to automatically grant mercy if there are differences of opinion at any stage of the proceedings, and not only at the stage of the High Court. The differences of opinion at the level of the Supreme Court ought to be given more importance.

2. Death despite dissenting judgements

> "*312. Before I part with this topic I may point out that only way in which the vice of arbitrariness in the imposition of death penalty can be removed is by the law providing that in every case where the death sentence is confirmed by the High Court there shall be an automatic review of the death sentence by the Supreme Court sitting as a whole and the death sentence shall not be affirmed or imposed by the Supreme Court unless it is approved unanimously by the entire court sitting enbanc and the only exceptional cases in which death sentence may be affirmed or imposed should be legislatively limited to those where the offender is found to be so depraved that it is not possible to reform him by any curative or rehabilitative therapy and even after his release he would be a serious menace to the society and therefore in the interest of the society he is required to be eliminated. Of course, for reasons I have already discussed such exceptional cases would be practically nil because it is almost impossible to predicate of any person that he is beyond reformation or redemption and therefore, from a practical point of view death penalty would be almost non-existent. But theoretically it may be possible to say that if the State is in a position to establish positively that the offender is such a social monster that even after suffering life imprisonment and undergoing reformative and rehabilitative therapy, he can never be reclaimed for the society, then he may be awarded death penalty. If this test*

> *is legislatively adopted and applied by following the procedure mentioned above, the imposition of death penalty may be rescued from the vice of arbitrariness and caprice. But that is not so under the law as it stands today.*" Justice P N Bhagwati in his dissenting judgement in *Bachan Singh vs State of Punjab* (1982 AIR 1325) on 16 August 1982 declaring the death penalty provided under Section 302 of the Indian Penal Code read with Section 354 Sub-section (3) of the Code of Criminal Procedure, 1973 as unconstitutional and void as being violative of Articles 14 and 21.

In India, it is only when two judge bench of the High Courts or the Supreme Court differ on the issue of imposing death penalty that the case is referred to a third judge at the High Court level and three bench judges at the Supreme Court. Therefore, the ratio of difference of opinion is often as narrow as 2:1. This makes decisions on imposing death penalty extremely vulnerable to arbitrariness, irrationality and unfairness.

The minority view in the judgements is seldom referred as *stare decisis*. Otherwise, the judgement of Justice Bhagwati in the *Bachan Singh* case in 1980 would have significantly addressed what the Supreme Court in *Sangeet & Anr Vs State of Haryana*[6] of 20 November 2012 termed as "*judge centric*", an euphemistic term to describe the vice of the arbitrariness in the imposition of death penalty.

There is no doubt that the unanimity has become almost indispensable considering the unreliability, unpredictability, and arbitrariness in the imposition of death penalty. Though the broad guidelines of the Government of India for consideration of mercy petitions, among others, accepts "differences of opinion at the level of High Court" as a ground for commutation,[7] the need for unanimity of the judges for imposing death penalty has not been adequately deliberated upon by the Indian judiciary and the government. There is need to address this issue considering the fact that the differences of opinion range from acquittal to death sentence.

Differences of opinion: acquittal vs death sentence

There is no doubt that if the difference of opinion is a serious as acquittal vs death sentence, death penalty ought not to be imposed as *ratio decidendi*. However, in such cases, the Supreme Court awarded both death sentence and life imprisonment. It is clear that the Supreme Court has not yet considered differences of opinion among judges of a bench as a ground for not imposing death sentences.

In the case of *Gurmeet Singh* of Uttar Pradesh, out of the two judges of the High Court one was for upholding the Sessions Court's conviction including the death sentence, the other judge was for acquittal of the accused.[8] The matter was referred to a third judge who upheld conviction and death sentence.[9] The Supreme Court also upheld the conviction and death sentence considering the case as 'rarest of the rare'. On 1 March 2013, President Pranab Mukherjee rejected the mercy petition of Gurmeet Singh and failed to comply with the guidelines of the Government of India to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court*"[10]. Thereafter, the Supreme Court in *Shatrughan Chauhan Vs. Union of India*[11] commuted the death sentence of Gurmeet Singh into life imprisonment due to delay in disposal of his mercy petition by the President of India.

However, in the case of *Lalit Kumar Yadav* of Uttar Pradesh, the division bench of the Allahabad High Court differed on the quantum of the sentence. One of the judges affirmed the order of conviction and sentence recorded by the trial Court while the other judge reversed the whole judgment and the order of the trial Court and acquitted him. The

case was referred to a third judge who upheld the judgment rendered by the trial Court confirming the death penalty.[12] On 25 April 2014, the Supreme Court affirmed the conviction of the appellant but commuted the death sentence to life imprisonment.[13]

Differences of opinion: death penalty vs life imprisonment

The usual divergence or differing views relate to quantum of sentence i.e. whether to impose death penalty or life imprisonment. In some cases when the matter was referred to larger bench, death sentence was confirmed while in some other cases, life imprisonment was imposed.

In the case of *Saibanna Nigappal Natikar* of Karnataka,[14] on 10 June 2003, a Division Bench of the High Court of Karnataka differed on the quantum of sentence with one judge imposing life imprisonment and the other imposing death sentence under Section 302 of the Indian Penal Code (IPC). Both however held that framing of charge for the offence under Section 303 of the IPC by the trial court was incorrect in the light of the *Mithu vs State of Punjab*.[15] The matter was referred to a third Judge of the High Court who confirmed the death penalty on Saibanna.[16] Regrettably, the Supreme Court failed to note the unanimous verdict of two High Court judges that framing of charge under Section 303 was wrong and the Supreme Court went on to uphold the death sentence on Saibanna in 2005.[17] It was only on13 September 2009 in *Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra*[18] that another bench of the Supreme Court declared that death sentence imposed on Saibanna under section 303 of the IPC is "*inconsistent with Mithu (supra) and Bachan Singh (supra).*"[19] The President of India while rejecting the mercy plea of Saibanna on 4 January 2013 further failed to consider guidelines of the Government of India to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court*"[20] and the fact that Supreme Court itself had declared the death sentence on Saibanna as *per incuriam*.[21] The Karnataka High Court stayed the execution of Saibanna[22] and is yet to deliver the final judgement.

Two judges of the High Court of Karnataka confirmed the conviction of *B A Umesh* but differed whether to impose death sentence or life imprisonment. The case was referred to the third judge who concurred with imposition of death sentence.[23] The Supreme Court too upheld his death penalty on 2 January 2011.[24] On 12 May 2013, President Pranab Mukherjee rejected the mercy petition of B A Umesh[25] in violation of the Government of India's guidelines to grant mercy in case of "*difference of opinion in a Bench of two Judges necessitating reference to the third Judge of the High Court*"[26] The review petition filed by B A Umesh before the Supreme Court is pending for hearing in open court.[27]

However, in some cases when the matter was referred to larger bench, life imprisonment was imposed. In the case of *Swami Shraddananda @ Murali Manohar Mishra*, the death sentence was confirmed by the High Court of Karnataka on 19 September 2005. A two judge Bench of the apex court differed on the quantum of the sentence – whether to impose death sentence or life imprisonment.[28] In view of the split verdict, the case was referred to larger bench of three judges. On 22 July 2008, the three-judge bench commuted appellant's death sentence into life imprisonment till rest of his life.[29]

In the case of *Rameshbhai Chandubhai Rathod*, the High Court of Gujarat confirmed the conviction and death penalty[30] but the Supreme Court differed on the sentence to be awarded. While Justice Arijit Pasayat upheld the death penalty, Justice Ashok Kumar Ganguly commuted the death penalty into life imprisonment after observing uncertainty

with the nature of the circumstantial evidence, mitigating circumstances in particular young age of the appellant and possibility of his reformation, inadequate opportunity to the accused to plead on the question of sentence, etc.[31] The case was referred to a three judge bench which on 24 January 2011 commuted the death sentence of the appellant to imprisonment for life extending to the full life subject to any remission or commutation by the government *"taking into account all the aggravating and mitigating circumstances".*[32]

Normal capital crimes vs terror capital crimes

Though there is no legal basis to differentiate normal capital crimes and terror capital crimes, the Courts in India often differentiate between terror offences and other offences with the courts invariably awarding death sentence for the terror offences.

Devender Pal Singh Bhullar[33], Perarivlan @ Arivu[34] and Afzal Guru[35], all accused of terror offences were sentenced to death based on confessional statement and circumstantial evidence. They were not given any benefit of doubt as they were accused of terror offences. However, in the case of *Bishnu Prasad Sinha and Anr Vs. State of Assam* held that "*There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded*".

The issue of determining juvenility

Even on the question of considering juvenility of death row convicts which requires stricter scrutiny as international human rights law prohibits execution of juveniles[36], the Supreme Court had faltered. In the case of Ram Deo Chauhan @ Rajnath Chauhan of Assam, the Gauhati High Court vide judgment dated 1 February 1999 confirmed the conviction and sentence of death on the appellant.[37] On 31 July 2000, two judges Bench of the Supreme Court upheld the death sentence.[38] Ram Deo Chauhan filed a review petition contending that he was a juvenile at the time of commission of the offence. On 10 May 2001, a larger Bench held that Chauhan was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act.[39] On 8 May 2009, the Supreme Court indeed set aside the Governor's order of commutation of death sentence on Ramdeo Chauhan to life imprisonment, among others, on the recommendation of the National Human Rights Commission (NHRC) on the grounds of juvenility. The Supreme Court in fact stated that the NHRC had no jurisdiction to make such recommendation and held "*the NHRC proceedings were not in line with the procedure prescribed under the Act. That being so, the recommendations, if any, by the NHRC are non est".*[40] However, on 19 November 2010, two judge Bench of the apex court comprising Justice Aftab Alam and Justice Ashok Kumar Ganguly quashed the Supreme Court order dated 8 May 2009 and restored the decision of the Governor commuting appellant's death sentence. The Court observed that both the findings of its previous bench on the commutation by the Governor and NHRC's jurisdiction were *"vitiated by errors apparent on the face of the record".* The Court held the NHRC had not "committed any illegality" in making a recommendation to the Governor and that the "NHRC acted within its jurisdiction".[41]

3. Experiences of the US: Lessons for India

The experiences of the United States on the need for unanimity of judges for imposing death sentence are instructive. In 2002, the United States Supreme Court in Timothy Ring (*Ring v. Arizona*) ruled Arizona's death penalty statute as unconstitutional because it allowed "*a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty*."[42]

Further, the Connecticut Supreme Court ruled that Connecticut's death penalty sentencing statute does

not mandate a specific outcome when the jury is not unanimous in its decision on whether to impose the death penalty. The court stated that the statute neither authorizes the death penalty nor requires imposition of a life sentence in these circumstances. The court stated that the trial court has discretion to declare a mistrial and can impanel a new jury to retry the penalty phase. [43]

A study in the US in 2005 had shown that if there is no unanimity for imposition of death penalty, in 20 states of the United States, courts must impose a lesser penalty when the jury cannot agree on whether to impose the death penalty, in four states the jury can continue to deliberate on penalties other than the death penalty before the court imposes a sentence, in one State the judge has the option of imposing a sentence of life imprisonment without parole or impaneling a new jury, and in two states, statutes authorise the court to impanel a new jury if the first jury cannot reach a verdict.[44]

4. Conclusion and recommendations

The "differences of opinion at the level of High Court" is recognised as a ground for commutation of death sentences under the broad guidelines on consideration of mercy pleas adopted by the Ministry of Home Affairs, Government of India.[45] However, the Ministry of Home Affairs regularly flouts its own guidelines while advising the President of India.

Considering the miscarriage of justice and admitted judge-centric character of death sentencing, the time has come for India to make imposition of death penalty solely based on unanimous decisions of a constitutional bench of the Supreme Court. The President of India too ought to automatically grant mercy if there are differences of opinion at any stage of the proceedings, and not necessarily at the stage of the High Court. The differences of opinion at the stage of the Supreme Court ought to be given more importance.

Annexure I: Summary of the cases referred

i. Acquittal vs death sentence

Case 1: Gurmeet Singh, Uttar Pradesh

Gurmeet Singh of Uttar Pradesh was accused of killing 13 members of his family in Pilibhit in 1986. On 20 September 1992, the trial court convicted him under Section 302 of the IPC and sentenced to death. On 28 April 1994, the Division Bench of the Allahabad High Court pronounced the judgment in the petitioner's Criminal Appeal No. 1333 of 1992. There was difference of opinion between the two Judges who comprised the Bench hearing the appeal. One Judge was for dismissal of the appeal and maintaining conviction and the death sentence, while the other Judge was for acquittal of the accused on the following grounds[46]:

i) Eye witnesses were near relations;

ii) It was felt that the deceased family members must have raised alarm by shouting and crying and if the murder was committed as stated by the prosecution in the house of the appellant, neighbours would have come to help; and

iii) It was also felt that it was surprising that no resistance was offered.

On 29 February 1996, a third Judge upheld Gurmeet Singh's conviction and sentence. On 8 March 1996, the Division Bench dismissed the appeal of the petitioner herein and confirmed his death sentence.[47]

Gurmeet Singh preferred an appeal against the judgment of the Allahabad High Court in the Supreme Court which by its judgment dated 28 September 2005 upheld the conviction and sentence considering the case as 'rarest of the rare'.

On 1 March 2013, President Pranab Mukherjee rejected the mercy petition of Gurmeet Singh. Thereafter, the condemned prisoner filed a writ petition in the Supreme Court seeking review of rejection of his mercy petition by the President. In an order dated 21 January 2014, a three judges Bench of the Supreme Court in *Shatrughan Chauhan & Vs. Union of India*[48] commuted the death sentence of the appellant into life imprisonment due to delay in disposal of his mercy petition by the President of India.

Case 2: Lalit Kumar Yadav, Uttar Pradesh

Lalit Kumar Yadav of Uttar Pradesh was accused of rape and murder of a 21 year old girl on 23 February 2004. In February 2005, the trial court held the accused guilty under Sections 302 and 376 read with Section 511 of the IPC and awarded death sentence for the offence under Section 302 of the IPC and 5 years rigorous imprisonment for the offence under Section 376 read with Section 511 of the IPC. The High Court on reference affirmed the death sentence on 11 August 2006.

Initially, the appeal was heard by the Division Bench of the Allahabad High Court, Lucknow Bench, but the case was referred to a third judge following divided opinion on the quantum of the sentence to be awarded. One of the Judges affirmed the order of conviction and sentence recorded by the trial Court and the other Judge reversed the whole judgment and the order of the trial Court and acquitted the appellant on both the counts. The third Judge after hearing the parties dismissed the appeals and upheld the judgment rendered by the trial Court confirming the death penalty.[49]

On 25 April 2014, the Supreme Court affirmed the conviction of the appellant but commuted the death sentence to life imprisonment. The apex court considering the mitigating circumstances such as age, no criminal antecedent and possibility of reformation held that the case does not fall under 'rarest of rare' category and commuted the death sentence to life imprisonment. It observed *"The Court has to consider different parameters as laid down in Bachan Singh (supra) followed by Machhi Singh (supra) and balance the mitigating circumstances against the need for imposition of capital punishment."*[50]

ii. Death penalty vs life imprisonment

Case 1: Saibanna Nigappal Natikar, Karnataka

Saibanna Nigappal Natikar, a resident of Mandwal village in Gulbarga, Karnataka, was initially convicted for life for the murder of his first wife in 1992. While on parole in September 1994, Saibanna killed his second wife and his minor daughter suspecting her fidelity. After assaulting the deceased Saibanna also attempted to commit suicide by inflicting injuries on himself. The First Information Report (FIR) was registered under Sections 303, 307 and 309 of the IPC. After investigation, the police filed charge sheet against the accused in the court. On 4 January 2003, the trial court convicted Saibanna under Section 303 of the IPC and awarded the sentence of death. The trial court found that the prosecution had proved beyond reasonable doubt that the accused was guilty of the offence under Section 303 of the IPC. Pertinently, the accused was awarded death penalty despite bringing to the notice of the trial court that Section 303 of the IPC was declared unconstitutional by the Supreme Court in a decision delivered on 7 April 1983 in *Mithu vs State of Punjab 1983 AIR 473.*[51]

On 10 June 2003, a Division Bench of Justices A M Farooq and S R Bannurmath of the High Court of Karnataka had differed on the quantum of sentence

to be awarded to the appellant. Justice A M Farooq took the view that the appropriate punishment would be life imprisonment, while Justice S R Bannurmath was of the opinion that it was a fit case in which death sentence had to be imposed. However, both the judges agreed on the conviction of the appellant under Section 302 of the IPC. They further held that framing of charge for offence under Section 303 of the IPC by the trial Court was incorrect in the light of the *Mithu vs State of Punjab*. However, the Division Bench of the High Court pointed out that the case can be considered as having been tried under Section 302 of the IPC in the light of the Supreme Court judgment in the case of *Ranjith Singh vs Union Territory of Chandigarh* (1991) 4 SCC 304.[52]

In his dissenting judgment, Justice A M Farooq who was of the view that the appropriate sentence would be life imprisonment held as under:[53]

> *"The motive for committing the murder is a mystery. It is not spoken to by anybody. It is also the prosecution case that the accused inflicted injuries on his person. The said injuries on the accused show that they were grievous injuries. The offences were not committed in a calculated manner. Thus all the circumstances show that the accused had no motive at all to commit the offence. In fact admittedly he had not carried away any weapon to commit the offences and the fact that he inflicted grievous injuries on his person show his regret for having committed the acts. All these facts of the case show that this is not a case where the accused has acted in a diabolic manner or that it pricks the conscience of the Court or there are any circumstances which show that the accused is a menace to the society or that he is not capable of reformation or rehabilitation. Moreover, the acts are not committed in a gruesome manner and reason to commit the murders surrounds in mystery. The accused did not run away or try to escape. Under these circumstances, I am of the view of the view that this Court cannot say that this is a rarest of rare case where the accused should be sentenced to death. Hence in my view the reference has to be rejected and the accused has to be sentenced to life imprisonment instead of death sentence."*

Because of the split judgment over the quantum of sentence, the case was referred to a third Judge of the High Court (Justice B. Padmaraj), who after hearing the matter concluded that the case as "rarest of rare" involving pre-planned brutal murders without provocation and confirmed the death penalty awarded by the trial Court to appellant Saibanna on 21 August 2003.[54]

The appellant preferred an appeal against the judgement and order of the High Court. A Supreme Court bench comprising Justice K G Balakrishnan and B N Srikrishna dismissed the appeal and upheld the death sentence of the appellant. The Supreme Court held "*Thus, taking all the circumstances in consideration, we are of the view that the High Court was right in coming to the conclusion that the appellant's case bristles with special circumstances requisite for imposition of the death penalty*".[55]

By judgment dated 13 September 2009 in *Santosh Kumar Satishbhusan Bariyar vs. State of Maharashtra*[56], a Bench of the Supreme Court comprising Justice S B Sinha and Justice Cyriac Joseph held the decision in *Saibanna vs State of Karnataka* as *per incuriam* on "*to that extent it is inconsistent with Mithu (supra) and Bachan Singh (supra).*"[57]

On 4 January 2013, President of India Pranab Mukherjee rejected Saibanna's mercy petition. He filed a writ petition seeking judicial review of rejection of his mercy petition in the High Court of Karnataka which stayed Saibanna's execution[58] and the Court is yet to deliver its final verdict.

Case 2: B A Umesh, Karnataka

The accused B A Umesh @ Umesh Reddy was accused of committing rape and murder of the

deceased, a widowed mother in Bangalore, Karnataka on 28 February 1998. On 26 October 2006, the trial Court convicted the accused under Sections 376, 302 and 392 of the IPC and awarded him death sentence. On 4 October 2007, two judges Bench of the High Court of Karnataka confirmed the conviction on the accused. However, the judges had differed on the quantum of sentence. Justice V G Sabhahit confirmed the trial Court's order imposing death penalty. Justice Ravi B Naik differed on the ground that death penalty as a deterrent had failed to curb crime, and modified the death sentence to imprisonment for life, with no scope for amnesty under any circumstances. Justice Naik, while agreeing with the conviction of the appellant by the trial Court, was of the view that *"as a rule death sentence should be imposed only in the rarest of rare cases in order to eliminate the criminal from society, but the same object could also be achieved by isolating the criminal from society by awarding life imprisonment for the remaining term of the criminal's natural life"*. The case was referred to a third judge who concurred with Justice V G Sabhahit and confirmed the death sentence on the B A Umesh in February 2009.[59]

B A Umesh challenged the impugned judgment of the High Court in the Supreme Court. The Supreme Court upheld his death penalty on 2 January 2011 stating that the case fell with the category of rarest of rare cases.[60] On 12 May 2013, President Pranab Mukherjee rejected the mercy petition of B A Umesh.[61] The review petition of B A Umesh is currently pending for hearing in open court after a Five-Judge Constitution Bench of the Supreme Court, in a majority judgment, decided that review of death sentence cases will be heard in open court by a Bench of three judges.[62]

Case 3: Swamy Shraddananda, Karnataka

Swami Shraddananda @ Murali Manohar Mishra was accused of killing his wife in May 1991. During investigation, the accused confessed that he killed his wife and disposed of her body. Based on circumstantial evidence, the trial Court found the accused guilty of commission of offence under Sections 302 and 201 of the IPC and sentenced him to death in May 2005. The death sentence was confirmed by the High Court of Karnataka on 19 September 2005.[63]

The appellant filed an appeal in the Supreme Court. A two judge Bench of the apex court comprising Justice S B Sinha and Justice Markandey Katju upheld the conviction but differed on the quantum of the sentence.[64] Justice Katju held that appellant's case felt within the category of rarest of rare cases and hence he deserved death sentence. On the other hand, Justice Sinha held that under facts and circumstances of the case, the imposition life imprisonment shall serve the ends of justice. Justice Sinha held:

> *"…….Appellant herein made a confession before the High Court. The High Court took the same into consideration in the main judgment which could not be done. He had been brought before the High Court only for purpose of fulfilling the requirement of sub-section (2) of Section 235 of the Code of Criminal Procedure. His Statement was taken during midst of hearing. He knew the implications thereof. Despite the same, he made a categorical statement that he was responsible for burying the dead body. He gave an explanation, which might not have found favour with the High Court, but the fact that he had made a confession at least accepting a part of the offence could not have been ignored at least for the purpose of imposition of punishment. He is more than 64 years' old. He is in custody for a period of 16 years. The death sentence was awarded to him by the trial court in terms of its judgment dated 20.05.2005. In a situation of this nature, we are of the opinion that imposition of a life imprisonment for commission of the crime under Section 302 shall serve the ends of justice."*

In view of the split verdict, the case was referred to larger bench of three judges. On 22 July 2008, the three-judge Bench of Justices B N Agrawal, G S Singhvi and Aftab Alam commuted appellant's death sentence into life imprisonment till rest of his life.[65]

Case 4: Rameshbhai Chandubhai Rathod, Gujarat

Rameshbhai Chandubhai Rathod, aged about 28 years, was accused of rape and murder of a 10 year old girl in Surat, Gujarat. The accused was arrested and forwarded to the Additional Sessions Judge, Fast Track Court No.9, Surat for trial. The trial court found the accused guilty and sentenced to death. The High Court of Gujarat confirmed the conviction and death penalty of the appellant.[66]

The appellant preferred an appeal in the Supreme Court. The appeal was heard by a two judge bench comprising Justice Arijit Pasayat and Justice Ashok Kumar Ganguly. On 25 February 2009, the Bench confirmed the conviction but differed on the sentence to be awarded. In their separate orders, Justice Arijit Pasayat upheld the death penalty while Justice Ashok Kumar Ganguly commuted the death penalty into life imprisonment on observing uncertainty with the nature of the circumstantial evidence, mitigating circumstances in particular young age of the appellant and possibility of his reformation, inadequate opportunity to the accused to plead on the question of sentence, etc. In his order, Justice Ashok Kumar Ganguly ruled:[67]

> *"For the reasons discussed above and in view of mitigating circumstances and the law laid down in Bachan Singh (supra) and the various gaps in the prosecution evidence, pointed hereinabove, death sentence cannot be awarded to the appellant as in my view it does not come under the `rarest of rare cases'. Apart from that in the case of the appellant proper sentencing procedure was not followed by the trial Court and the Hon'ble High Court erred by approving the same."*

Due to divergent view on the quantum of sentence, the case was referred to a three judge bench which on 24 January 2011 commuted the death sentence of the appellant to imprisonment for life extending to the full life subject to any remission or commutation by the government *"taking into account all the aggravating and mitigating circumstances"*.[68]

iii. Normal capital crimes vs terror capital crimes

Case 1: Bishnu Prasad Sinha and Anr. Vs. State of Assam

The deceased aged about 7-8 years was travelling with her parents Bishnu Deb (father-P.W.23), Anima Deb (mother- P.W.22) and younger brother in a private transport service known as Network Travels from Dharmanagar (Tripura). They were on their way to Dimapur in the State of Nagaland. They reached Network Travels' Complex at Paltan Bazar, Guwahati at around 10.30 p.m. on 12.7.2002. There was no connecting bus to Dimapur at that time. They were advised to stay over for the night at Guwahati. Accused No.1 was a night chawkidar (watchman) of the waiting room of the said Network Travels. He suggested that the family could stay there for the night and therefore should not have any apprehension in regard to their safety. Their luggage was carried by the appellant No.1 to the waiting room.

Accused No.1 insisted on the deceased's mother repeatedly that she should go to sleep stating that as the waiting room would be locked, there was nothing for her to worry about. As she had not been sleeping, the accused No.1, allegedly scolded her to do so. At that time, a bus bearing No.AS-25-C-1476 arrived at the said bus stop. Putul Bora – Accused No.2 was the 'handiman' of the said bus. While the

Manager, Driver and the Conductor slept inside the bus, he did not. He was seen talking with the accused No.1[69].

Anima Deb, the deceased's mother slept for a while. As her son had cried out, she woke up at about 3 p.m only to find that her daughter was missing. She raised a hue and cry and her husband, Bishnu Deb also woke up. A search was carried out in the three buses, which were at the bus stop belonging to the travel agency. As the girl could not be found despite vigorous search, Bishnu Deb was advised to inform the police. A missing entry was lodged before the Officer-in- Charge of Paltan Bazar Police Station. At about 8.30 a.m. on 14.7.2002, a complaint was made that the flush in the toilet was not working. P.W.7- Amar Deep Basfore (sweeper) was asked by P.W.2-Shri Kapil Kumar Paul (cashier of the travel agency) to find out the reason therefor. He later on opened the septic tank and saw the head of a small child. He immediately reported the matter to P.W.1-Shri Bidhu Kinkar Goswami as well as P.W.2-Shri Kapil Kumar Paul.[70]

Pursuant to the said FIR, a case under Sections 376(2)(g) and 302 read with Section 34 of the IPC was registered. An inquest of the dead body was made by a Magistrate. The suspects were arrested. During the course of investigation, the accused No.1 made a confessional statement before the Magistrate under Section 164 of the Criminal Procedure Code (CrPC). He gave a vivid description about how the offence was committed by him and the accused No.2.[71]

The accused were charged and convicted for commission of offences under Sections 376(2)(g), 302 and 201 read with Section 34 of the IPC for rape and murder of the deceased, Barnali Deb.[72]

They preferred an appeal before the Gauhati High Court against their conviction and sentence. The Gauhati High Court dismissed the same. Aggrieved with the dismissal, they preferred an appeal before the Supreme Court. The Supreme Court commuted the death penalty of the accused into one of imprisonment for life. The apex court held thus:

> *"There is another aspect of this matter which cannot be overlooked. Appellant No.1 made a confession. He felt repentant not only while making the confessional statement before the Judicial Magistrate, but also before the learned Sessions Judge in his statement under Section 313 of the Code of Criminal Procedure.*
>
> *It is, therefore, in our opinion, not a case where extreme death penalty should be imposed. We, therefore, are of the opinion that imposition of punishment of rigorous imprisonment for life shall meet the ends of justice. It is directed accordingly. Both the appellants, therefore, are, instead of being awarded death penalty, are sentenced to undergo rigorous imprisonment for life, but other part of sentence imposed by the learned Sessions Judge are maintained.*
>
> *Subject to the modification in the sentence mentioned hereinbefore, this appeal is dismissed."*[73]

Case 2: Devender Pal Singh Bhullar, Delhi

Devender Pal Singh Bhullar was charged with criminal conspiracy for alleged assassination bid on the then President of Indian Youth Congress (I) by causing bomb blasts at Raisina Road, New Delhi on 11 September 1993. Nine persons were killed in the blast. Bhullar was arrested after the German authorities deported him from Frankfurt during the night between 18th and 19th January 1995. Bhullar and co-accused namely Kuldeep, Sukhdev Singh, Harnek and Daya Singh Lahoria were accused of being members of a terrorist organization called Khalistan Liberation Force, and carrying out the attack.[74]

On 25 August 2001, the Designated TADA Court, New Delhi convicted Bhullar for the offence punishable under Section 3(2) (i) of the TADA and Section 120B read with Section 302 307, 326 324 323 436 and 427 of the IPC and sentenced him to death. Other accused Daya Singh Lahoria, who was extradited from United States to India, was also arrested and tried along with Bhullar but was acquitted by the Designated Court on the ground that there was no evidence against him and that he had not made any confessional statement. The Court also observed that there was no iota of material on record to corroborate confessional statement made by accused Bhullar against his co-accused Daya Singh Lahoria and in the absence of corroboration, Daya Singh was acquitted on benefit of doubt. Bhullar's conviction was based solely on his confessional statements recorded by Deputy Commissioner of Police B S Bhola under Section 15 of the TADA.[75]

Against the judgment and order dated 25th August 2001, Bhullar filed Criminal Appeal No. 993 of 2001 and for confirmation of death sentence; the State had filed Death Reference Case (Crl.) No. 2 of 2001 before the Supreme Court. By majority of 2:1, the Supreme Court confirmed the conviction and sentence as awarded by the Designated Court and dismissed the appeal.[76]

One of the three judges, Justice M B Shah had passed a dissenting judgment setting aside Bhullar's conviction and ordered for his release. With respect to the question of conviction of the appellant solely on the basis of alleged confessional statements, Justice M B Shah held that *"before solely relying upon the confessional statement, the Court has to find out whether it is made voluntarily and truthfully by the accused. Even if it is made voluntarily, the Court has to decide whether it is made truthfully or not"*. On the plea of non-corroboration of confessional statements with evidence, Justice Shah held *"There is nothing on record to corroborate the aforesaid confessional statement. Police could have easily verified the hospital record to find out whether D.S. Lahoria went to the hospital and registered himself under the name of V.K. Sood on the date of incident and left the hospital after getting First Aid. In any set of circumstances, none of the main culprits i.e. Harnaik or Lahoria is convicted. In these set of circumstances, without there being corroborative evidence, it would be difficult to solely rely upon the so-called confessional statement and convict the accused and that too when the confessional statement is recorded by the investigating officer"*. In conclusion, Justice Shah held:[77]

> *"In this view of the matter, when rest of the accused who are named in the confessional statement are not convicted or tried, this would not be a fit case for convicting the appellant solely on the basis of so-called confessional statement recorded by the police officer.*
>
> *Finally, such type of confessional statement as recorded by the investigating officer cannot be the basis for awarding death sentence."*

Bhullar preferred a review petition against dismissal of his appeal by the majority judgment. The review petition was dismissed by the Supreme Court on 17 December 2002.[78]

On 14th January 2003, Bhullar submitted a mercy petition to the President. During the pendency of the mercy petition, he also filed a Curative Petition (Criminal) No. 5 of 2003 which was dismissed by the Supreme Court on 12th March 2003. In May 2011, the President of India had rejected Bhullar's mercy petition.

On 24 June 2011, Bhullar's wife filed a Writ Petition (Criminal) No. 146 of 2011 before the Supreme Court challenging the rejection of his mercy petition by the President of India. On 12 April 2013, the Supreme Court held that there was an unreasonable delay of 8 (eight) years in disposal

of mercy petition, which is one of the grounds for commutation of death sentence to life imprisonment as per the established judicial precedents. However, the apex Court dismissed the writ petition on the ground that when the accused was convicted under the TADA, there was no question of showing any sympathy or considering supervening circumstances for commutation of death sentence. The Supreme Court while dismissing the Writ Petition on 12 April 2013 held that "*long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes…. as it is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death*".[79]

Thereafter, Bhullar's wife had filed a Review Petition being (Criminal) No. 435 of 2013 which was also dismissed by the apex Court on 13 August 2013. In the landmark *Shatrughan Chauhan vs Union of India*[80] delivered on 21 January 2014 the Supreme Court declared the judgment of 12 April 2013 on the review petition as *per incuriam* as there is no provision in law which states that terror convicts cannot be given mercy as per law! On 31 March 2014, the Supreme Court based on the principle enunciated in *Shatrughan Chauhan* judgement commuted the death sentence on Bhullar into life imprisonment both on the ground of unexplained/ inordinate delay of eight years in disposal of mercy petition and on the ground of insanity.[81]

Case 3: State (N.C.T of Delhi) Vs. Navjot Sandhu @ Afsan Guru And Shaukat Hussain Guru Vs. State (N.C.T. of Delhi)

On 13th December 2001, five heavily armed persons attacked the Parliament House complex and inflicted heavy casualties on the security men on duty. In the attack, nine persons including eight security personnel and one gardener were killed and 16 persons including 13 security men received injuries. The five terrorists were also killed. Investigation over a short span of 17 days revealed the possible involvement of the four accused persons and some other proclaimed offenders said to be the leaders of the banned militant organization known as "Jaish-E-Mohammed". After the conclusion of investigation, the investigating agency filed charge sheets against the four accused persons.[82]

The designated Special Court framed charges against the accused persons under various sections of Indian Penal Code, the Prevention of Terrorism Act, 2002 and the Explosive Substances Act. The designated Special Court tried the accused on the charges and the three accused, namely, Mohd. Afzal Guru, Shaukat Hussain Guru and S.A.R. Gilani were convicted for the offences under Sections 121, 121A, 122, Section 120B read with Sections 302 & 307 read with Section 120B of the IPC, sub-Sections (2), (3) & (5) of Section 3 and Section 4(b) of the POTA and Sections 3 & 4 of the Explosive Substances Act. The accused 1 & 2 were also convicted under Section 3(4) of the POTA. Accused No.4 namely Navjot Sandhu @ Afsan Guru was acquitted of all the charges except the one under Section 123 of the IPC for which she was convicted and sentenced to undergo rigorous imprisonment for five years and to pay fine. Death sentences were imposed on the other three accused for the offence under Section 302 read with Section 120B of the IPC and Section 3(2) of the POTA. They were also sentenced to life imprisonment on as many as eight counts under the provisions of the IPC, the POTA and the Explosive Substances Act in addition to varying amounts of fine. The amount of Rs.10 lakhs, which was recovered from the possession of two of the accused, namely, Mohd. Afzal and Shaukat Hussain, was forfeited to the State under Section 6 of the POTA.[83]

The designated Judge submitted the record of the case to the High Court of Delhi for confirmation of

death sentence imposed on the three accused. Each of the four accused filed appeals against the verdict of the Learned designated Judge. The State also filed an appeal against the judgment of the designated Judge of the Special Court seeking enhancement of life sentence to the sentence of death in relation to their convictions under Sections 121, 121A and 302 of the IPC. In addition, the State filed an appeal against the acquittal of the 4th accused on all the charges other than the one under Section 123 of the IPC. The Division Bench of the High Court, by its judgment pronounced on 29.10.2003 dismissed the appeals of Mohd. Afzal and Shaukat Hussain Guru and confirmed the death sentence imposed on them. The High Court allowed the appeal of the State in regard to sentence under Section 121 of the IPC and awarded them death sentence under that Section also. The High Court allowed the appeals of S.A.R. Gilani and Navjot Sandhu @ Afsan Guru and acquitted them of all charges.[84]

Aggrieved with the judgement dated 29.10.2003 of the Delhi High Court, Shaukat Hussain Guru preferred two appeals while Mohd. Afzal preferred one and the Government of National Capital Territory of Delhi preferred four appeals against the acquittal of S.A.R. Gilani and Navjot Sandhu.

The Supreme Court dismissed the appeal filed by Mohd. Afzal and confirmed the death sentence imposed upon him. The appeal of Shaukat was allowed partly and he was convicted under Section 123 of the IPC and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 25,000/- and in default of payment of fine he should suffer rigorous imprisonment for a further period of one year. His conviction on other charges was set aside. The appeals filed by the State against the acquittal of S.A.R. Gilani and Afsan Guru were dismissed.

On the issue of compliance of procedural safeguards as provided in Section 32 and the other safeguards contained in Section 52 of the POTA in respect of recording of confessional statements, the prosecution contended that the Deputy Commissioner of Police before recording the confession, gave the statutory warning and then recorded the confession at a place away from the police station, gave a few minutes time for reflection and only on being satisfied that the accused Afzal volunteered to make confession in an atmosphere free from threat or inducement that he proceeded to record the confession to the dictation of Afzal. The Supreme Court however observed that the investigating authorities failed to comply with the procedural safeguards. The court pointed out that the more important violation of the procedural safeguards was not appraising the accused the right to consult a legal practitioner either at the time they were initially arrested or after the POTA was brought into picture as required under sub-section (2) read with sub-Section (4) of Section 52 of the POTA. The Commissioner of Police, who is competent to investigate the POTA offences, failed to inform the persons under arrest of their right to consult a legal practitioner, nor did he afford any facility to them to contact the legal practitioner.

The Supreme Court further pointed out that the investigation authorities failed to inform the family member or relative of the arrested persons about the arrests. Sub-section (3) of Section 52 of the POTA enjoins that the information of arrest shall be immediately communicated by the Police Officer to a family member or in his absence, to a relative of such person by telegram, telephone or by any other means and this fact shall be recorded by the Police Officer under the signature of the person arrested.

Another breach of safeguard that the Supreme Court pointed out was not giving reasonable time to the accused for reflection before recording their confession. The court observed that 5 to 10 minutes time admittedly granted to the accused by prescribed authority who recorded the confession for thinking/

reflection before recording their confession was not adequate.

The Court finally held,

> *"All these lapses and violations of procedural safeguards guaranteed in the statute itself impel us to hold that it is not safe to act on the alleged confessional statement of Afzal and place reliance on this item of evidence on which the prosecution places heavy reliance."*

On the issue of legal aid to Afzal Guru, the learned counsel, who represented Afzal Guru in the Supreme Court, contended that Afzal Guru was denied proper legal aid, thereby depriving him of effective defence in the course of trial. The contention was that the counsel appointed by the Court as 'amicus curiae' to defend Afzal was thrust on him against his will and the first amicus made concessions with regard to the admission of certain documents and framing of charges without his knowledge. It was further submitted that the second counsel who conducted the trial did not diligently cross-examine the witnesses. In a nutshell, it was therefore contended that his valuable right of legal aid flowing from Articles 21 and 22 was violated.

The apex court rejected this contention stating that it was devoid of substance and it was observed that the learned trial Judge did his best to afford effective legal aid to the accused Afzal when he declined to engage a counsel on his own. The court further observed that the criticism against the counsel seemed to be an afterthought raised at the appellate stage. The Supreme Court opined that the right of legal aid cannot be taken to the extent that the Court (trial court) should dislodge the counsel and go on searching for some other counsel to the liking of the accused.

On the issue of circumstantial evidence, it had been held numerous circumstances on record were against Afzal. Among others, the Court observed that Accused 1 Afzal knew who the deceased terrorists were and he identified the dead bodies of the deceased terrorists. There was frequent telephonic communication among Afzal and couple of the dead terrorists. The Court also observed that there is clear evidence to the effect that the mobile instruments were being freely exchanged between Afzal and Mohammed and other terrorists. It has been further out that the details of the phone calls and the instruments used revealed close association of Afzal with the deceased terrorists.

The other circumstances which prominently shed light on the involvement of the accused Afzal relate to the discovery of the abodes or hideouts of the deceased terrorists and the recovery of various incriminating articles there from as well as the identification of certain shops from where the appellant and one or the other deceased terrorist purchased various items used for preparation of explosives etc.

Case 4: State through Superintendent of Police, CBI/SIT vs. Nalini and Ors[85]

Rajiv Gandhi, a former Prime Minister of India was assassinated on 21-5-1991 at a place called Sriperumpudur in Tamil Nadu. The assassin named Thanu who was made into a human bomb and she got herself exploded at 10.19 P.M. at very close proximity to the visiting former Prime Minister. In the explosion, 18 others were also killed. Investigation pointed criminal conspiracy to murder the former Prime Minister.[86]

It was the case of the prosecution that a criminal conspiracy was hatched and developed by the hardcore cadres of the Liberation Tigers of the Tamil Eelam (LTTE) cadres over a long period of 6 years commencing from July 6, 1987 and stretching over till May 1992. The main objects of the conspiracy were: (1) to carry out acts of terrorism and disruptive

activities in Tamil Nadu and other places in India during the course of which to assassinate Rajiv Gandhi and others, (2) to cause disappearance of evidence thereof, (3) to harbour all the conspirators living in India, and (4) to escape from being apprehended and to screen all those who were involved in the conspiracy from legal consequences.

On completion of the investigation the CBI filed the charge-sheet against all the 26 appellants besides Veluppillai Piribhakaran (the Supremo of the LTTE), Pottu Omman (the Chief of intelligence wing of the LTTE) and Akila (Deputy Chief of intelligence) for various offences including the main offence under Section 302 read with Section 120-B of the IPC and Sections 3 & 4 of the TADA.

The Special Judge of the TADA convicted all the 26 accused of all the main offences charged against each of them. He sentenced all of them to death for the principal offence under Section 302 read with Section 120-B of the IPC. In addition thereto A-1 (Nalini) was again sentenced to death under Section 3(1)(ii) of the TADA. (A-16) Ravichandran and (A-17) Suseendran were further convicted under Section 5 of the TADA and were sentenced to imprisonment for life. For other offences of which the accused were convicted the trial court awarded sentences of lesser terms of imprisonment.

The Supreme Court confirmed the conviction for the offence under Section 120B read with Section 302 of the IPC on A-1 (Nalini), A-2 (Santhan @ Raviraj) A-3 (Murugan @ Thas), A-9 (Poyert Pauyyas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivlan @ Arivu) and sentenced them to death while the Court set aside the conviction and sentence of the offences under Section 302 read with Section 120B passed by the trial court on the remaining accused. Most importantly, the Supreme Court struck down the punishment under the TADA.

On whether the offences in the present cases constitute "Terrorist Act" as defined in Section 2(1)(h) or do the same fall under Sub-section (2) or Sub-section (3) of Section 3 of the TADA, the Supreme Court held that the offences in the present case did not constitute terrorist act as defined in the TADA. The Court held that none of the conspirators can be caught in the dragnet of Sub-section (3) of Section 4 of the TADA relating to disruptive activities.

Whether the charges have been proved beyond reasonable doubts, the Supreme Court held that the prosecution has successfully established that Rajiv Gandhi was assassinated at 10.19 P.M. on 21.5.1991 at Sriperumbudur by a girl named Thanu who became a human bomb and got herself exploded in the same event; and that altogether 18 persons, including the above two, died in the said explosion. There was overwhelming evidence to show that assassination of Rajiv Gandhi was resulted from a conspiracy to finish him.

However, the cardinal principles of fair trial were violated as Arivu was convicted solely based on confessional statement without any corroborative evidence. The investigation officer of the CBI Superintendent of Police, P V. Thiagarajan subsequently admitted manipulation of confessional statement of Arivu. In an interview with the *Times of India* on 21st November 2013, P V Thiagarajan admitted that he had manipulated the confessional statements of A.G. Perarivalan to join the missing links in respect of charge of bomb making in order to secure convictions. He reportedly regretted having done that. In the interview Thiagarajan said that Perarivalan, in his confession before him, admitted that he purchased the battery. In the words of Thiagarajan, "*But he said he did not know the battery he bought would be used to make the bomb. As an investigator, it put me in a dilemma. It wouldn't have qualified as a confession statement without his admission of being part of the conspiracy. There I omitted a part of his statement and added my interpretation. I regret it*."[87] The fact that confessional statement was not

verified implies that the right to cross examine the witnesses as per 14(2)(e) was violated.

iv. The issue of determining juvenility

Case 1: Ram Deo Chauhan @ Rajnath Chauhan, Assam

Ram Deo Chauhan @ Rajnath Chauhan accused of killing four persons of his employer's family on 8 March 1992. A criminal case was registered against the accused on an FIR lodged by Bani Kant Das, elder brother of the deceased. After investigation and preparation of charge sheet, the case was submitted to the trial Court and charges were framed against the accused under Sections 302, 323, 325 and 326 of the IPC. On 31 March 1998, the trial Court had found Ramdeo Chauhan guilty of murder of four members of his employer's family and awarded death penalty. On appeal, the Gauhati High Court vide judgment dated 1 February 1999 confirmed the conviction and sentence of death on the appellant.[88] On 31 July 2000, two judges Bench of the Supreme Court upheld the death sentence.[89]

Ramdeo Chauhan's juvenility at the time of commission of the offences was subject matter of subsequent litigation before the Supreme Court and the Gauhati High Court.

Ram Deo Chauhan filed a review petition being (Crl) 1105 of 2000 contending that he was a juvenile at the time of commission of the offence. As the question of juvenility was raised, the review petition was referred to a larger Bench comprising Justice K T Thomas, Justice R P Sethi and Justice S N Phukan.[90] On 10 May 2001, the larger Bench delivered the judgement in which the majority view comprising Justice R P Sethi and Justice S N Phukan held that Chauhan was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act, while the minority view of Justice K T Thomas held that he was a juvenile and commuted the death sentence to life imprisonment. In his dissenting judgment Justice K T Thomas observed as under:

> *"But I am inclined to approach the question from a different angle. Can death sentence be awarded to a person whose age is not positively established by the prosecution as above 16 on the crucial date. If the prosecution failed to prove positively that aspect, can a convicted person be allowed to be hanged by neck till death in view of the clear interdict contained in Section 22(1) of the Juvenile Act."* Justice Thomas further observed *"The question here, therefore, is whether the plea of the petitioner that he was below the age of 16 on the date of his arrest could unquestionably be foreclosed. If it cannot be so foreclosed, then imposing death penalty on him would, in my view, be violative of Article 21 of the Constitution."*[91]

During the pendency of the review petition, Ram Deo Chauhan had filed a mercy petition before the Governor of Assam on 17 August 2000 for commutation of the death sentence. On 28 January 2002, the Governor of Assam commuted the death sentence of Chauhan to one of life imprisonment, among others, on the basis of recommendation of the NHRC. On 21 May 2001, the NHRC taking into consideration the dissenting judgment of Justice K T Thomas and observation of Justice S N Phukan who opined that *"the factors which have weighed with my learned Brother Mr. Justice Thomas can be taken note of in the context of section 432(2) of the Code"* recommended that the death sentence of Chauhan be commuted to life imprisonment by the Governor of Assam/President of India. The decision of the order of the Governor was challenged in the Supreme Court by Bani Kanta Das, elder brother of the deceased. On 8 May 2009, the Supreme Court set aside the Governor's order ruling that the order directing commutation by the Governor did not disclose any reason, while the NHRC had no jurisdiction

to intervene and make such recommendation. The Supreme Court while ruling that the NHRC had no jurisdiction to make such recommendation held "*the NHRC proceedings were not in line with the procedure prescribed under the Act. That being so, the recommendations, if any, by the NHRC are non est.*"[92] Ram Deo Chauhan filed a review petition being (C) No.1378 of 2009 (Second review petition) against the apex court order. On 19 November 2010, a two judge Bench of the apex court comprising Justice Aftab Alam and Justice Ashok Kumar Ganguly quashed the Supreme Court order dated 8 May 2009 and restored the decision of the Governor commuting appellant's death sentence. The Court observed that both findings on the commutation by the Governor and NHRC's jurisdiction were *"vitiated by errors apparent on the face of the record."* The Court held the NHRC had not "committed any illegality" in making a recommendation to the Governor and that the "NHRC acted within its jurisdiction". The Supreme Court further noted *"In that judgment, this court did not advert to the question of age of the petitioner as it was possibly not argued."*[93]

Accordingly, the Supreme Court, while granting liberty to Chauhan to claim juvenility in appropriate forum held *"If such a proceeding is initiated by the petitioner, the same will be dealt with without being impeded by any observation made or finding reached in any of the judgments arising out of the concerned criminal case against the petitioner, by any Court, including this Court."*[94]

Pursuant to this, Ramdeo Chauhan moved an application claiming juvenility before the Juvenile Justice Board (JJB), Morigaon district but determination of the application was inordinately delayed.[95] On 3 July 2011, child rights activist Minna Kabir wrote a letter to the Chief Justice of the Gauhati High Court seeking intervention to expedite the proceedings before the JJB, Morigaon, on Chauhan's application claiming juvenility. The Gauhati High Court *suo motu* converted Ms. Kabir's letter into a public interest litigation (No.39/2011). In the judgement dated 9 August 2011, a bench comprising Justice Amitava Roy and Justice C.R. Sharma held that "*on a rational and judicious assessment of the evidence available on record as well as the authorities cited at the Bar, we are of the unhesitant opinion that the accused applicant was a juvenile as defined in section 2(k) of the Act on the date of the commission of the offence i.e. 8.3.1992 and is thus entitled to be treated as a juvenile in conflict with law vis-à-vis the charges and was entitled at all relevant points of time to be dealt with as such."* The court finally ordered that Ramdeo Chauhan @ Rajnath Chauhan be released forthwith from custody.[96]

"The Natoinal Campaign for Abolitoin of Death Penalty in India" is an initiative of Asian Centre for Human Rights funded by the European Commission under the European Instrument for Human Rights and Democracy – the European Union's programme that aims to promote and support human rights and democracy worldwide.

(Endnotes)

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62. The judgment was passed in Writ Petition (Criminal) No. 77 of 2014 with Writ Petition (Criminal) No. 137 of 2010, Writ Petition (Criminal) No.52 of 2011, Writ Petition (Criminal) No. 39 of 2013, Writ Petition (Criminal) No. 108 of 2014 and Writ Petition (Criminal) No. 117 of 2014
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64. Ibid
65. Swamy Sharaddananda vs. State of Karnataka (2008) 13 SCC 767
66. Rameshbhai Chandubhai Rathod vs. State of Gujarat, (2009) 5 SCC 740
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The following reports of Asian Center for Human Rights relating to the issue of death penalty in India are available at http://www.achrweb.org/death_penalty.html

- **Arbitrary on all Counts: Consideration of mercy pleas by President of India, 10 December 2014**
- **Death Reserved for the Poor, November 2014**
- **Death penalty through self incrimination in India, October 2014**
- **India: Death Without the Right to Appeal, September 2014**
- **Award of enhanced punishment of death by the Supreme Court, 26 September 2014**
- **India: Death Penalty Has No Deterrence, August 2014**
- **India: Death Penalty Statistics, June 2014**
- **The Case for Abolition of Death Penalty in India - ACHR's submission to the Law Commission of India on Capital Punishment, May 2014**
- **Mercy on Trial in India, 22 October 2013**
- **The State of Death Penalty in India 2013: Discriminatory treatment amongst the death row convicts, 14 February 2013**

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