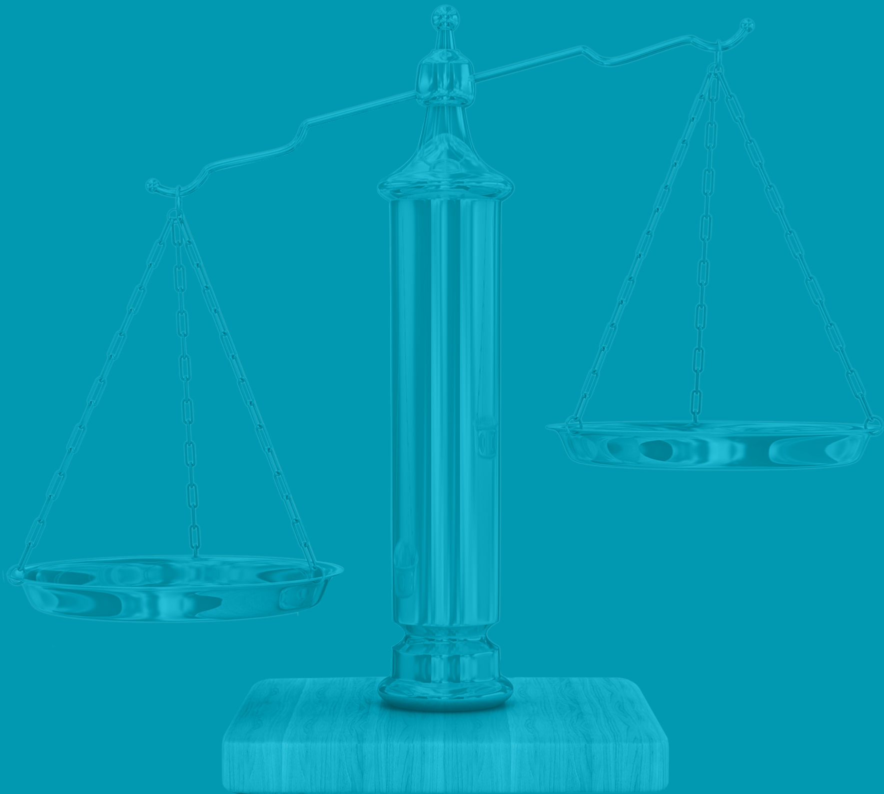

INDIA

DEATH WITHOUT LEGAL SANCTION

Asian Centre For Human Rights

India: Death Without Legal Sanction

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Abbreviations

ACHR	Asian Centre for Human Rights
CBI	Central Bureau of Investigation
CrPC	Code of Criminal Procedure
D.B.	Division Bench
FIR	First Information Report
ICCPR	International Covenant on Civil and Political Rights
IPC	Indian Penal Code
JJB	Juvenile Justice Board
LTTE	Liberation Tigers of the Tamil Eelam
MHA	Ministry of Home Affairs
NDPS	Narcotic Drugs and Psychotropic Substances Act
NHRC	National Human Rights Commission
POTA	Prevention of Atrocities Act
PW	Prosecution witness
TADA	Terrorist and Disruptive Activities (Prevention) Act
UN	United Nations

1. Preface

The International Covenant on Civil and Political Rights (ICCPR) ratified by India requires that death penalty may be imposed only in the most serious crimes and further that the trial must meet the highest standards of fair trial as provided under Article 14 of the ICCPR. In addition to Article 14 of the ICCPR, India as a member of the United Nations ought to comply with customary international human rights standards relating to death penalty including United Nations (UN) Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN Basic Principles on the Independence of the Judiciary, UN Basic Principles on the Role of Lawyers, UN Guidelines on the Role of Prosecutors, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and UN Standard Minimum Rules for the Treatment of Prisoners.

Imposition of death penalty without ensuring respect for the fair trial standards provided under international human rights standards is arbitrary deprivation of the right to life. Such death penalty is nothing but judicial murder.

This study highlights that India has not been complying with its obligations under the ICCPR and has indeed been imposing death penalty without legal sanction. While the violations of international fair trial standards such as denial of legal assistance of the defendant's own choosing at every stage of the proceedings and trial without delay are plenty, this report highlights six critical instances of imposition of death penalty without legal sanction. These include imposition of mandatory death sentence, imposition of death sentence in violations of the judgements of the constitutional bench of the Supreme Court on imposition of death penalty, rejection of mercy pleas by the President of India in violation of Article 21 (relating to the right to life) of the Constitution of India and execution of death row convicts in violations of the Article 14 (relating to equality and non-discrimination) and Article 21 of the Constitution. In addition, there are cases of imposition of death sentence on juveniles though the same have been corrected, at times with great difficulty.

No country governed by the rule of law can defend imposition of death penalty without legal sanction. The time has come for India to abolish death penalty given its widespread imposition without legal sanction.

2. Death without legal sanction

There is universal consensus that imposition of death penalty, which may be imposed only in the most serious crimes, must meet the highest standards of fair trial. Article 6.2 of the International Covenant on Civil and Political Rights (ICCPR) provides that "*sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court*".

The 'provisions of the Covenant' as provided under Article 6.2 include the right to fair trial as provided under Article 14 which is further complemented by the United Nations (UN) Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, the UN Basic Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, the UN Guidelines on the Role of Prosecutors, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners. The UN Human Rights Committee in its General Comment No. 6 stated that "*the imposition of the death penalty upon the conclusion of a trial in which the due process and fair trial guarantees in article 14 of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant on the right to life.*" [1] Therefore, imposition of death penalty without ensuring respect for the fair trial standards provided under the ICCPR amounts to violation of the Article 6.1 of the ICCPR which unequivocally states that "*No one shall be arbitrarily deprived of his life*". Arbitrary deprivation of the right to life need not be perpetrated only by the law enforcement personnel alone but by the judiciary too if the standards of fair trial are not ensured or complied with during trial for imposition of death penalty.

1. Moving Away from the Death Penalty: Lessons in South-East Asia, Office of the High Commissioner for Human Rights Regional Office for South-East Asia, October 2013, available at http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf

While the violations of international fair trial standards such as denial of legal assistance of the defendant's own choosing at every stage of the proceedings and trial without delay are plenty, this report highlights six critical instances of imposition of death penalty without legal sanction.

First, judicial discretion is one of the cardinal principles of independence of judiciary which stands violated in case of mandatory death penalty as it prevents any possibility of taking into account the defendant's personal circumstances, the circumstances of the particular offence and any related mitigating factors by the judiciary. The UN Human Rights Committee has stated that "*the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6, paragraph 1 of the ICCPR*", and is fundamentally incompatible with the right to fair trial and due process guarantees under Article 14 of the ICCPR.[2] India's Supreme Court had declared mandatory death penalty under Section 303 of the Indian Penal Code (IPC) as unconstitutional in *Mithu v. State of Punjab*[3] in 1983 stating, inter alia, that

> *"… Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. "The infinite variety of cases and facets to each would make general standards either meaningless 'boiler plate' or a statement of the obvious.......*
>
> *It is because the death sentence has been made mandatory by section 303 in regard to a particular class of persons that, as a necessary consequence, they are deprived of the opportunity under section 235(2) of the Criminal Procedure Code to show cause why they should not be sentenced to death and the Court is relieved from its obligation under section 354(3) of that*

2. Moving Away from the Death Penalty: Lessons in South-East Asia, Office of the High Commissioner for Human Rights Regional Office for South-East Asia, October 2013, available at http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf
3. Mithu v. State of Punjab Etc. 1983 AIR 473, 1983 SCR (2) 690

Code to state the special reasons for imposing the sentence of death. The deprivation of these rights and safeguards which is bound to result in injustice is harsh, arbitrary and unjust…..

Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Sec. 303 as valid. Sec. 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Sec. 303 is such a law and it must go the way of all bad laws".

Though the Supreme Court declared mandatory death sentence as unconstitutional in 1983, the courts continued to impose mandatory death penalty in other laws such as Section 27(3) of the Arms Act of 1959 providing for mandatory death sentence.[4] For example, on 25 April 2005, a trial court in West Bengal imposed death penalty under various provisions including under Section 27(3) under the Arms Act to seven persons including Jamiludin Nasir and Aftab Ahmed Ansari. On 5 February 2010, the High Court of Calcutta confirmed the conviction and death sentence of two out of the seven persons, Jamiludin Nasir and Aftab Ahmed Ansari passed by the trial court on all counts.[5] In the meantime, on 1 February 2012, the Supreme Court in *State of Punjab v. Dalbir Singh* struck down Section 27(3) of the Arms Act, as unconstitutional.[6] Consequently, the Supreme Court in a judgement on 10 October 2014 set aside the conviction of Jamiludin Nasir and Aftab Ahmed Ansari under Section 27(3) of Arms Act and altered the death sentence imposed on other provisions.[7]

What is more shocking is the fact that Government of India continues to enact laws providing for mandatory death sentences, knowing fully well that mandatory death sentence had already been declared as unconstitutional by

4. Section 27(3) of the Arms Act, "Whoever uses any prohibited arms or prohibited ammunition or does any act in contravention of section 7 and such use or act results in the death of any other person, shall be punishable with death".
5. Md. Jamiluddin Nasir v. State of West Bengal (2014) 42 SCD 19
6. State of Punjab v. Dalbir Singh (2012) 3 SCC 346
7. Md. Jamiluddin Nasir v. State of West Bengal (2014) 42 SCD 19

the Supreme Court. The laws enacted since 1983 providing mandatory death sentence include the Narcotic Drugs and Psychotropic Substances Act of 1985 (NDPS),[8] the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act of 1989[9], and the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act of 2002.[10] This lack of respect for the judgements of the Supreme Court by the Government of India led to numerous litigations challenging constitutional validity of the mandatory death sentencing.

In June 2011, the Bombay High Court in an order read down Section 31A[11] of the NDPS Act which prescribed mandatory death sentence and the same is under consideration of the Supreme Court.[12] However, this has not stopped the courts in India to impose mandatory death penalty under Section 31A of the NDPS Act.

8. Under Section 31A of the NDPS Act
9. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 provides mandatory death sentence under Section 3(2)(i) of the Act which provides:
"3.(2). Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-
(i) gives or fabricates false evidence intending thereby to cause, or knowing it to be likely that he will thereby cause, any member of a Scheduled Caste or a Scheduled Tribe to be convicted of an offence which is capital by the law for the time being in force shall be punished with imprisonment for life and with fine; and if an innocent member of a Scheduled Caste or a Scheduled Tribe be convicted and executed in consequence of such false or fabricated evidence, the person who gives or fabricates such false evidence, shall be punished with death."
10. Section 3(1)(g)(i) of the SUA Act read as under:**"3 Offences against ship, fixed platform, cargo of a ship, maritime navigational facilities, etc.- (1) Whoever unlawfully and intentionally-……………(g) in the course of commission of or in attempt to commit, any of the offences specified in clauses (a) to (d) in connection with a fixed platform or clauses (a) to (f) in connection with a ship-**
(i) causes death to any person shall be punished with death." The SUA Act, 2002 can be accessed at: http://www.nia.gov.in/acts/The_Suppression_of_Unlawful_Acts_Against_Safety_of_Maritime_Navigation_Act_2002.pdf
11. Section 31A of NDPS provides "Death penalty for certain offences after previous conviction.- (l) Notwithstanding anything contained in section 31, if any person who has been convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, any of the offences punishable under 3 [section 19, section 24, section 27 A and for offences involving commercial quantity of any narcotic drug or psychotropic substance] is subsequently convicted of the commission of, or attempt to commit, or abetment of, or criminal conspiracy to commit, an offence relating to-
(a) engaging in the production, manufacture, possession, transportation, import into India, export from India or transshipment, of the narcotic drugs or psychotropic substances specified under column (1) of the Table below and involving the quantity which is equal to or more than the quantity indicated against each such drug or substance, as specified in column (2) of the said Table:………………. (b) financing, directly or indirectly, any of the activities specified in clause (a), shall be punishable with death." Note the Table not produced here but it says Opium, Morphine, Heroin, Codeine, Thebaine, Cocaine, Hashish, LSD, LSD-25(+)-N, N Diethyllysergamide (d-lysergic acid diethylamide), THC (Tetrahydrocannabinols, the following Isomers: 6a (10a), 6a (7) 7, 8, 9, 10, 9 (11) and their stereochemical variants), Methamphetamine (+)-2-Methylamine-1- Phenylpropane, Metha qualone (2- Meth y 1-3-0-tol y 1-4-(3h)-quinazolinone), Amphetamine (+)-2-amino-1-phenylporpane, Salts and preparations of the psychotropic substances mentioned in (ix) to (xii) etc, of quantity ranging between 500 grams to 20 Kgs
12. Writ Petition (Civil) No. 1784 and 1790 of 2010

In January 2012, the Court of Additional District and Sessions Judge, Chandigarh awarded death sentence to Paramjit Singh of Punjab under Section 20(C) read with Section 31A of the NDPS Act.[13] In March 2012, the District Court Chandigarh again awarded death sentence to Balwinder Singh of Punjab under Section 21(c) read with Section 31A of the NDPS Act.[14]

In fact, courts still award death penalty under Section 303 of the IPC. Saibanna Nigappa Natikar of Karnataka was given death sentence under Section 303 of the IPC by a trial court in 2003. The High Court of Karnataka, despite acknowledging that framing of charges under Section 303 of the IPC was wrong, went on to confirmed the death sentence on Saibanna.[15] The Supreme Court also upheld the death sentence on Saibanna in 2005.[16] It was on 13 September 2009 that the Supreme Court in *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra* held the decision in *Saibanna v. State of Karnataka* as *per incuriam* for being *"inconsistent with Mithu (supra) and Bachan Singh (supra)"*.[17]

<u>Second</u>, India imposes death penalty in clear violation of the fair trial standards provided under the ICCPR. Article 6.2 of the ICCPR provides that death penalty "*can only be carried out pursuant to a final judgement rendered by a competent court*". In this regard, the features of the "competent court" ought to be considered as the establishment of a court by law by itself cannot be considered as 'competent' unless the trial complies with the fair trial standards and the court itself meets the UN Basic Principles on the Independence of the Judiciary. A competent court must conduct the trial through the common laws of the country such as Code of Criminal Procedure (CrPC) and Evidence Act. However, when the common laws relating to trial are circumscribed and made subservient to special laws while trying the cases relating to national security, counter terrorism or anti-drug measures, the special courts or designated courts are effectively reduced to military tribunal/summary trial.

13. See 'Drug peddler gets capital punishment', Times of India, 29 January 2012, http://timesofindia.indiatimes.com/city/chandigarh/Drug-peddler-gets-capital-punishment/articleshow/11670031.cms
14. Drug peddler gets death sentence, Hindustan Times, 26 March 2012, available at: http://www.hindustantimes.com/punjab/chandigarh/drug-peddler-gets-death-sentence/article1-831175.aspx
15. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf
16. Saibanna v. State of Karnataka [2005(2)ACR1836(SC)]
17. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498

The Government of India under the Terrorist and Disruptive Activities (Prevention) Act (TADA) and the Prevention of Terrorism Act (POTA) made self-incrimination prohibited under ICCPR admissible for the purposes of imposing death penalty and further allowed in camera trial including the National Investigation Agency Act[18]. Though the courts under the TADA and the POTA were established by law, because of the violations of the principles of fair trial, these courts cannot be considered as "competent court" as provided in the ICCPR; and therefore imposition of death sentences by these courts are illegal irrespective of the review by the Supreme Court.

Devender Pal Singh Bhullar was arrested under the TADA and the Indian Penal Code and he was sentenced to death solely based on his confessional statements recorded by Deputy Commissioner of Police B.S. Bhola under Section 15[19] of the TADA. While two judges of the Supreme Court confirmed the conviction and death sentence on Bhullar on 22 March 2002, Justice M. B. Shah delivered a dissenting judgement, and pronounced Bhullar as "innocent". Justice Shah held that there was nothing on record to corroborate the confessional statement of Bhullar and police did not verify the confessional statement including the hospital record to find out whether D. S. Lahoria, one of the main accused 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. None of the main accused, i.e. Harnek or Lahoria was convicted[20] but Bhullar, the alleged conspirator, was sentenced to death. In April 2013,

18. Section 13 of the TADA, 1985 refers to protection of the identity and address of the witness and in camera proceedings. Section 16 of TADA, 1987 followed the TADA, 1985 as it provided camera trial for the protection of identity of witnesses. It was mandatory to hold proceedings in camera under Section 13 of TADA, 1985 whereas the proceedings could be held in camera under Section 16 of TADA, 1987 only where the Designated Court so desired.
    Section 30 of POTA 2002 also provided camera proceedings on the same lines as Section 16 of TADA, 1987.
    Section 17 of National Investigative Agency Act, 2008 also provides for camera proceedings for the protection of identity of witnesses if the Special Court so desires.
19. "15. Certain confessions made to police officers to be taken into consideration. - (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:
    Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.
    (2) The police officer shall, before recording any confession under subsection (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."
20. ACHR "Death Penalty Through Self Incrimination in India", October 2014, http://www.achrweb.org/reports/india/Incrimination.pdf

Anoop G Chaudhari, the Special Public Prosecutor who had appeared against Bhullar in the Supreme Court in 2002 stated that though two of the three judges on the Supreme Court bench upheld his arguments, he found himself agreeing with the dissenting verdict delivered by the presiding judge, M B Shah, who had acquitted Bhullar. Chaudhari had stated "*Surprising as it may sound, I believe that Shah was right in not accepting my submissions in support of the trial court's decision to convict Bhullar in a terror case, entirely on the basis of his confessional statement to the police*".[21]

Similarly for assassination of Rajiv Gandhi, former Prime Minister of India, one of the accused Perarivlan @ Arivu was sentenced to death. The Central Bureau of Investigation (CBI) charge-sheeted 26 accused for various offences under the TADA and the IPC[22] and the Special Judge of the TADA Court sentenced all 26 main accused to death.[23] On 11 May 1999, the Supreme Court set aside convictions under the TADA but confirmed the death sentence passed by the TADA Court on Nalini, Santhan, Murugan and Arivu under the Indian Penal Code.[24] Arivu was sentenced to death based on his confessional statement. Interestingly, in a documentary released in November 2013 on Arivu, the former Superintendent of Police of the CBI Mr P V Thiagarajan admitted that he had manipulated Arivu's confessional statement in order to join the missing links in the narrative of the conspiracy in order to secure convictions. Thiagarajan stated, "*But [Perarivalan] 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*."[25]

21. Public prosecutor turns surprise ally for Bhullar, The Times of India, 18 April 2013, http://timesofindia.indiatimes.com/india/Public-prosecutor-turns-surprise-ally-for-Bhullar/articleshow/19606737.cms
22. They were charged under Section 302 read with Section 120-B of the Indian Penal Code and Section 3 & 4 of the TADA.
23. They were sentenced under Section 302 read with Section 120-B IPC. One of accused was also sentenced to death under Section 3(1)(ii) of the TADA.
24. The death sentence was under Section-120B read with Section 302 IPC. State through Superintendent of Police, CBI/SIT v. Nalini and Ors.[AIR1999SC2640]
25. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at: http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms

In the cases of both Arivu and Bhullar, the confessions made to the police officers are in violation of the Indian Evidence Act,[26] which does not allow confessions made to police officers as admissible evidence, and Article 14(3)(g) of the ICCPR which prohibits self-incrimination.[27] Had they been tried under the IPC based on the evidence taken under the India Evidence Act, both would have certainly been acquitted. Had they been tried only under the TADA, they would not have been sentenced to death as the maximum punishment for abetment under the TADA is five years imprisonment.[28] Since Arivu was discharged under the TADA, the evidence (confession made to police officer) extracted under the TADA should not have been used as evidence to prosecute him under the IPC offences. In such a case Arivu would have been released as confession made to a police officer is not admissible under the Indian Evidence Act. Devender Pal Singh Bhullar too, if tried under the IPC without relying on the evidence obtained under the TADA (confession made to a police officer) would have certainly been acquitted.

It is clear that death sentences are imposed in terror cases in clear violations of the ICCPR and therefore, without proper legal sanction as provided under international human rights law.

Third, imposition of death penalty in clear violation of *stare decisis* is imposition of death penalty without legal sanction. The *Bachan Singh* judgement held that death penalty can be imposed only in the "rarest of rare" cases after considering aggravating circumstances relating to the crime and mitigating circumstances relating to the criminal. A balance sheet of these elements is required to be spelt out in the judgement.

In the same judgement i.e. *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra,* the Supreme Court further declared *Saibanna v. State of Karnataka*[29] as *per incuriam* for being "inconsistent with Mithu (supra) and Bachan Singh (supra)".

26. Section 25. Confession to police officer not to be proved - No confession made to police officer shall be proved as against a person accused of any offence.
27. Article 14 (3). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (g) Not to be compelled to testify against himself or to confess guilt."
28. Under Section 3(3) of the TADA the punishment for abetting terrorism is "imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine".
29. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra [(2009) 6 SCC 498]

In February 2014, the Supreme Court stayed execution of three death row convicts sentenced in *Ankush Maruti Shinde v. State of Maharashtra* following the logic laid down in *Ravji v. State of Rajasthan* which had been declared as *per incuriam.*[30]

Fourth, the President of India has been held responsible for violations of Article 21 of the constitution of India[31] in considering the mercy pleas of the death row convicts. Further, there is prohibition under Section 32A of the NDPS Act against any suspension, remission or commutation in any sentence awarded under the Act.

The Supreme Court has held that "*It is well established that exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.*" The Court further held that "*Therefore, inasmuch as Article 21 is available to all the persons including convicts and continues till last breath if they establish and prove the supervening circumstances, viz., undue delay in disposal of mercy petitions, undoubtedly, this Court, by virtue of power under Article 32, can commute the death sentence into imprisonment for life. As a matter of fact, it is the stand of the petitioners that in a petition filed under Article 32, even without a presidential order, if there is unexplained, long and inordinate delay in execution of death sentence, the grievance of the convict can be considered by this Court.*"

The Supreme Court had commuted the death sentence of a number of death row convicts for violation of Article 21 of the Constitution of India by the President of India. These included commutation of death sentences of

30. Times of India, "SC revisiting death penalties, stays three more" 6 February 2014, http://timesofindia.indiatimes.com/india/SC-revisiting-death-penalties-stays-three-more/articleshow/29920086.cms
31. Article 21. Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Mahendra Nath Das on 1 May 2013[32]; 14 death row convicts consisting of Suresh, Ramji, Gurmeet Singh, Praveen Kumar, Sonia, Sanjeev Kumar, Sundar Singh, Jafar Ali, Shivu, Jadeswamy, Bilavendran, Simon, Gnanprakasam and Madiah on 21 January 2014[33]; Devender Pal Singh Bhullar on 31 March 2014[34]; and Ajay Kumar Pal in 12 December 2014[35]. On 28 January 2015, the Allahabad High Court commuted the death sentence of death row convict, Surendra Koli[36] on the same ground.

Indeed, there is legal bar to consider mercy pleas. Section 32A of the NDPS Act deprives an accused/convict from exercising his right to be granted remission/commutation, etc.[37] On 7 May 2013, a Division Bench of the Supreme Court while hearing an appeal filed by one Krishnan and others, convicted under NDPS Act, challenging the Punjab and Haryana High Court's order which held that he was not entitled to any remission in view of the provisions of Section 32A of the NDPS Act referred the matter to the larger bench of the Supreme Court for examining the validity of Section 32A of the NDPS Act.[38] This provision effectively deprives a convict sentenced to death under Section 31A of the NDPS Act from filing mercy petition to the Governors and the President of India for commutation of the death sentence.

<u>Fifth</u>, India carries out execution of death row convicts in clear violation of Article 14 of the Constitution of India[39] and international human rights law relating to equality and non-discrimination. The Supreme Court of India in the landmark *Shatrughan Chauhan v. Union of India* delivered on 21 January 2014 held: "*It is well settled law that executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable and the protection of Article 21 of the Constitution of India inheres in every person, even death row prisoners, till the very last breath of their lives. We have already seen the*

32. Mahindra Nath Das v. Union Of India (2013) 6 SCC 253
33. Shatrughan Chauhan v. Union of India (2014) 3 SCC 1
34. Navneet Kaur v. State of NCT of Delhi (2014) 7 SCC 264
35. Ajay Kumar Pal v. Union Of India, Writ Petition (Criminal) No.128 of 2014
36. Public Interest Litigation (PIL) No 57810 of 2014
37. Section "*32A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.*"
38. Krishnan v. State of Haryana, Criminal Appeal No. 973 of 2008
39. Article 14. Equality before law.—The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

provisions of various State Prison Manuals and the actual procedure to be followed in dealing with mercy petitions and execution of convicts."

As the rights under Article 21 of the Constitution of India extend to till the last breadth, it implies that all death row convicts are equal before law even after rejection of their mercy pleas and the laws of India do not differentiate between those convicted under anti-terror laws and other criminal offences. The right to equality and non-discrimination among the death row convicts does not get extinguished by rejection of mercy pleas.

However, there are at least two recent cases where President of India jumped queue ahead of others to reject the mercy petitions and executed them too.

On 28 October 2012, the President's Secretariat had displayed all the mercy petitions pending before President Pranab Mukherjee on its webpage. As per that list, there were altogether 12 pending mercy pleas which were listed in sequential order as per the date of recommendation received by the President Secretariat from the Ministry of Home Affairs (MHA), with the oldest listed first. In that list, the mercy plea of Ajmal Kasab, sentenced to death for 26/11 Mumbai terror attack, was put at the last being number 12 based on the receipt of the recommendations of the MHA dated 16.10.2012 to reject the mercy plea.[40] However, President Pranab Mukherjee jumped the queue of 11 other convicts whose cases appeared first in sequential order and rejected the mercy plea of Kasab on 05.11.2012.[41] Soon after rejection of his mercy plea Kasab was executed on 21.11.2012 and buried at Pune's Yerwada Central Prison.[42]

Similarly, the mercy plea of Mohammad Afzal Guru, convicted for the attack on Parliament in 2001, had been listed at number 6 based on the receipt of the recommendation of the MHA dated 04.08.2011.[43] The President rejected

40. Ajmal Kasab's mercy petition last among 12 pending petitions in President Pranab Mukherjee's office, The Times of India, 30 October 2012; link http://articles.economictimes.indiatimes.com/2012-10-30/news/34817055_1_mercy-petitions-mercy-plea-afzal-guru
41. President Secretariat: Statement of Mercy Petition cases – Rejected as on 01.08.2014; available at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf
42. Ajmal Kasab hanged, buried at Pune's Yerwada Jail, Indiatoday.com, 21 November 2012; available at: http://indiatoday.intoday.in/story/ajmal-kasab-hanged-after-president-rejected-his-mercy-plea/1/230103.html
43. Ajmal Kasab's mercy petition last among 12 pending petitions in President Pranab Mukherjee's office, The Times of India, 30 October 2012; link http://articles.economictimes.indiatimes.com/2012-10-30/news/34817055_1_mercy-petitions-mercy-plea-afzal-guru

his mercy plea ahead of the other pending cases[44] on 03.02.2013[45] and he was hanged on 09.02.2013[46] without his family being informed about the hanging as required under the Jail Manual.

Sixth, the courts in India continue to impose death sentence on juveniles though the same have been corrected, at times with great difficulty, when the issue of juvenility was brought to the notice of the courts. With respect to Ramdeo Chauhan, a juvenile sentenced to death, the Supreme Court corrected itself after mistakenly ruling that Chauhan was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act.[47] Similarly, Ankush Maruti Shinde was sentenced to death by the Supreme Court[48] and he further filed a mercy petition with the President of India. However, the mercy petition became redundant after it was confirmed by the Additional Sessions Court in Nashik on 7 July 2012 that he was a juvenile at the time of the commission of offence following an inquiry into his age.[49] Even though the judgements awarding death sentence were corrected by the Courts, the facts remains juveniles continue to be sentenced to death because of the failure of the system. While the maximum sentence under the Juvenile Justice Act for any crime is three years, Shinde had served six years jail including in solitary confinement.[50]

44. Afzal Guru hanged in secrecy, buried in Tihar Jail, The Hindu, 10 February 2013
45. President Secretariat: Statement of Mercy Petition cases – Rejected as on 01.08.2014; available at: http://rashtrapatisachivalaya.gov.in/pdfs/mercy.pdf
46. Afzal Guru hanged in secrecy, buried in Tihar Jail, The Hindu, 10 February 2013
47. Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das SCR [2010] 15 (ADDL.) S.C.R.
48. RTI reply No.RB-2013/Admin/RTI/23805 dated 15 June 2013 received from PIO & Under Secretary to Governor (Admin), Raj Bhavan, Mumbai by ACHR
49. *See* 'After six years on death row, spared for being a juvenile', The Times of India, 21 August 2012 at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms
50. After six years on death row, spared for being a juvenile, The Times of India, 21 August 2012; available at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms

3. International human rights standards on fair trial

International Covenant on Civil and Political Rights ratified by India sets forth international human rights standards on fair trial. The international fair trial standards include equality before law, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, to be presumed innocent until proven guilty, the right to have adequate time and facilities for the preparation of defence, the right to communicate with counsel of the defendant's choosing, the right to free legal assistance for poor defendants, the right to cross-examination, the right to free assistance of an interpreter if the defendant cannot understand or speak the language used in court, the right against self-incrimination, the right to have the sentence reviewed by a higher tribunal and making all judgements rendered in a criminal case public. [51]

The ICCPR is further complemented by UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN Basic Principles on the Independence of the Judiciary, UN Basic Principles on the Role of Lawyers, the UN Guidelines on the Role of Prosecutors, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and UN Standard Minimum Rules for the Treatment of Prisoners.

With respect to foreign nationals, Article 36 of the Vienna Convention on Consular Relations ensures the consular access.[52] It provides the following:

"Article 36 Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

   (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of

51. THE RIGHT TO A FAIR TRIAL: PART II – FROM TRIAL TO FINAL JUDGEMENT, OHCHR, available at http://www.ohchr.org/Documents/Publications/training9chapter7en.pdf
52. The Vienna Convention on Consular Relations is availabble at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. \

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

Article 14 of the ICCPR provides the following guarantees for fair trial is reproduced below:[53]

"Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and

53. The International Covenant on Civil and Political Rights is available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   (c) To be tried without undue delay;

   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

   (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The United Nations safeguards guaranteeing protection of the rights of those facing the death penalty as adopted by the United Nations Economic and Social Council resolution 1984/50 of 25 May 1984 as given as under[54]:

"1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence

54. The UN Safeguards guaranteeing protection of the rights of those facing the death penalty is available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx

be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."

4. Summary of Death Sentences Imposed in Violation of the International Fair Trial Standards

Case 1: Devender Pal Singh Bhullar v. State (NCT of Delhi)

A. Details of the case and the proceedings[55]

i. Brief case facts

The prosecution charged Devender Pal Singh Bhullar and co-accused viz. Kuldeep, Sukhdev Singh, Harnek, and Daya Singh Lahoria of being members of a terrorist organization called Khalistan Liberation Force, and carrying out assassination attempt on the life of Mr. M.S. Bitta, the then President of Indian Youth Congress(I) on 11.09.1993 by causing bomb blasts in which 9 persons were killed. During the night between 18th and 19th January 1995, German authorities deported Bhullar from Frankfurt to New Delhi and handed him over to Airport police at the Indira Gandhi International Airport, New Delhi. He was show arrested. Prosecution alleged that immediately upon his arrest, Bhullar tried to swallow cyanide capsule. However, he was prevented from doing so.

ii. Decision of the Designated TADA Court

By judgment and order dated 25th August 2001, in Sessions Case No. 4 of 2000, the Designated Court-1, New Delhi convicted Bhullar for the offence punishable under Section 3(2)(i) of the TADA and Section 120B read with Sections 302 307, 326 324 323 436 and 427 of the IPC and sentenced him to death with a fine of Rs. 10,000/-. He was also sentenced to suffer rigorous imprisonment for five years for the offence punishable under Sections 4 and 5 of the TADA.

Other accused Daya Singh Lahoria, who was extradited from the USA to India, was also 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

55. Devender Pal Singh Bhullar v. State (NCT of Delhi) AIR2002SC1661

accused Bhullar against his co-accused Daya Singh Lahoria and in the absence of corroboration, Daya Singh was acquitted on benefit of doubt.

iii. Basis of the conviction

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.

iv. Decision of the Supreme Court

Against the judgment and order dated 25th August 2001, Bhullar filed Criminal Appeal No. 993 of 2001 while the State had filed Death Reference Case (Crl.) No. 2 of 2001 before the Supreme Court for confirmation of death sentence.

By majority of 2:1, the Supreme Court confirmed the conviction and sentence passed by the trial court and dismissed Bhullar's appeal.

One of the three judges, Justice M.B. Shah passed a dissenting judgement. Justice Shah ruled that Bhullar's appeal be allowed, trial court's judgement and order convicting him be set aside and he be released forthwith if not required in any other case.

i. Majority view (Per Justices Arijit Passayat and B.N. Agarwal)

On the plea that Bhullar cannot be convicted solely on the basis of his alleged confessional statements, the majority view held that whenever an accused challenges that his confessional statement is not voluntary, the initial burden is on the prosecution for it has to prove that all requirements under Section 15 of the TADA and Rule 15 of the Terrorist and Disruptive Activities (Prevention) Rules, 1987, have been complied with. Once this is done, the prosecution discharges its burden and then it is for the accused to show and satisfy the Court that the confessional statement was not made voluntarily. The confessional statement of the accused can be relied upon for the purpose of conviction, and no further corroboration is necessary if it relates to the accused himself.

The majority view further stated that once it is held that the confessional statement is voluntary, it would not be proper to hold that the police had incorporated certain aspects in the confessional statement which were gathered in the investigation conducted earlier. Further that the appellant's so called

retraction was long after he was taken into judicial custody. While he was taken to judicial custody on 24.3.1995, after about a month, he made a grievance about the statement having been forcibly obtained. This was clearly a case of afterthought. The majority view held that since the confessional statement was voluntary, no corroboration for the purpose of its acceptance is necessary.

On the plea that prosecution had failed to place any material to show as to why accused would make a confessional statement immediately on return to India, the majority view held that acceptance of such a plea would necessarily mean putting of an almost impossible burden on the prosecution to show something which was within exclusive knowledge of the accused. It can be equated with requiring the prosecution to show motive for a crime. One cannot normally see into the mind of another. What is the emotion which impels another to do a particular act is not expected to be known by another. It is quite possible that said impelling factors would remain undiscoverable. After all, the factors are psychological phenomenon. No proof can be expected in all cases as to how mind of the accused worked in a particular situation. Above being the position, the majority view concluded that learned trial Judge had rightly held the appellant to be guilty.

b. Per Justice M.B. Shah (Minority view)

On the question of conviction of the appellant solely on the basis of alleged confessional statements, the minority view held that before solely relying upon the confessional statement, the Court had to find out whether it was made voluntarily and truthfully by the accused. Even if it is made voluntarily, the Court had to decide whether it was made truthfully or not.

On the plea of non-corroboration of confessional statements with evidence, the minority view held that there was 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., Harnek or Lahoria was 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 was recorded by the Investigating Officer.

B. Violations of international standards on fair trial

The Supreme Court judgement sentencing Bhullar to death was in clear violation of the fair trial standards provided under Article 14 of the ICCPR ratified by India. It is pertinent to mention that India did not express any reservation to Article 14 while ratifying the ICCPR[56] and therefore is legally bound to ensure its implementation at national level.

Article 14(1) of the ICCPR provides that "*all persons shall be equal before the courts and tribunals*" while Article 14(5) provides that "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*."

Both these provisions stand violated in Bhullar's case. Bhullar was denied the right to equality before courts and tribunals and the right to his conviction and sentenced being reviewed by a higher tribunal. Under India's three tier judicial system, the judgements of the trial courts are reviewed by the High Courts and the judgements of the High Courts are reviewed by the Supreme Court. However, under the TADA[57], judgements of the designated courts could not be reviewed by the High Courts and only the Supreme Court was authorised to review. Therefore, he was denied review by a higher tribunal as available to those not charged under the TADA. There are plenty of instances where the High Courts complied with international human rights standards more than the Supreme Court. The fact that the Prevention of Terrorism Act

56. India made the following reservations to the ICCPR (available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec):
"I. With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words `the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.
"II. With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State.
"III. With respect to article 13 of the International Covenant on Civil and Political Rights, the Government of the Republic of India reserves its right to apply its law relating to foreigners."

57. *Section 19 of the TADA*. Appeal- 1. Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.
2. Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court.
3. Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment; sentence or order appealed from:
Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.

(POTA) enacted subsequently repealed the provision barring review by the High Courts is an admission of error by the Government of India itself.[58]

Article 14(3)(g) of the ICCPR ensures the right "*not to be compelled to testify against himself or to confess guilt*" while Article 14(3)(e) provides the right "*to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*"

These cardinal principles of fair trial were violated as Bhullar was convicted solely based on confessional statement without any corroborative evidence and therefore, Article 14(3)(e) too stands violated. Further, none of the main accused was convicted while the conspirator Bhullar was convicted. This violates the fundamental principle on presumption of innocence as provided under Article 14(2) of the ICCPR that "*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*." The fact that confessional statement was not verified implies that the right to cross examine the witnesses as per Article 14(2)(e) was violated.

In conclusion, it is clear that majority judgement sentencing Bhullar to death was in clear violation of Article 14(2), Article 14(1) read with Article 14(5) and Article 14(3)(g) read with Article (14(3)(e) of the ICCPR. The minority judgement acquitting Bhullar was consistent with international standards on fair trial.

Case 2: State through Superintendent of Police, CBI/SIT v. Nalini and Ors

A. Details of the case and the proceedings[59]

i. Brief case facts

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

58. Section *10 of POTA. Appeal*.- (1) Any person aggrieved by an order of forfeiture under section 8 may, within one month from the date of the receipt of such order, appeal to the High Court within whose jurisdiction, the Special Court, who passed the order appealed against, is situated.
(2) Where an order under section 8 is modified or annulled by the High Court or where in a prosecution instituted for the contravention of the provisions of this Act, the person against whom an order of forfeiture has been made under section 8 is acquitted, such property shall be returned to him and in either case if it is not possible for any reason to return the forfeited property, such person shall be paid the price therefor as if the property had been sold to the Central Government with reasonable interest calculated from the day of seizure of the property and such price shall be determined in the manner prescribed.
59. State through Superintendent of Police, CBI/SIT v. Nalini and Ors.[AIR1999SC2640]

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.

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.

ii. Decision of the Designated TADA Court

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.

iii. Decision of the Supreme Court

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. However, 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.

Major issues before the Supreme Court

Issue no. 1: 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.

> *Answer of the Supreme Court*: 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 *"64. In view of the paucity of materials to prove that the conspirators intended to overawe the Government of India or to strike terror in the people of India we are unable to sustain the conviction of offences under Section 3 of TADA."*

Issue no. 2: Whether the conspirators did any "disruptive activities" so as to be caught in the dragnet of Section 4(1) of the TADA

Answer of the Supreme Court: The Court held that none of the conspirators can be caught in the dragnet of Sub-section (3) of Section 4 of the TADA.

Issue no. 3: Whether a confession made by an accused person under Section 15 of the TADA can be used as substantive evidence against co-accused

Answer of the Supreme Court: The Court held that confessional statement made by an accused after his arrest, if admissible and reliable, can be used against a confessor as substantive evidence, but its use against the other co-accused would be limited only for the purpose of corroboration of other evidence.

Issue no. 4: Whether the charges have been proved beyond reasonable doubts.

Answer of the Supreme Court: The Court held that the prosecution had successfully established that Rajiv Gandhi was assassinated at 10.19 P.M. on 21.5.1991 at Sriperumpudur 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.

B. Violations of international standards on fair trial

The Supreme Court judgement sentencing Arivu to death was in clear violation of the fair trial standards provided under Article 14 of the ICCPR ratified by India. It is pertinent to mention that India did not express reservation to Article 14 while ratifying the ICCPR and therefore is legally bound to ensure its implementation at national level.

Article 14(1) of the ICCPR provides that "*all persons shall be equal before the courts and tribunals*" while Article 14(5) provides that "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*."

A.G. Perarivalan @ Arivu was denied the right to equality before courts and tribunals and the right to his conviction and sentenced being reviewed by a higher tribunal. Under India's three tier judicial system, the judgements of the trial courts are reviewed by the High Courts and the judgements of the High Courts are reviewed by the Supreme Court. However, under the TADA[60], judgements of the designated courts cannot be reviewed by the High Courts. There are plenty of instances where the High Courts complied with international human rights standards more than the Supreme Court. The fact that the Prevention of Terrorism Act (POTA) enacted subsequently repealed the provision barring review by the High Courts is an admission of error by the Government of India itself.[61]

Article 14(3)(g) of the ICCPR provides the right "*not to be compelled to testify against himself or to confess guilt*" while Article 14(3)(e) provides the right "*to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.*"

Arivu was convicted solely based on confessional statement and therefore he was convicted in violation of Article 14(3)(e) of the ICCPR. 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

60. Supra Section 19 of TADA
61. Supra Section *10 of POTA*.

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*."[62] The fact that confessional statement was not verified implies that the right to cross examine the witnesses as per Article 14(2)(e) of the ICCPR was violated.

In conclusion, it is clear that majority judgement sentencing Arivu to death was in clear violation of Article 14(2), Article 14(1) read with Article 14(5) and Article 14(3)(g) read with Article (14(3)(e) of the ICCPR.

Case 3: Krishna Mochi and Ors. v. State of Bihar etc.

A. Details of the case and the proceedings[63]

i. Brief case facts

Krishna Mochi, Nanhe Lal Mochi, Bir Kuer Paswan and Dharmendra Singh @ Dharu Singh were accused of killing 35 persons belonging to Bhumihars, a landed caste, at Bara village in Gaya district of Bihar on the night of 13 February 1992. Charge-sheet was submitted against 119 persons including the accused persons. Out of them, 13 including the appellants were tried by the Designated Court of Sessions Judge, Gaya in G.R. Case No. 430 of 1992, Tekari Police Station Case No. 19 of 1992 under the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and under Section 302/149 etc. of Indian Penal Code. On 8 June 2001, the Designated TADA Court convicted Bir Kuer Pasan, Krishna Mochi, Dharmendra Singh @ Dharu Singh, Nanhe Lal Mochi and imposed death penalty on them. The conviction was based on confessional statements of co-accused and testimonies of unreliable eye-witnesses.

62. Ex-CBI man altered Rajiv death accused's statement, The Times of India, 24 November 2013, available at: http://timesofindia.indiatimes.com/india/Ex-CBI-man-altered-Rajiv-death-accuseds-statement/articleshow/26283700.cms
63. Krishna Mochi and Ors. v. State of Bihar etc.[2001(3)CriminalCC190]

ii. Decision of Designated TADA Court

Vide judgment and order dated 8.6.2001, the TADA Designated Court:

- convicted A-5 Bir Kuer Pasan, A-8 Krishna Mochi, A-9 Dharmendra Singh @ Dharu Singh, A-13 Nanhe Lal Mochi and sentenced them to death;
- convicted A-2 Bihari Manjhi, A-4 Ramautar Dusadh @ Lakhan Dusadh, A-6 Rajendra Paswan, A-7 Wakil Yadav and imposed life imprisonment; and
- acquitted A-1 Nanhe Yadav@ Dina Yadav, A-10 Nanhak Teli, A-11 Naresh Chamar and A-12 Ramashish Mahto.

iii. Basis of conviction

Conviction based on confessional statements of co-accused and testimonies of unreliable eye-witnesses._

iv. Decision of the Supreme Court

There was divergence in the opinion of the three judges' bench comprising Justice B.N. Agarwal, Justice Arijit Passayat and Justice M.B. Shah.

Per majority view: Justice B.N. Agarwal and Justice Arijit Passayat

The majority of 2:1 comprising Justice B.N. Agarwal and Justice Arijit Passayat allowed the appeals filed by A-2 Bihari Manjhi, A-4 Ramautar Dusadh @ Lakhan Dusadh, A-6 Rajendra Paswan and A-7 Wakil Yadav, set aside the sentence of life imprisonment and acquitted them. In respect of A-5 Bir Kuer Pasan, A-8 Krishna Mochi, A-9 Dharmendra Singh @ Dharu Singh, A-13 Nanhe Lal Mochi, the majority view dismissed their appeals and confirmed the death sentence imposed by the Designated TADA Court.

The major issues before the majority view were:

Issue no. 1: The prosecution has failed to prove the participation of the Appellants in the crime by credible evidence

Per majority view: On the point of participation of the Appellants the majority view concluded that out of the evidence of PW-8, PW-16, PW-I8, PW-19, PW-20, PW-21, PW-22 and PW-29, the evidence of PW-8, PW-16, PW-18, PW-21

and PW-22 was unimpeachable whereas no reliance can be placed upon the statements of PW-19, PW-20 and PW-29.

Issue no. 2: The participation of the Appellants in the crime becomes highly doubtful as their names have not been enumerated in the confessional statement of accused Bihari Manjhi wherein he is said to have named several accused persons

Per majority view: The majority view was that there might be various reasons for non-disclosure of names of these Appellants in the confessional statement of co-accused; they might not be fully known to the confessing accused or for reasons best known to him, with an oblique motive, to save the Appellants, their names might not have been disclosed.

Issue no. 3: The informant who lodged the First Information Report (FIR) has not been examined as such the FIR cannot be used as substantive piece of evidence inasmuch as on this ground as well the Appellants are entitled to an order of acquittal

Per majority view: The majority view was that this submission was totally misconceived. Even if the FIR was not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by prosecution. Therefore, non-examination of the informant could not in any manner affect the prosecution case.

Issue no. 4: Nothing incriminating could be recovered from them which goes to show that they had complicity with the crime

Per majority view: The majority view was that recovery of no incriminating material from the accused cannot alone be taken as a ground to exonerate them from the charges, more so when their participation in the crime was unfolded in-ocular account of the occurrence given by the witnesses, whose evidence had been found by the learned trial judge to be unimpeachable.

Issue no. 5: The alleged occurrence is said to have taken place during the night, it was not possible to identify the accused persons, much less any of the Appellants

Per majority view: The majority view held that in view of the fact that the night was not dark and there was sufficient light by virtue of setting fire to the houses and heaps of straw, it cannot be said that it was not possible for the witnesses to identify the accused persons much less any of the Appellants.

Issue no. 6: Counsel for the Appellants further pointed out that according to the prosecution case and evidence, none of the Appellants were alleged to have assaulted either any of the 35 deceased or the injured persons and that from mere presence at the place of occurrence their participation in the crime cannot be inferred in as much as they may be even sight seers

Per majority view: The majority view was that merely because the Appellants were not said to have assaulted either any of the deceased or injured persons, it could not be inferred that they had no complicity with the crime, more so according to the evidence they were also armed with deadly weapons, like firearms, bombs, etc. but did not use the same.

The majority view observed that according to the prosecution case and the evidence, the accused persons arrived at the village of occurrence, pursuant to a conspiracy hatched up by them, they divided themselves into several groups, different groups went to the houses of different persons in the village, entered the houses by breaking open the door, forcibly took away inmates of the house after tying their hands, taken them first to the temple and thereafter near the canal where their legs were also tied and there some of them were done to death at the point of firearm, but a vast majority of them were massacred by slitting their throats with *pasuli*. All these acts were done by the accused persons pursuant to a conspiracy hatched up by them to completely eliminate members of a particular community in the village and to achieve that object, they formed unlawful assembly and different members of that unlawful assembly had played different role.

Issue no. 7: Whether the case falls under the rarest of the rare category?

Per majority view: On the issue of sentence, the majority view authored by Justice Pasayat was as under-

> "From the evidence adduced, it has been amply proved that the accused persons belonged to a militant group, being members of M.C.C. which is considered to be an organisation of militants, hatched up a conspiracy to massacre members of one particular community in the village in question and were raising slogans 'long live MC' and 'whoever comes in their way, would be destroyed'. Pursuant to the conspiracy hatched up, the militants formed different groups and went to different localities

in the village in police uniforms armed with fire arms and explosive substances, broke open the doors of houses of members of that particular community, took out the entire family members after tying their hands, had taken some of them to the temple and thereafter to the canal whereas others were directly taken to the canal after tying their hands where their legs were also tied and after surrounding them from all sides, when they were in most helpless condition and could not take recourse to save their lives, some of them were done to death by fire arms but vast majority were massacred by slitting their throats with pasuli which resulted into 35 casualties and several persons were injured including prosecution witnesses. The number of accused persons was vast but upon completion of investigation, charge sheet was submitted against 119 persons and so many persons were shown as prosecution witnesses therein. The accused persons also set fire to the houses of the members of the said community in the village. As a result of this incident, there was great commotion in the locality. There cannot be any manner of doubt that the villagers were done to death in an extremely diabolic, revolting and dastardly manner and had affected the normal tempo of life of the community in the locality. The crime in the present case is not only ghastly, but also enormous in proportion as 35 persons, all of whom belonged to one community, were massacred. Thus, after taking into consideration the balance sheet of aggravating and mitigating circumstances, in which 35 persons have been deprived of their lives by the accused persons who were thirsty of their blood, I have no doubt in holding that culpability of the accused persons assumes the proportion of extreme depravity that a special reason can legitimately be said to exist within the meaning of Section 354(3) of the Code of Criminal Procedure in the case on hand and it would be mockery of justice if extreme penalty of death is not imposed. Thus, I am clearly of the opinion that the Designated Court was quite justified in upholding convictions of the Appellants and awarding the extreme penalty of death which punishment alone was called for in the facts of the present case."

Minority view: Per Justice M B Shah

Justice M B Shah allowed the appeal filed by Appellant No. 2 Dharmendra Singh alias Dharu Singh (A-9) and acquitted him of the charges for which he was facing trial while in respect of Appellant No. 1 Krishna Mochi (A-

8), Appellant No. 3 Nanhe Lal Mochi (A-13) and Appellant No. 4 Bir Kaur Paswan (A-5) their appeals were partly allowed and the death penalty imposed upon them was altered to life imprisonment.

Upon appreciation of the evidence, Justice held that-

> (1) It is apparent that the investigation in the present case is totally defective. The investigating officers have not taken any care and caution of recording the statement of witnesses immediately. No identification parade of accused was held. Investigating officer was not examined.
>
> (2) It is also settled law that when accused are charged with heinous brutal murders punishable to the highest penalty prescribed by the Penal Code the judicial approach in dealing with such cases has to be cautions, circumspect and careful. In case of defective investigation, the Court can rely upon the evidence led by the prosecution and connect the accused with the crime if found reliable and trustworthy.
>
> (3) In the present case, it can be said without any doubt that almost all witnesses have exaggerated to a large extent by naming number of persons as accused but they could identify only one or two accused. This would clearly reveal that for one or other reason, witnesses were naming number of person as accused who were not known to them or whom they had not seen at the time of incident. In that set of circumstances, their evidence to a large extent becomes doubtful and/or tutored.
>
> (4) Nowhere the witnesses assigned any specific role to the accused, except their presence in the mob at the time of offence.
>
> (5) The witnesses nowhere stated that identified accused were having any weapon of offence.
>
> (6) Investigating officers had not recovered any weapon of offence or any incriminating article from the possession of any of the accused.

Finally, Justice MB Shah held that "In view of the shortcomings in the investigation and the evidence which only proves the presence of the accused at the scene of offence, this would not be a fit case for imposing the death penalty."

B. Violations of international standards on fair trial

The Supreme Court judgement sentencing Krishna Mochi, Nanhe Lal Mochi, Bir Kuer Paswan and Dharmendra Singh @ Dharu Singh to death was in clear violation of the fair trial standards provided under Article 14 of the ICCPR ratified by India. It is pertinent to mention that India did not express reservation to Article 14 while ratifying the ICCPR[64] and therefore is legally bound to ensure its implementation at national level.

Article 14(1) of the ICCPR provides that "*all persons shall be equal before the courts and tribunals*" while Article 14(5) provides that "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law*."

Krishna Mochi, Nanhe Lal Mochi, Bir Kuer Paswan and Dharmendra Singh @ Dharu Singh were denied the right to equality before courts and tribunals and the right to their conviction and sentenced being reviewed by a higher tribunal. Under India's three tier judicial system, the judgements of the trial courts are reviewed by the High Courts and the judgements of the High Courts are reviewed by the Supreme Court. However, under the TADA[65], judgements of the designated courts cannot be reviewed by the High Courts. Therefore, he was denied review by a higher tribunal as available to those not charged under the TADA. There are plenty of instances where the High Courts complied with international human rights standards more than the Supreme Court. The fact that the Prevention of Terrorism Act (POTA) enacted subsequently repealed the provision barring review by the High Courts is an admission of error by the Government of India itself.[66]

Further, non conduct of identification parade of accused, no specific averments of the accused as to the specific role of the accused, no specific averments that identified accused were having any weapon of offence and non-recovery of any weapon of offence or any incriminating articles show that the trial did not meet international standards of fair trial.

64. Supra India's reservations to the ICCPR (available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec)
65. Supra Section 19 of the TADA
66. Supra Section 10 of the POTA

Case 4: State (N.C.T of Delhi) v. Navjot Sandhu @ Afsan Guru and Shaukat Hussain Guru v. State (N.C.T. of Delhi)

A. Details of the case and the proceedings[67]

i. Brief case facts

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 organisation known as "Jaish-E-Mohammed". After the conclusion of investigation, the investigating agency filed charge sheets against the four accused persons.

ii. Conviction by Designated POTA Court

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

67. State (N.C.T of Delhi) v. Najvot Sandhu @ Afsan Guru And Shaukat Hussain Guru v. State (N.C.T. of Delhi) : AIR2005SC3820

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.

iii. Decision of the High Court

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.

iv. Decision of the Supreme Court

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 the death sentence imposed upon him was confirmed. 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.

Major issues before the court

Issue no. 1: Confessions were not true and voluntary. Afzal Guru and Shaukat were reluctant to make confession before the court; therefore POTA charges were added to get the confession recorded by a Police officer according to the wishes of the investigators. It was further submitted that the language and tenor of the confessional statement gives enough indication that it was not written to the dictation of appellants (accused), but it was a tailor made statement of which they had no knowledge

Answer of the Supreme Court: On the submissions of the defence counsels, the Supreme Court held that though these arguments are plausible and persuasive, it is not necessary to rest conclusion on these probabilities.

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 DCP 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."

Issue no.2: Denied proper legal aid to Afzal Guru leading to depriving him of effective defence in the course of trial

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.

Answer of the Supreme Court: 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.

Issue no. 3: Evidence against Afzal

Answer of the Supreme Court: It has been held numerous circumstances on record were against Afzal. Among others, the Court observed that 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.

B. Violations of international standards on fair trial

The Supreme Court judgement sentencing Afzal Guru to death was in clear violation of the fair trial standards provided under Article 14 of the ICCPR ratified by India. It is pertinent to mention that India did not express reservation to Article 14 while ratifying the ICCPR[68] and therefore is legally bound to ensure its implementation at national level.

Afzal Guru was admittedly denied the right to contact his counsel. Therefore, Article 14(3((b) of the ICCPR which provides the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" stands violated.

Further Guru was denied adequate legal assistance and therefore Article 14(3((d) of the ICCPR, interalia, relating to "have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it stands violated.

It is admitted fact that he was convicted based on his confessional statement. Therefore, the Article 14(3)(g) of the ICCPR relating to the right "*not to be compelled to testify against himself or to confess guilt*" stands violated.

68. Supra India's reservations to the ICCPR (available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec):

5. Summary of the per incuriam cases

Article 6.2 of the ICCPR provides that "*sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and <u>not contrary to the provisions of the present Covenant</u> and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court*".

However, when the highest court in India i.e. the Supreme Court of India pronounced that judgements awarding death penalty are *per incuriam*, it is nothing but imposition of death penalty without legal sanction. The *Bachan Singh* judgement held that death penalty can be imposed only in the "rarest of rare" cases after considering aggravating circumstances relating to the crime and mitigating circumstances relating to the criminal. A balance sheet of these elements should be spelt out in the judgement.

The Supreme Court vide judgement dated 13 May 2009 in *Santosh Kumar Satish Bhusan Bariyar v. State of* Maharashtra held the decision in *Ravji @ Ravi Chandra v. State of Rajasthan* as *per incuriam* because it only considered the aggravating circumstances of the crime without conforming with the *Bachan Singh* judgment which directed to impose death penalty after considering both aggravating circumstances and mitigating circumstances relating to the crime and the criminal. The Supreme Court held:

> "*A conclusion as to the rarest of rare aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal. It was in this context noted:*
>
> > *"The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal"*
> >
> > *Curiously in Ravji alias Ram Chandra v. State of Rajasthan, [(1996) 2 SCC 175] this court held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, stating:*

> *"...The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal"..."*

We are not oblivious that this case has been followed in at least 6 decisions of this court in which death punishment has been awarded in last 9 years, but, in our opinion, it was rendered per incuriam. Bachan Singh (supra) specifically noted the following on this point:

> *"...The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302 of the Penal Code, the court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal."*
>
> *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra, [AIR2009SC56], Mohan Anna Chavan v. State of Maharashtra [(2008)11SCC113], Bantu v. The State of U.P.,[(2008)11SCC113], Surja Ram v. State of Rajasthan, [(1996)6SCC271], Dayanidhi Bisoi v. State of Orissa, [(2003)9SCC310], State of U.P. v. Sattan @ Satyendra and Ors., [2009(3)SCALE394] are the decisions where Ravji Rao (supra) has been followed. It does not appear that this court has considered any mitigating circumstance or a circumstance relating to criminal at the sentencing phase in most of these cases. It is apparent that Ravji Rao (supra) has not only been considered but also relied upon as authority on the point that in heinous crimes, circumstances relating to criminal are not pertinent."*

In the same judgement, the Supreme Court also declared *Saibanna Nigappa Natikar* of Karnataka[69] as *per incuriam* for being "*inconsistent with Mithu (supra) and Bachan Singh (supra).*"[70] Indeed, 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*"[71] and the fact that Supreme Court itself had declared the death sentence on Saibanna as *per incuriam*.[72] The Karnataka High Court stayed the execution of Saibanna.[73]

As late as 3 February 2014, the Supreme Court admitted the petitions filed by condemned prisoners in the case of *Ankush Maruti Shinde and Ors. v. State of Maharashtra* as they were sentenced to death based on *Ravji alias Ram Chandra v. State of Rajasthan* which has already been held as *per incuriam.*[74]

All these death sentences are illegal. The admission of error by the Supreme Court was too late for two condemned prisoners namely Ravji @ Ram Chander and Surja Ram who were executed on 4 May 1996 and 7 April 1997 respectively on the basis of flawed judgments.[75]

Case 1: Ravji @ Ram Chandra v. State of Rajasthan[76]

i. Brief case facts

Ravji was tried in Sessions Case No. 122/93 before the Additional Sessions Judge, Banswara, on the charge of committing murder of five persons including his wife and three minor sons and attempting to murder his own mother and the wife of a neighbour.

69. Criminal Ref. Case No. 2/2003 and Criminal Appeal No. 497 of 2003, High Court of Karnataka, Judgment available at: http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/367873/1/CRLRC2-03-10-10-2003.pdf
70. Ibid
71. http://mha1.nic.in/par2013/par2013-pdfs/ls-110214/3107.pdf
72. Karnataka HC extends stay on murder convict Saibanna's execution till April 6, Times of India, 5 March 2013; available at: http://timesofindia.indiatimes.com/india/Karnataka-HC-extends-stay-on-murder-convict-Saibannas-execution-till-April-6/articleshow/18810209.cms
73. Saibanna's execution stayed by a week Saibanna's execution stayed by a week, Deccan Herald, 23 January 2013 available at http://www.deccanherald.com/content/307123/saibannas-execution-stayed-week.html
74. Times of India, "SC revisiting death penalties, stays three more" 6 February 2014, http://timesofindia.indiatimes.com/india/SC-revisiting-death-penalties-stays-three-more/articleshow/29920086.cms
75. The Hindu, "Take these men off death row" 6.7.2012, http://www.thehindu.com/opinion/lead/take-these-men-off-death-row/article3606856.ece
76. Ravji @ Ram Chandra v. State Of Rajasthan: 1996 AIR 787

ii. Decision of the trial court

The trial court after relying on the evidences of witnesses including injured eye-witnesses inter alia came to the finding that the prosecution had established by leading cogent evidence that the appellant was guilty of murdering five persons and he was also guilty for attempting to murder his mother Smt. Mangi (PW 12) and a neighbour's wife Smt. Galal (PW 4). Considering the fact that the commission of the said murders was committed in a brutal and barbaric manner, the trial court sentenced him to death. By a common judgement on 22 March 1995, the High Court of Rajasthan at Jodhpur dismissed the appeal of the accused appellant while confirming the death sentence by allowing the Murder Reference.

iii. Decision of the High Court and Supreme Court

Aggrieved by the impugned decision of the High Court, the appellant preferred an appeal before the Supreme Court. By judgement dated 5 December 1995 the Supreme Court bench comprising Justice G.N. Ray and Justice G.T. Nanavati dismissed the appeal and affirmed the death penalty. The Supreme Court held thus;

> "…. The crimes had been committed with utmost cruelty and brutality without any provocation, in a calculated manner. It is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to end be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal. In our view, if for such heinous crimes the most deterrent punishment for wanton and brutal murders is not given, the case of deterrent punishment will lose its relevance. We, therefore, do not find any justification to commute the death penalty to imprisonment for life. The appeal therefore must fail and is dismissed".[77]

77. Ibid

iv. Decision on mercy petition

Ravji filed a clemency petition before the President of India and the same was rejected. [78] Thereafter, he was executed on 4 May 1996.

v. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[79] declared *Ravji alias v. State of Rajasthan* as *per incuriam* for not following the *Bachan Singh* judgement that instructed to consider aggravating and mitigating circumstances of a particular case for imposition of death penalty.

Case 2: Surja Ram v. State of Rajasthan[80]

i. Brief case facts

The accused appellant Surja Ram and his two brothers Dalip Ram and the deceased Raji Ram were living in one compound (Ahata) in their respective residential unit. There had been partition of joint property amongst the brothers. On such partition, the accused and Dalip Ram each got 13 killa of land and the deceased Raji Ram got 14 killa. There was some land dispute amongst the brothers about 6 to 7 months prior to the present incident of murder but such dispute was stated to have been sorted out at the intervention of Sarpanch Chandra Pal. About 5 or 6 days prior to the incident, the accused expressed the desire to erect wire fencing in the compound but the deceased Raji Ram protested against such proposal.

According to the prosecution, on 7 August 1990 at about 9.00 P.M., the members of the family of the deceased Raji Ram retired after taking their dinner. The informant Dalip Ram, who was the other brother of the deceased and the wife of Dalip Ram were sleeping in their courtyard. Raji Ram and his two sons Naresh and Ramesh were sleeping in the outer room of his residential unit. Raji Ram's wife Phoola Devi, her daughter Sudesh and Raji Ram's father's sister Niko Bai were sleeping in their courtyard. In the courtyard of Surja Ram the wife of the accused Imarti was also sleeping. After taking meal,

78. Reply dated 28 March 2013 received under the Right to Information Act, 2005 from the Ministry of Home Affairs (Judicial Division), Government of India
79. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498
80. Surja Ram v. State of Rajasthan: AIR1997SC18

the appellant went out of the house. At about 12.30 A.M., Dalip Ram heard the cries of Sudesh, when he came out, he saw in the light that the accused Surja Ram was standing with a kassi in his hand and was assaulting Sudesh. Dalip Ram and the wife of the accused Imarti challenged the accused and he ran away. Sudesh suffered severe injuries on her neck and she fell down in the courtyard and Niko and Phoola were also found lying seriously injured. Niko was, however, found dead and Phoola was gasping for life. When Dalip Ram went inside the room, he found that Raji Ram and his son Naresh were lying dead and the other son Ramesh though alive, was critically injured. The said Ramesh, however, died shortly thereafter and Sudesh and Phoola were taken in a jeep and admitted in the hospital at Sangaria. On being treated in the hospital both of them survived.

ii. Decision of the trial court

The accused Surja Ram was convicted by the Additional Sessions Judge, Hanumangarh in Sessions Trial No. 28 of 1991 for the offence under Section 302 of the IPC for committing murder of his real brother Raji Ram; his two sons Naresh and Ramesh and his sister Niko Bai, and for an offence under Section 307 of the IPC for attempting to murder Sudesh, the daughter of Raji Ram and Phoola Devi the wife of Raji Ram. The Additional Sessions Judge awarded death sentence to Surja Ram for the offence of murder.

iii. Decision of the High Court

Against such convictions and sentences, the accused appellant Surja Ram preferred an appeal before the Rajasthan High Court (Jodhour Bench). The said appeal was heard along with D.B. Criminal Murder Reference No. 1 of 1995 and by the impugned common judgment dated 18 January 1996 the High Court dismissed the appeal and confirmed the death sentence as passed by the trial court.

iv. Decision of the Supreme Court

Aggrieved by the judgement of the High Court, the accused-appellant filed a Special Leave Petition challenging his conviction and sentences before the Supreme Court. By judgement dated 25 September 1996, the Supreme Court Bench of Justice G.N. Ray and Justice G.T. Nanavati dismissed his special leave petition and affirmed the death penalty. The Supreme Court held that the crime committed by the accused falls in the category of rarest of rare cases

for which extreme penalty of death was fully justified. The judgement of the Supreme Court stated thus[81]:

> "*24. It is true that the appellant was not convicted for any other offence on any previous occasion. Such fact can hardly be considered as a mitigating factor in favour of the appellant that will outweigh all the aggravating factors and circumstances in which the crime of the murders had been committed. The murders had been committed very brutally and mercilessly of absolutely innocent persons, namely, the Bua and two minor sons of his brother with whom there was no occasion to come in conflict and to entertain any grudge or ill feeling. Even if it is assumed that there was still some property dispute between the brothers despite sorting out of such dispute at the intervention of the Sarpanch, for such common place property dispute between brothers particularly when the accused was not dispossessed from the possession and enjoyment of his demarcated landed property by the deceased brother, it cannot be reasonably held that the accused had a genuine cause to feel aggrieved for injustice meted out to him in the hands of his deceased brother which may impel him to cause the murder of his brother. In any event, there could not be any cause to take a decision to wipe out the entire family of the brother in a very cruel manner when being asleep they were absolutely helpless. The members of the family of his brother were absolutely innocent and two of them were even minors. Such murders and attempt to commit murders in a cool and calculated manner without provocation cannot but shock the conscience of the society which must abhor such heinous crime committed on helpless innocent person. Punishment must also respond to the society's cry for justice against the criminal. While considering the punishment to be given to the accused, the Court should be alive not only to the right of the criminal to be awarded just and fair punishment by administering justice tempered with such mercy as the criminal may justly deserve, put also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused. In the facts and circumstances of the same, we are of the view, that the crime committed by the accused falls in the category of rarest of rare cases for which extreme penalty of death is fully justified, we, therefore, find no reason to interfere with the*

81. Surja Ram v. State of Rajasthan: AIR1997SC18

sentence of death awarded against the appellant since confirmed by the High Court. This appeal and the jail petition being numbered as D. No. 1007/96 stand dismissed."

v. Decision on mercy petition

Surja Ram filed a Mercy petition before the President but the same was rejected.[82] He was executed on 7 April 1997.[83]

vi. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[84] declared *Surja Ram v. State of Rajasthan as per incuriam* for following the dictum of the *Ravji* case which was declared as in violation of the *Bachan Singh* case.

Case 3: Dayanidhi Bisoi v. State of Orissa[85]

i. Brief case facts

It is the case of the prosecution that the accused-appellant Dayanidhi Bisoi was a nephew of one of the deceased, Anirudha Sahu, who was working as a Peon in the Sales Tax Department and residing in the Irrigation Colony at Jeypore in Orissa. The family of the deceased consisted of himself, his wife Lata and his 3-year-old daughter. The accused-appellant, a resident of village Niranguda, was carrying on turmeric and mustard business and had suffered some losses in business. It was stated that he was on visiting term with the deceased and on the day of murder of the deceased i.e. during the night between 3rd and 4th June 1998, the accused appellant visited the residence of the deceased and stayed along with them during the night. Aniruddha was seen in the company of the accused at around 9 p.m. betal shop owner who had also seen the accused-appellant going from the direction of the residence of the deceased next morning. It was further the case of the prosecution that on 4th June, 1998 having not seen the family members of Anirudha till late in the morning, the neighbours got suspicious about the welfare of the family of Anirudha,

82. Reply dated 28 March 2013 received under the Right to Information Act, 2005 from the Ministry of Home Affairs (Judicial Division), Government of India
83. Annexure I to the letters submitted by 14 former judges to the President of India for commutation of death penalty of 13 accused involve in seven cases rendered *per incuriam* by the Supreme Court
84. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498
85. Dayanidhi Bisoi v. State of Orissa: AIR2003SC3915

hence, tried to find out what has happened to Anirudha and his family. In this process, it was stated that one of the neighbour's brother climbed a Guava tree in front of the flat of the deceased and saw Anirudha, his wife Lata and Puja lying dead inside the house. Thereafter, the prosecution alleged that the neighbours joined together broke open the front door of the flat which was locked from outside and entered the house where they found the dead bodies of the above-mentioned persons having injuries in their neck. They also noticed that the ornaments normally worn by Lata and Puja were missing. They also saw the almirah in the flat was opened and all the household articles were ransacked. Thereafter, the neighbours informed the police which started investigation and apprehended the accused-appellant.

It was further stated that on information given by the appellant, a knife was recovered from a bamboo bush near the hay-stack in the village of the appellant. The prosecution also alleged that on the information of the appellant they recovered some cash and a ladies watch in a small plastic box from the house of the appellant. It was also stated that on information given by the appellant gold ornaments were recovered from the gold smith T. Rama Rao which according to the prosecution belonged to the deceased Lata and Puja. In a Test Identification Parrade conducted by the police, the appellant was identified by the owner of the betal shop owner, the goldsmith who negotiated the transaction between the accused another goldsmith T. Rama Rao. On analysing the finger prints found at the place of incident, the Finger Prints Bureau reported that some of the finger prints recovered tallied with that of the appellant. Based on such investigation, the prosecution charged the appellant of offences punishable under Sections 394 and 302 of the IPC before the learned Additional Sessions Judge Jeypore.

ii. Decision of the trial court

The Sessions Judge after examining the material on record and hearing the arguments of the counsels came to the conclusion that though the case in hand was based on circumstantial evidence, the prosecution had established each and every circumstances placed against the appellant and the links in the chain of circumstances without any doubt had established the guilt of the appellant. The trial court convicted the accused-appellant and sentenced him to death. He preferred an appeal to the High Court against the said judgment of the trial court.

iii. Decision of the High Court

The High Court heard the Death Reference case as also the appeal of the appellant together and delivered the impugned judgment dismissing the appeal of the appellant and accepting the reference made by the trial court in regard to the death sentence awarded by it to the appellant.

iv. Decision of the Supreme Court

Aggrieved with the impugned decision of the High Court he preferred an appeal in the Supreme Court. By judgement dated 23 July 2003 a bench of the Supreme Court comprising Justice N. Santosh Hegde and Justice B.P. Singh dismissed his appeal and confirmed the death penalty. The Supreme Court judgement, among others, held as below:

> "...... On re-appreciation of those materials on record, we find no reason to differ from the said findings of the courts below. The fact that the murder in question is committed in such a deliberate and diabolic manner while the victims were sleeping, without any provocation whatsoever from the victims side, that too having enjoyed the hospitality and kindness of the victims, indicates the cold blooded and premeditated approach of the appellant to put to death the victims which include a child of three years age just to gain some monetary benefit. In our opinion, the extenuating circumstances put forth by the learned counsel for the appellant in regard to the age of the appellant, his surviving relatives and the possibility of rehabilitation would not, in our opinion, justify the courts to impose a sentence of life imprisonment on the facts and circumstances of this case. Hence, we have no hesitation in agreeing with the findings of the courts below and coming to the conclusion that the case in hand is a rarest of the rare case involving a pre-planned brutal murder without provocation, hence, we find no reason whatsoever in interfere even with the quantum of punishment awarded by the courts below."[86]

v. Decision on mercy petition

The Odisha Governor commuted his sentence to life imprisonment.[87]

86. Dayanidhi Bisoi v. State of Orissa: AIR2003SC3915
87. "A case against the death penalty", Frontline Magazine, Volume 29 - Issue 17 :: Aug. 25-Sep. 07, 2012 ;available at: http://www.frontline.in/static/html/fl2917/stories/20120907291700400.htm

vi. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[88] declared *Dayanidhi Bisoi v. State of Orissa* as *per incuriam* for following the dictum of the *Ravji* case.

Case 4: Mohan Anna Chavan v. State of Maharashtra[89]

i. Brief case facts

The family of the deceased – one girl aged five years and the other aged 10 years - lived at Gulamb in Kolhapur district of Maharashtra. The deceased and the accused Mohan Anna Chavan who lived with his wife and a daughter were neigbhours. His house was next to the house of the deceased. On the evening of 14th December 1999 at about 6.00 p.m. the accused along with his daughter, Reshma (P.W.8), had gone to the grocery shop of Sunil (P.W. 6) for purchase of grocery articles. Similarly, at the same time the deceased girls were also sent to the grocery shop for purchase of dry coconut, by their family members. The girls met the accused and Reshma and one of the deceased girls asked the accused to give sweets (Khau) to them. The accused said that he did not have change and asked the deceased to accompany him. By saying so, he took both the girls with him. He thereafter committed rape on both the girls and murdered them. He threw the dead body of one of the deceased in a well while he concealed the dead body of another in the bushes. The accused thereafter arrived at village Gulumb on the morning and the villagers caught hold of him and informed the police. Police took him into custody and at his instance; the dead body of the elder deceased was recovered from the well. He was taken to police station and his bloodstained dresses were seized. Further interrogation led to revelations by the accused about the place where he concealed the dead body of the younger deceased girl. He led the police and panch to the place where he concealed the dead body and same was recovered. He also led police to the spots where he raped both the deceased. He further led the police to the place where frocks worn by the deceased at the time of the occurrence were concealed and the same were recovered. After the investigation was over the charge sheet came to be filed.

88. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498
89. Mohan Anna Chavan v. State of Maharashtra (2008)7 SCC 561

ii. Decision of the trial court

The trial court considered all the circumstances to be a complete chain to point at the guilt of the accused and sentenced him to death under Section 302 of the IPC apart from other lesser sentence on different counts.

iii. Decision of the High Court

The accused appellant questioned correctness of the judgment before the High Court and a Death Reference was made by the trial court. The High Court confirmed the conviction and the sentence of death.

iv. Decision of the Supreme Court

Aggrieved with the impugned decision of the High Court, the accused appellant preferred an appeal in the Supreme Court. A Supreme Court bench of Justice Dr. Arijit Pasayat, Justice P. Sathasivam and Justice Mukundakam Sharma dismissed the appeal and affirmed the death penalty. The apex court judgement, inter alia, stated thus:

> 35. The case at hand falls in the rarest of rare category. The past instances highlighted above, the depraved acts of the accused call for only one sentence that is death sentence.
>
> 36. Looked at from any angle the judgment of the High Court, confirming the conviction and sentence imposed by the trial court, do not warrant any interference."

v. Decision on mercy petition

The death-row convict filed a Mercy petition before the Governor of Maharashtra on 17 June 2010 and the same is pending final disposal.[90]

vi. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[91] declared *Dayanidhi Bisoi v. State of Orissa* as *per incuriam* for following the dictum of the *Ravji* case.

90. Reply dated 15 June 2013 under the Right to Information Act, 2005 received from the Secretariat of the Governor of Maharashtra
91. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498

Case 5: Shivaji @ Dadya Shankar Alhat v. State of Maharashtra[92]

i. Brief case facts

The incident in question occurred on 14th January, 2002. The deceased and her two sisters and their grandmother were present in the house. At about 11.30 a.m., the deceased and her sister had gone to the borewell of one Sangale to fetch water. There they found the accused who told the deceased that he would give her fuel wood from the hill. After fetching water the deceased went along with the accused towards the hill called Manmodya Dongar. Thereafter the deceased did not return home. The deceased's mother and other family members searched for the deceased but could not find her. Not finding the deceased, grandmother of the deceased lodged a missing complaint in which she stated that the deceased had left the house with the accused and had not come back. In the meanwhile it came to be known that the dead body of the deceased was lying on the Manmodya hill where the accused took the deceased apparently to fetch firewood.

The accused was not traceable for some days after the incident but was found hiding in the sugarcane crop of a farmer. He was arrested and put on trial.

ii. Decision of the trial court

The Second Additional Judge, Pune tried the accused for offences punishable under Sections 302 and Section 376(2)(f) of the Indian Penal Code, 1860. By judgment and order dated 27th June, 2004, the trial court found the accused guilty for the aforesaid offences and sentenced him to death for the offence of murder and in respect of the other offence, he was sentenced to suffer rigorous imprisonment for ten years.

iii. Decision of the Bombay High Court

The accused challenged his conviction and sentence before the Bombay High Court which heard the same along with the death reference case. The High Court in its judgement confirmed the death sentence.

iv. Decision of the Supreme Court

The accused challenged the impugned judgement of the Bombay High Court before the Supreme Court. A bench of the Supreme Court comprising Justice

92. Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra [(2008) 15 SCC 269]

Arijit Passayat and Justice Mukundakam Sharma confirmed the conviction and death sentence on the accused. The Supreme Court held as under:

> *"40. The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death are awarded for rape and murder and the like, there is practically no scope for having an eye witness. They are not committed in the public view. But very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of learned Amicus Curiae that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable.*
>
> *41. The case at hand falls in the rarest of rare category. The circumstances highlighted above, establish the depraved acts of the accused, and they call for only one sentence, that is death sentence.*
>
> *42. Looked at from any angle the judgment of the High Court, confirming the conviction and sentence imposed by the trial court, do not warrant any interference."*

v. Decision on mercy petition

The death-row convict filed a Mercy petition before the Governor of Maharashtra on 17 June 2010 and the same is pending final disposal.[93]

93. Reply dated 15 June 2013 under the Right to Information Act, 2005 received from the Secretariat of the Governor of Maharashtra

vi. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[94] declared *Dayanidhi Bisoi v. State of Orissa* as *per incuriam* for following the dictum of the *Ravji* case.

Case 6: Bantu v. State of U.P.[95]

i. Brief case facts

The incident in this case dates back to 4th October 2003 which happened in Basao Khurd village under Tajganj Police station are of Agra District in Uttar Pradesh. The victim was about 5 years. According to the prosecution case, there was "Devi Jagran" at the house of Chandrasen alias Taplu (PW 3) in village Basai Khurd in the eventful night. A number of persons of the locality had assembled there. The informant - Naresh Kumar (PW2) along with his brother Vishal and niece Vaishali, the deceased, had also gone there. Around 9 P.M. the accused Bantu, a neighbour of the informant reached there. Exhibiting playful and friendly gestures with Vaishali with whom he was familiar before because of neighborhood, enticed her away on the pretext of giving her a balloon. Several persons including Naresh Kumar (PW 2) and Nand Kishore (PW 6) saw him going away with the girl from the place of "Devi Jagran". When Vaishali did not return for a long time, a frantic search was made to trace her out by the members of the family. Chandrasen alias Taplu (PW 3) and Sanjiv son of Daulat Ram informed them that they had seen the accused Bantu going with Vaishali hoisted on his waist towards the pond. Around 9.30 PM they reached near the field of one Dharma in which grown up Dhaincha plants were there. With the help of torches they saw that the accused Bantu was thrusting a stem/stick of Dhaincha in the vagina of Vaishali having thrown her down. An alarm was raised by them and Bantu was caught red handed in completely naked state. Vaishali was lying on the ground unconscious with a part of stem of Dhaincha inserted in her vagina. She was bleeding profusely. She had other injuries also on her person and was not responding at all. She was instantly rushed to S.N. Medical College, Agra where the doctors pronounced her to be dead. Upon interrogation, the accused Bantu allegedly admitted that after committing the rape he inserted stem/stick in her vagina to murder her.

94. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498
95. Bantu v. State of U.P.: (2008)11SCC113

In the opinion of the doctor, the death was caused due to shock and hemorrhage as a result of ante mortem injuries due to insertion of the wooden stick into the vagina of the deceased.

ii. Decision of the trial court

The Additional Sessions Judge, Agra convicted the accused and sentenced him to death under Section 302 of the IPC, ten years rigorous imprisonment under Section 364 of the IPC and life imprisonment under Section 376 of the IPC. His conviction was based on oral and documentary evidences.

iii. Decision of the High Court

The Allahabad High Court confirmed death penalty and other sentences awarded by the Additional Sessions Judge, Agra. The High Court also observed that in order to camouflage the serious kind of rape in a planned manner and after committing rape he mercilessly inserted wooden stick deep inside the vagina of the girl to the extent of 33cms to cause her death, with a view to masquerade the crime as an accident.

iv. Decision of the Supreme Court

A bench of the Supreme Court consisting of Justice Arijit Passayat and Justice Mukundakam Sharma affirmed the death penalty of the accused as confirmed by the High Court and awarded by the Trial court. Dismissing the appeal of the accused-appellant, the apex held as under:

> "38. The case at hand falls in the rarest of rare category. The depraved acts of the accused call for only one sentence that is death sentence."

v. Decision on mercy petition

The President commuted the death sentence on Bantu on 2 June 2012.[96]

vi. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[97] declared *Dayanidhi Bisoi v. State of Orissa* as *per incuriam* for following the dictum of the *Ravji* case.

96. See "President Pratibha Patil goes on mercy overdrive", The Times of India, 22 June 2012, http://timesofindia.indiatimes.com/india/President-Pratibha-Patil-goes-on-mercy-overdrive/articleshow/14330594.cms
97. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498

Case 7: State of U.P. v. Sattan @ Satyendra and Ors.[98]

i. Brief case facts

In the night between 30th and 31st August 1994 at about 12.30 five persons of Sheo Pal's family were gunned down in his house in village Saloni within the area of police station Bahadurgarh, Ghaziabad district of Uttar Pradesh. Four others were injured, out of whom Neetu also succumbed to her injuries later on. One of the survivors, Smt. Bala, of the attack reported the matter to the police. Some of the accused persons were arrested while others surrendered in court and after completion of investigation charge sheet was prepared against all the accused persons who had been either arrested or surrendered in court and also against Upendra alias Guddu, Pappu, Dheeraj and Devendra who were then absconding.

The case as set out in the FIR was that some incident had occurred in the year 1986 between family members of complainant and accused Mukesh and Guddu sons of Rajveer and the matter was reported at the police station from complainant's side. A case was proceeding in court at Hapur some time before the present incident and the police had raided the house of accused Mukesh. Mukesh and Guddu, came to the house of Sheo Pal Singh and gave threats to them saying that they had not done good by getting their house raided. The accused persons were thus bearing enmity with Sheo Pal and others.[99]

As per the FIR in the night between 30/31 August, 1994 at about 12.30 A.M. Mukesh and Guddu carrying country made pistols with them and accused Sattan of village Lohari also having a country made pistols alongwith 4-5 unknown persons who were also having weapons like pistols, Dalkati, Lathi etc. entered into her house and murdered family members of Bala. Villagers who were awakened by noise of firing and tried to reach to the place of occurrence had to return back to their respective homes for safety as the assailants threatened to kill anyone who dared to approach. Taking advantage of the panic in the village the perpetrators left the scene of occurrence.

At the trial the informant Smt. Bala (PW 1) widow of deceased Shiv Singh corroborated the facts stated by her in the FIR and further added that the

98. State of U.P. v. Sattan @ Satyendra and Ors.: 2009(2)ACR1385(SC)
99. State of U.P. v. Sattan @ Satyendra and Ors.: 2009(2)ACR1385(SC)

assailants were ten in number, out of whom she identified Mukesh, Guddu, Rakesh, Naresh, Pappu, Sattan, Haripal son of Kiran Singh, Haripal son of Ram Charan, Dhirendra alias Dheeraj.

ii. Decision of the trial court

The trial court found the evidence of the witnesses to be credible and cogent and sentenced Sattan @ Satyendra, Upendra, Hari Pal son of Kiran Singh and Hari pal son of Ram Charan to death.

iii. Decision of the High Court

A Death Reference under Section 366 of the Code of Criminal Procedure, 1973 for confirmation of the death sentence in respect of the accused appellants in Criminal Appeal No. 2140 of 1999 was made before the High Court. The High Court confirmed their convictions but altered the death sentence into one of life imprisonment. The High court held that this was a case where there were certain mitigating circumstances which warranted alteration of the death sentence into life sentence.

iv. Decision of the Supreme Court

Aggrieved with the impugned judgement of the High Court the State of U.P. preferred an appeal in the Supreme Court challenging the High Court judgement. The Supreme Court bench comprising Justice Arijit Passayat and Justice Mukundakam Sharma, holding that the instant case fell in the category of rarest of rare case, enhanced the sentence of life imprisonment into one of death penalty. The relevant portion of the Supreme Court decision stated as below:

> "*17. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counterproductive in the long run and against societal interest which*

needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."

…29. Murder of six members of a family including helpless women and children having been committed in a brutal, diabolic and bristly manner and the crime being one which is enormous in proportion which shocks the conscious of law, the death sentence as awarded in respect of accused Sattan and Guddu was the appropriate sentence and the High Court ought not to have altered it. So far as the acquittal of the Hari Pal son of Kiran Singh and Hari Pal son of Ram Charan are concerned, the High Court has noted that the evidence so far as their involvement is concerned was not totally free from doubt. The High Court have analysed the factual scenario in detail to direct the acquittal. We find no reason to differ from the conclusions of the High Court. The acquittal as directed stands affirmed. So far as other four respondents i.e. appellants in Criminal Appeal No. 2237 of 1999 is concerned they were charged under Section 120B. It has been recorded by the High Court that except the suspicion which the informant was having in her mind about the involvement of these four accused persons there was neither any direct or circumstantial evidence to fasten the charge of criminal conspiracy. That being so the High Court was justified in directing their acquittal. Criminal Appeal No. 314 is allowed. The State's appeal so far as Sattan and Upendra are concerned is allowed to the extent that the death sentence as was awarded by the trial court is restored so far as they are concerned. The appeal fails so far as respondents Hari Pal son of Kiran Singh and Hari Pal son of Ram Charan are concerned, Crl. A. Nos. 314 and 315 of 2001 are disposed of accordingly."

v. Decision on mercy petition

The President of India commuted the death sentence in July 2011.[100]

vi. Declaration as per incuriam

In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[101] declared *Dayanidhi Bisoi v. State of Orissa* as *per incuriam* for following the dictum of the *Ravji* case.

100. See "A case against the death penalty" Frontline, Volume 29 - Issue 17, 25 August – 7 September 2012
101. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498

Case 8: Saibanna v. State of Karnataka[102]

i. Brief case facts

While serving the sentence of life imprisonment for murder of his first wife, the accused appellant Saibanna was released on parole for a period of one month in August 1994. During this time the accused appellant committed the murder of his second wife, Nagamma and minor daughter suspecting the fidelity by his second wife. After assaulting the deceased the accused appellant also attempted to commit suicide by inflicting injuries on himself.

ii. Decision of the trial court

The Sessions Court found that the prosecution had proved beyond reasonable doubt that the accused was guilty of the offence under Section 302 of the IPC and imposed death sentence. Conviction was based on ocular and documentary evidences.

iii. Decision of the High Court

The High Court of Karnataka confirmed the conviction and death sentence of the appellant.

iv. Decision of the Supreme Court

The appellant preferred an appeal against the impugned judgement and order of the High Court. A Supreme Court bench comprising Justice K.G. Balakrishnan and B.N. Srikrishna dismissed the appeal and affirmed the death sentence of the appellant. The Supreme Court made the following observations:

> "20. 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."

v. Decision on mercy petition

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

102. Saibanna v. State of Karnataka;[Case NO. Appeal (Crl.) 656 of 2004]

his mercy petition in the High Court of Karnataka which stayed Saibanna's execution[103] and the Court is yet to deliver its final verdict.

vi. Declaration as per incuriam

Mandatory death punishment (prescribed under section 303 of Indian Penal Code) was stuck down as unconstitutional by this court in *Mithu v. State of Punjab* [AIR 1983 SC 473]. In 2009, the Supreme Court in the case of *Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra*[104] declared *Saibanna v. State of Karnataka* as *per incuriam.* The Supreme Court stated,

> *"...If the law provides a mandatory sentence of death as Section 303 of the Penal Code does, neither Section 235(2) nor Section 354(3) of the Code of Criminal Procedure can possibly come into play. If the court has no option save to impose the sentence of death, it is meaningless to hear the accused on the question of sentence and it becomes superfluous to state the reasons for imposing the sentence of death. The blatant reason for imposing the sentence of death in such a case is that the law compels the court to impose that sentence. The ratio of Bachan Singh, therefore, is that, death sentence is Constitutional if it is prescribed as an alternative sentence for the offence of murder and if the normal sentence prescribed by law for murder is imprisonment for life."*
>
> *Justice O. Chinnappa Reddy, J. in his concurring opinion agreed with the majority opinion and observed:*
>
> *"25. Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable [sic irresuscitable] is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional." {See also Reyes v. R. [(2002)*

103. Karnataka HC extends stay on murder convict Saibanna's execution till April 6, Times of India, 5 March 2013; available at: http://timesofindia.indiatimes.com/india/Karnataka-HC-extends-stay-on-murder-convict-Saibannas-execution-till-April-6/articleshow/18810209.cms

104. Santosh Kumar Satish Bhusan Bariyar v. State of Maharashtra: (2009)6SCC498

UKPC 11 : 12 BHRC 219], Hughes, R. v. (Saint Lucia) [(2002) UKPC 12], Fox v. The Queen (2002) 2 AC 284, Bowe v. The Queen (2006) 1 WLR 1623 and Coard & Ors. v. The Attorney General (Grenada), (2007) UKPC 7} Saibanna (supra) to that extent is inconsistent with Mithu (supra) and Bachan Singh (supra).

Case 9: Ankush Maruti Shinde and Ors. v. State of Maharashtra[105]

i. Brief case facts

It was the case of the prosecution that on 5th June 2003 Trambak and all his family members as well as a guest Bharat More were chitchatting after dinner and at about 10.30 p.m. seven to eight unknown persons forcibly entered into his hut and they started threatening the family members. They demanded money as well as ornaments and Trambak took out Rs. 3000/-from his pocket and handed over to one of them. Some of the gang members robbed the family members of their valuables like mangalsutra and other ornaments such as ear-tops, dorley, silver rings while some other gang members re-entered their with weapons like knife, axe handle, sickle, spade with handle and yokpin etc., to rob more money and valuables. Thereafter they went out of the hut and consumed liquor only to come back again. They beat up all six family members and their guest and took turns to rape the two female members of the family. As a result of assault all except Manoj (PW1) and his mother Vimalabai (PW 8) died. They were the eye witnesses to the prosecution case. On the basis of information given by them, investigation was undertaken and all six accused persons viz. Ankush Maruti Shinde, Raja Appa Shinde, Ambadas laxman shinde, Raju Mashu Shinde, Bappu Appa Shinde and Surya @ Suresh were arrested and tried.

ii. Decision of the trial court

The Third Adhoc Additional Sessions Judge, Nasik, convicted all the accused persons and sentenced them to death.

iii. Decision of the High Court

A reference under Section 366 of the Criminal Procedure Code, 1973 for confirmation of the death sentence was submitted to the Bombay High Court.

105. Ankush Maruti Shinde and Ors. v. State of Maharashtra: AIR2009SC2609

While upholding the conviction and the death sentence of accused Nos. 1, 2 & 4, the death penalty in respect of the accused Nos. 3, 5 & 6 was altered to life sentence.

iv. Decision of the Supreme Court

Aggrieved with the impugned decision of the High Court, the State of Maharashtra preferred a Special Leave Petition in the Supreme Court and leave was granted in respect of alteration of death sentence imposed upon accused Nos. 3, 5 & 6 to life sentence. The accused also preferred appeals in the Supreme Court against the decision of the High Court. A bench of the Supreme Court consisting of Justice Arijit Passayat and Justice Mukundakam Sharma confirmed the death penalty imposed upon accused Nos. 1, 2 & 4 and enhanced the life sentence of accused Nos. 3, 5 & 6 to death sentence. The Supreme Court held that the case at hand fell in the category of rarest of rare cases and the crimes committed by the accused persons call for only one sentence i.e. death sentence. The Supreme Court held thus:

> *"31. The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1, 2 & 4; but held that in the case of others it was to be altered to life sentence. The High Court itself noticed that live members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenseless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged in the open field, gang raped and done to death. There can be no doubt that the case at hand falls under the rarest of rare category. There was no reason to adopt a different yardstick for A2, A3 and A5. In fact, A3 was the main person. He assaulted PW1 and took the money from the deceased.*
>
> *32. Above being the position, the appeal filed by the, accused persons deserves dismissal, which we direct and the State's appeal deserves to be allowed.*

A2, A3 and A5 are also awarded death sentence. In essence all the six accused persons deserve death sentence."

v. Decision on mercy petition

The death-row convicts viz. Ankush Maruti Shinde, Raju Masu Shinde, Rajya Appa Shinde, Bapu Appa Shinde, Ambadas Laxman Shinde and Surya @ Suresh Shinde have filed a Mercy petition before the Governor of Maharashtra on 17 June 2010 and the same are pending final disposal.[106] However, on 6 July 2012, a Nashik Sessions Court found and declared Ankush Maruti Shinde as a juvenile at the time of the instant crime. The order of the Sessions Court has rendered the mercy petition of death-convict redundant as the maximum penalty under the juvenile justice law for any crime is three years whereas he had served six years jail including in solitary confinement.[107]

vi. Whether per incuriam

In February 2014, the Supreme Court stayed execution of three death row convicts sentenced in *Ankush Maruti Shinde and Ors. v. State of Maharashtra* following the logic laid down in *Ravji v. State of Rajasthan* which had been declared as *per incuriam*.[108]

106. Reply dated 15 June 2013 under the Right to Information Act, 2005 received from the Secretariat of the Governor of Maharashtra

107. After six years on death row, spared for being a juvenile, The Times of India, 21 August 2012; available at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms

108. Times of India, "SC revisiting death penalties, stays three more" 6 February 2014, http://timesofindia.indiatimes.com/india/SC-revisiting-death-penalties-stays-three-more/articleshow/29920086.cms

6. Summary of the cases sentencing juveniles to death

There is universal consensus that persons below eighteen years shall not be sentenced to death. Article 6(5) of the ICCPR provides that "*Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women*."

India follows the same policy. However, there have been a few cases where children were sentence to death; and the same was rectified with extreme difficulty.

Case 1: Ramdeo Chauhan, Assam

Ramdeo 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.[109] On 31 July 2000, two judges Bench of the Supreme Court upheld the death sentence.[110]

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.

Ramdeo 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.[111]

109. Ramdeo Chauhan @ Rajnath Chauhan v Bani Kant Das & Ors.: SCR [2010] 15 (ADDL.) S.C.R.
110. Ramdeo Chauhan @ Rajnath Chauhan v. State of Assam: AIR2000SC2679
111. Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das & Ors.: SCR [2010] 15 (ADDL.) S.C.R.

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."*[112]

During the pendency of the review petition, Ramdeo 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 National Human Rights Commission (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 of commutation of death sentence to life imprisonment ruling that the order directing commutation by the Governor did not disclose any reason, while the NHRC had no jurisdiction to intervene

112. Ibid.

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.*"[113] Ramdeo Chauhan filed a review petition being (C) No.1378 of 2009 (Second review petition) against the apex court order. 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 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."*[114]

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."*[115]

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.[116] 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*

113. Bani Kanta Das v. State Of Assam, Writ Petition (Civil) No. 457 of 2005
114. Ramdeo Chauhan @ Rajnath Chauhan v. Bani Kant Das & Ors, Review Petition (C) No.1378 of 2009
115. Ibid
116. Supreme Court acts to prevent travesty of Justice!, available at: http://www.hrln.org/hrln/child-rights/pils-a-cases/693-supreme-court-acts-to-prevent-travesty-of-justice.html

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.[117]

Case 2. Ankush Maruti Shinde and five others, Maharashtra

On 5 June 2003, five persons including minors were killed at village Vihitgaon in Nasik district, Maharashtra. One of the deceased, a minor girl, was gang raped before being killed. Six persons namely Ankush Maruti Shinde, Rajya Appa Shinde, Ambadas Laxman Shinde, Raju Mhasu Shinde, Bapu Appa Shinde and Surya alias Suresh were arrested by police and charged under Sections 395, 302 read with Section 34 of the IPC, Sections 376(2)(g), 307 read with Section 34 of the IPC, Sections 396, 397 read with Section 395 and Section 398 of the IPC.[118]

On 12 June 2006, Ankush Maruti Shinde and five others were sentenced to death by the trial court. On 22 March 2007, the Bombay High Court confirmed the death sentence of Ankush Maruti Shinde and two others and commuted the sentence of three to life imprisonment.[119] On 30 April 2009, the Supreme Court set aside the order of the Bombay High Court altering death sentence to life for three convicts and confirmed the death sentence of all the six including the juvenile.[120]

Ankush was sentenced to death by the trial court, the High Court and the Supreme Court without any attempt being made to ascertain his age on the date of offence even though unimpeachable documentary proof was available showing him to be a juvenile.[121] In July 2012, it was confirmed by the Additional Sessions Court in Nashik that Ankush Maruti Shinde was a juvenile at the time of the commission of offence pursuant to an application filed on his behalf by a human rights advocate seeking an inquiry into his age. The

117. Judgement dated 9 August 2011in public interest litigation (No.39/2011); available at: http://ghconline.nic.in/Judgment/PIL392011.pdf
118. State Of Maharashtra v. Ankush Maruti Shinde And Ors, Bombay High Court, 22 March 2007
119. Ibid
120. Ankush Maruti Shinde and Ors. v. State of Maharashtra [Criminal Appeal Nos. 1008-09 of 2007 and Criminal Appeal Nos. 881-882 of 2009 (Arising out of SLP (Crl.) Nos. 8457-58 of 2008 decided on 30.04.2009]
121. See 'Relief for a juvenile', Frontline, Volume 29 - Issue 17 :: Aug. 25-Sep. 07, 2012, at: http:// www.frontline.in/static/html/fl2917/stories/20120907291701100.htm

Court found that Ankush Maruti Shinde's age on the date of the crime was 17 year, nine months and fifteen days.[122] Ankush Maruti Shinde had to spend more than nine years in prison, six of which were spent in a solitary cell as a death-row convict.[123]

Ankush Maruti Shinde and other convicts filed mercy petitions before the Governor, which were pending disposal as on 15 June 2013.[124] However, the mercy petition of Ankush Maruti Shinde had become redundant after it was confirmed by the Additional Sessions Court in Nashik on 7 July 2012 that he was a juvenile at the time of the commission of offence following an inquiry into his age.[125]

In February 2014, the Supreme Court admitted the petitions filed by death row convicts accepting the argument of their counsel that the case *Ankush Maruti Shinde and Ors. v. State of Maharashtra* was decided by relying on *Rajvi alias Ram Chandra v. State of Rajasthan* which was declared as *per incuriam*.[126]

122. See 'After six years on death row, spared for being a juvenile', The Times of India, 21 August 2012 at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-ajuvenile/articleshow/15577973.cms
123. See 'Relief for a juvenile' Frontline, Volume 29 - Issue 17, August 25-September 7, 2012 at: http:// www.frontline.in/static/html/fl2917/stories/20120907291701100.htm
124. RTI reply No.RB-2013/Admin/RTI/23805 dated 15 June 2013 received from PIO & Under Secretary to Governor (Admin), Raj Bhavan, Mumbai by Asian Centre for Human Rights (ACHR)
125. *See* 'After six years on death row, spared for being a juvenile', The Times of India, 21 August 2012 at: http://timesofindia.indiatimes.com/india/After-six-years-on-death-row-spared-for-being-a-juvenile/articleshow/15577973.cms
126. See 'Supreme Court correcting itself? Supreme Court will re-hear the 2009 Death Appeal decided on the basis of a wrong precedent', Livelaw.in, 6 February 2014, http://www.livelaw.in/supreme-court-correcting/

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