

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL) No. D.No. 5529 OF 2020

UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

IN THE MATTER OF:

Vinay Sharma

.... Petitioner

Versus

Union of India & Ors

.... Respondents

with

CRL.MP. NO. _____ of 2020

(Application for Stay)

AND

CRL.MP. NO. _____ of 2020

(Application for Directions)

AND

CRL.MP. NO. _____ of 2020

(Application for exemption from filing typed and certified copies)

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PAPER-BOOK

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ADVOCATE FOR THE PETITIONER: SADASHIV

10. After the rejection of the mercy petition of the Petitioner, the counsel of the Petitioner filed urgent application under Section 7 of the Right to Information Act, 2005 before the Respondent authorities, specifically the Hon'ble President of India, the Ministry of Home Affairs, the Lieutenant Governor of the NCT of Delhi and the Home Department of the Govt. of NCT of Delhi. Copies of the RTI applications filed before the Hon'ble President, Ministry of Home Affairs, Hon'ble Lieutenant Governor and Home Department Govt of NCT of Delhi is annexed as **Annexure P9-(758 to 766)**.

11. Being aggrieved by the dismissal of his mercy petition and having no other efficacious remedy but this Hon'ble Court, the Petitioner is filing the present writ petition on the following grounds, each of which are pressed in the alternative and without prejudice to each other.

INDIAN LEGAL NEWS GROUNDS

A. For that the right to life under Article 21, along with all its other guarantees including procedural fairness inhere even in death sentenced prisoners, and are to be observed at every stage, even till the last breath of life (*Triveniben v. State of Gujarat* (1989) 1 SCC 678, para 60). Even after the mercy petition has been rejected it has been held by the Hon'ble Supreme Court that post-mercy judicial remedies are available to a prisoner

under Article 21 of the Constitution. (*Shatrughan Chauhan, para 241.11*).

**DUTY OF DISCLOSURE IN WRIT PETITIONS
CHALLENGING DETERMINATION OF MERCY PETITION IN
DEATH SENTENCE CASES**

B. For the effective adjudication of the present Writ Petition, this Hon'ble Court must have access to the original file of respective Respondents to ascertain whether the grounds as alleged in the Writ Petition are satisfied against the Respondents. Such access to documents must also be extended to the Petitioner's counsel to ascertain if the procedure adopted by the Respondents has violated the right of the Petitioner under Article 21.

C. It is submitted that Courts have routinely allowed the examination of the materials placed before the President for consideration along with the mercy petition. The immunity from judicial review under Article 74(2) of the Constitution does not protect the Respondents from an enquiry into the materials processed in the placement of and consideration of the mercy petition by the authority, including the copy of the mercy petition, the opinion of various officers (if any), the relevant rule of the State's jail manual under which the

mercy petition is submitted, the personality, age, conduct of the prisoner in jail is informed to the constitutional authority.

D. In *Shatrughan Chauhan* (supra) the Hon'ble Court held that prisoners have a right to document required for availing post-mercy remedies before Constitutional Courts, as the same are required for the protection under Article 21 guaranteed to the convicts. The Hon'ble Court has the power to grant commutation on the basis of supervening circumstances which cannot be discovered without a due appreciation of the documents in the original file of the State Respondents.

E. The Petitioner therefore wishes to reserve the right to make detailed submissions on fact and law until the disclosure of the material including the original file regarding the Petitioner. However, to aid this Court, the relevant judgements regarding the various grounds of challenge to mercy petitions are highlighted in the next section.

F. That the Supreme Court in *Epuru Sudhakar vs. State of Andhra Pradesh* (2006) 8 SCC 161 further clarified the scope of judicial review of mercy powers in the Constitution. It held that the President or the Governor's power under Article 72/161 can be impugned on the following grounds:

"(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness." [Para 34]

G. The Supreme Court in *Epuru Sudhakar* (supra) minutely considered the procedure adopted in grant of mercy by the Governor, including the various officers whose views were taken into consideration and placed before the Governor. Among the concerned officers, three district level officers being the Superintendent of Police, the District Collector and the District Probation Officers' views were taken. The Court concluded that the District Collector was required to conduct an independent inquiry and could not have relied upon the views of the other officers. [Para 55] The power of judicial review therefore extended to ascertainment of the conduct of all officers prior to placement of material before the Constitutional authority. In the instant case, the same can only be examined by examining the entire original file of the Respondents.

H. That the relevant considerations regarding judicial review pertinent to this case can only be pleaded upon a disclosure of the original file of the Respondents which can explain the conduct of all officers in the preparation, placement and consideration of the mercy petition by the constitutional authorities under Article 72.

I. The counsel for the Petitioner has approached the Respondent authorities i.e. the Hon'ble President, the Hon'ble Lieutenant Governor, the Ministry of Home Affairs and the Department of Home, Govt. of NCT of Delhi under the Right to Information Act, 2005 and filed RTI applications requesting for records pertaining to the rejection of his mercy petition by the authorities. However, since the same have not been replied to, the Petitioner is approaching this Hon'ble Court for the same as without access to records, the Petitioner cannot exercise his right under Article 21 of the Constitution of India and cannot agitate his claim against the rejection of the mercy petition.

ILLEGAL SEGREGATED/SOLITARY CONFINEMENT OF THE PETITIONER

J. In *Sunil Batra v. Union of India* (1978) 4 SCC 494 it was held that solitary or single cell confinement prior to rejection of mercy petition is unconstitutional. In that case, the Hon'ble Supreme Court had occasion to examine the import of Section

30 of the Prisons Act, which provides that all prisoners under sentence of death shall be "confined in a cell apart from all other prisoners". It was held that the term "apart from all other prisoners" does not warrant isolation or segregation in a separate cell. It was observed that *"all that it connotes is that in a cell where there are a plurality of inmates the death sentence will have to be kept separated from the rest in the same cell but not too close to the others. And this separation can be effectively achieved because the condemned prisoner will be placed under the charge of a guard by day and by night."* (Para 93). It was further held that even this form of confinement "apart from all other prisoners" under Section 30 of the Prisons Act is only applicable on death row prisoners only when their mercy petition is rejected. After that they attract the custodial segregation specified under Section 30(2) (Para 197A-5).

K. For that the Petitioner has admittedly been kept in illegal confinement, for a period of over one year. This is borne out by the response of the Central Jail, Tihar dated 14.01.2020.

L. This confinement is contrary to Sunil Bara's case and this Hon'ble Court in *Ajay Kumar Pal v. Union of India* (2015) 2 SCC 478, commuted the sentence of death to life imprisonment *inter alia* on grounds of solitary confinement.

M. The Petitioner does not have access to any document that reflects the nature of his confinement in Tihar Central Prison, starting from December 2012 except the reply of the Tihar Central Jail. For the purpose of understanding the nature and duration of illegal solitary and segregated confinement imposed upon the Petitioner, this Hon'ble Court is prayed to kindly call for the Bandhi register and/or any other register/document that marks the daily attendance as well as the time of number bandhi and number khuli (in time and out time from prison cell) for appreciating the nature of the Petitioner's confinement.

TORTURE IN PRISON

N. The Petitioner has been subjected to relentless and excruciating torture while in police custody and in Tihar Central Prison, starting from the day of his arrest. As stated in his mercy petition, repeated torture was inflicted upon the Petitioner in Tihar Central Prison by prison officials and other inmates. A detailed narration of the Petitioner's experience of physical and mental torture and its impact on his health has been provided in his mercy petition. For the sake of brevity, those facts are not repeated here.

O. The Hon'ble Supreme Court in *Shatrughan Chauhan* (supra) laid down that torture is a violation of the fundamental rights of a death row prisoner and is a ground for commutation of his

death sentence to life imprisonment. In that case, the Hon'ble Court noted that undue, inordinate and unreasonable delay in deciding mercy petitions and solitary confinement of prisoners sentenced to death amounts to torture which is a violation of Article 21 and therefore is a ground for commutation of the death sentence (*paras 60, 61, 88, 90*). It is also pertinent to note that the Hon'ble Supreme Court has held that the prisoner sentenced to death is not required to prove the "*actual harm occasioned by the delay*" in deciding mercy petitions. While commuting the death sentence imposed on convicts responsible for the assassination of Former Prime Minister Rajiv Gandhi, the Hon'ble Supreme Court of India held in *V. Sriharan v. Union of India* (2014) 4 SCC 242 Para 21 that, "*There is no obligation on the convict to demonstrate specific ill effects of suffering and agony on his mind and body as a prerequisite for commutation of sentence of death.*" Based on these decisions of the Hon'ble Supreme Court, various forms of physical and mental torture inflicted upon the Petitioner with impunity by the police and prison administration, over the last 7 years of his incarceration, amount to a violation of his right to life under Article 21 and is a ground for commutation of his death sentence to life imprisonment.

P. In *State of Madhya Pradesh v. Shyamsunder Trivedi* (1995) 4 SCC 262, while deciding a criminal appeal against police

officials in a case involving custodial death, the Hon'ble Supreme Court noted that *"exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt"* (Para 17) should not be done in cases involving custodial torture. The Hon'ble Court agreed with the recommendation of the 113th Report of the Law Commission suggesting that if injury is caused while in custody, the court may presume that it was caused by the police officer, unless proved to the contrary. It further added that, *"courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime."* (Para 18)

Q. The Petitioner has developed serious physical and mental health problems due to the torture and cruel, inhuman and degrading treatment that has been repeatedly inflicted upon him in Tihar Central Prison. In his mercy petition, the Petitioner has described the following forms of torture and cruel, inhuman and degrading treatment, inflicted upon as an undertrial as well as after his conviction and imposition of the death sentence:

- a. Physical assault on several occasions by groups of inmates or prison officials either either using

sticks, rods, leather shoes, blades or through kicking and punching using limbs;

- b. Confinement in a small cell with unhygienic conditions such as forced excretion within the cell, providing undrinkable salty water, and harsh 24*7 lighting;
- c. Choking the Petitioner's neck;
- d. Urination on the Petitioner's face;
- e. Spitting on the Petitioner's food;
- f. Pouring water over the Petitioner's blanket and clothes during winter;
- g. Verbal harassment and threats;
- h. Solitary confinement for different durations

R. Due to the above-mentioned forms of torture inflicted on the Petitioner, by the jail officials in Tihar Central Prisons and other inmates, the Petitioner has suffered irreversible physical and psychological trauma. A brief history of the medical records which show the impact of that torture on his physical and mental health are as follows:

- a. A Referred Slip of Central Jail Hospital Tihar dated 21.08.2015 prepared by Medical Officer In-Charge, Central Jail No. 5, Tihar stated a history of a "physical assault" on the Petitioner which took place a week back resulting in "back pain",

and "pain and swelling" at "right hand wrist joint", "right side elbow joint" and "right side ankle joint". The Medical Officer further referred the Petitioner "to Chief Medical Officer In-Charge of Deen Dayal Upadhyay Hospital".

b. An Outdoor Patient Ticket of Central Jail Hospital Tihar dated 1.12.2015 noted that the Petitioner was suffering from "decreased appetite" and "pain in right elbow". The Medical Officer prescribed the medicine "Cyproheptadine" for increasing appetite.

c. An Outdoor Patient Ticket of Central Jail Hospital Tihar dated 8.01.2016 noted that the Petitioner was suffering from "decreased appetite, 2-3 instances of vomiting and burning micturition". He was prescribed medicines "Norflox 400mg, Vitamin C, Cyproheptadine, Buscopan and syrup Alkasol to be mixed with 10mg of water".

d. An Outdoor Patient Ticket of Central Jail Hospital Tihar dated 23.07.2016 noted that the Petitioner was suffering from "swelling and pain" in hand and was prescribed medicine "Tramadol" OD and "Clonazepam 0.5mg" x-x-1 for five days and also referred to "psychiatry".

- e. On 18.08.2016, the Petitioner was found to be suffering from "pain in right hand" and was prescribed to continue the same treatment as on 04.08.2016.
- f. On 23.08.2016, the Petitioner was found to be suffering from "pain in right hand" and was prescribed medicine "Voveran" (50mg) 1x3 days and "Rantac" 1x3 days.
- g. On 07.09.2016, the Petitioner was discharged from MI room after his treatment for having suffered "pain in right elbow" for which he was also treated at Deen Dayal Upadhyay Hospital. The Petitioner was prescribed medicine "Fluoxetine 20 mg" (1-x-x), "Clonazepam 0.5 mg" (1-x-1) and "Ultracet" and "CA 500". The Petitioner was prescribed to continue the same treatment on 09.09.2016 and 14.09.2016.
- h. On 23.09.2016, the Petitioner was found to be suffering from "decrease in appetite" and "pain", "tenderness" and "swelling in the right elbow". The Petitioner was advised to get X-Ray done on the right elbow and was prescribed medicine "Dygesic MR", "Calcium", and "Rantac" for three

- i. On 30.09.2016, the Petitioner was taken to the Jail Hospital of Jail No. 8/9, where he was found to have "pain", "tenderness" and "swelling" in his "right elbow" and he was prescribed to continue the same treatment as prescribed on 23.09.2016.
- j. On 20.10.2016, the Petitioner was taken to Central Jail Hospital, where he was found to have an injury on his elbow including a deformity and he was referred to Deen Dayal Upadhyay Hospital for further opinion.
- k. On 13.12.2016, the Petitioner was found to have "pain" and "deformity" in "right elbow" and also a "psychiatry illness". The Petitioner was prescribed medicine "Diclo SR" 1 tab, "Rantac" 1 tab and "Brux gel", and was referred to the specialists of Ortho and Psychiatry.
- l. On 20.03.2017, the Petitioner was found to have a "wound on head" and was prescribed medicine "Augmentin", "Rantac" and "Brux Gel".
- m. On 13.10.2017, the Petitioner was referred to Deen Dayal Upadhyay Hospital for orthopedics advice and he was prescribed medicine Dido, Serratiopeptidase and Rantac for one week.

- n. On 16.12.2017, the Petitioner was found to have "cough" for past two weeks, "fever" at night and history of "Pul Koch's" disease, and he was prescribed medicine "Amoxiclav", "Pantop", "LCZ", "syrup Bomex" and "Paracetamol".
- o. On 30.01.2018, the Petitioner was found to have "physical trauma & injury to right thigh and knee", and was prescribed injections and medicine "Diclo" and "Serratiopeptidase" for five days.
- p. On 10.04.2018, the Petitioner was taken to Central Jail Hospital Tihar with a complaint of "pain in right side of back" which gets "severe" at "night" due to a history of having suffered "trauma" after a "knife" attack in "2015". The Petitioner also complained of "difficulty in breathing" and was prescribed medicine "Brufen 400mg", "Rantac 150mg", "Diclofenac gel" and "Buscopan" injection.
- q. On 18.04.2018, the Petitioner was taken to Central Jail Hospital with a "bite mark" injury and was recommended medicine "Diclofenac 80mg" and "Rantac 150mg" for three days.

- r. On 21.04.2018, the Petitioner was found to have pain in right elbow and decreased sleep. The Petitioner was prescribed "Ultracet" and "Rantac", and was referred to senior psychiatrist in view of drug dependence (he was being prescribed "Tramadol").
- s. On 26.12.2018, the Petitioner was taken to Central Jail Hospital Tihar where he was found to have suffered "pain" on "right knee" due to a physical "trauma 6-7 days" back. The Petitioner was prescribed medicines including "Serratiopeptidase" and "Rantac".
- t. On 04.01.2019, the Petitioner was taken to Central Jail Hospital Tihar where he was found to have suffered "multiple clean cut incised wound and present over right arm and forearm". The Petitioner was prescribed medicines.
- u. An undated medical record shows that the Petitioner was taken to Central Jail Hospital Tihar and was diagnosed with "right elbow pain" due to a "history of injury" in "right elbow". The Petitioner was prescribed medicine "Tramadol" and "Rantac".

- v. An undated medical record shows the Petitioner was taken to Central Jail Hospital Tihar and a "backache" was diagnosed. The Petitioner was prescribed medicine "Calcium 500mg" and "Voveran SR" for six days and was also referred to "senior psychiatrist".
- w. An undated medical record notes that the Petitioner suffered "pain in right elbow & right ankle" due to a "physical assault". The record notes upon "orthopedic examination (O/E) that "elbow & ankle" had "swelling" and "tenderness". It is pertinent to note that this record has mentioned another "trauma" which took place "8 months back" which resulted in "dislocation (posterior) of radial knee" and "ankle sprain".
- x. An undated medical record of Deen Dayal Upadhyay Hospital states that the Petitioner suffered a "physical assault" resulting in "CL lll over 2x1cm" of "frontal bone", "pain, tenderness and swelling over right elbow and thumb". It is pertinent to note that the record has referred to an undated "trauma over right elbow" of the Petitioner which took place in "2015". The Petitioner was prescribed to apply an above

elbow slab thumb and also medicine "Diclo 50mg", "Ranitidine 50mg", "Serretiotong" and "Calcium 500mg".

S. From the above medical records, it is clear that there has been a history of physical assault that was inflicted upon the Petitioner. On several occasions, the Petitioner has also reported severe injuries on his head, back, right thigh, right arm and knee which are unexplained. In light of the Petitioner's narrative in his mercy petition of repeated torture by prison officials and inmates at Tihar Central Prison, and as per the directions of the Hon'ble Supreme Court, these injuries must be presumed to be a result of physical assault inflicted upon the Petitioner, unless proved otherwise. It is also pertinent to note that the Petitioner was referred to the psychiatry department on several occasions and has been prescribed psychiatric medication.

T. Therefore, the torture and cruel, inhuman and degrading treatment that was inflicted upon the Petitioner with impunity throughout the period of his incarceration at Tihar Central Prison is a flagrant violation of his right to life and right to live with dignity guaranteed under Article 21 of the Constitution. As per the directions of the Hon'ble Supreme Court in *Sunil Batra (II)*, prison administration must be held responsible for the infliction of torture, irrespective of whether it is a direct party to

it. Considering that the Hon'ble Supreme Court in *Shatrughan Chauhan* (supra) held that violation of right to life under Article 21 due to torture would be a ground for commutation of death sentence, it is submitted that this Hon'ble Court may commute the death sentence imposed on the Petitioner to life imprisonment.

MENTAL ILLNESS OF THE PETITIONER

U. The Petitioner has suffered immense psychological trauma due to the torture and cruel, inhuman and degrading treatment that has been inflicted on him and he has developed mental illness because of which he has been prescribed psychiatric medication. It is submitted that this is a violation of the Petitioner's right to life and to live with dignity under Article 21 of the Constitution and must therefore be considered as a ground for commutation of his death sentence.

V. The Mental Healthcare Act, 2017 in section 2(1)(s) defines mental illness as "substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence". A

similar definition of "mental illness" is provided in the Schedule which defines the term "specified disability" under the Rights of Persons with Disabilities Act, 2016. It is also pertinent to note that these legislations guarantee the right to live with dignity for persons suffering from mental illness (Section 20, Mental Healthcare Act, 2017) and mandates the State to ensure the realisation of this right for those with this disability (Section 3(1), Rights of Persons with Disabilities Act, 2016).

W. The Delhi Prison Rules, 2018 also have special procedures for dealing with persons with mental illness. Chapter XXXV of these Rules contains the definition of mental illness and the scope of mental health care to be provided by the prison. (Rules 1842, 1843, 1844, 1851) Further, Chapter XVII which deals with 'Welfare of Prisoners' provides that all prisoners must be provided with counselling services. (Rule 1121)

X. Based on these rules, the Petitioner should have been treated as a person with mental illness and should have been provided the proper mental healthcare, counselling and psycho-social support services for the same. Further, a report regarding the Petitioner's mental illness would have been sent to the Inspector General, seeking orders regarding removal of the Petitioner from prison and transfer

to IBHAS or a Government Hospital. Since the Petitioner's counsel has not been provided the complete mental health, psychiatric treatment, counselling and psycho-social support record of the Petitioner, the same are required to be called upon for determination of this petition. Further, all correspondence to the Inspector General in this regard and his opinion on removal of the Petitioner from the Tihar Central Prison must be called for as well for the determination of this Petition.

Y. Rule No. 845 of Delhi Prison Rules, 2018 also states that prisoners on death row are prone to deteriorating mental health and therefore, "there should be regular mental health evaluation and appropriate medical care should be given to those in need". A brief history of the relevant records which reflect that the Petitioner was receiving psychiatric medication for mental health issues is as follows:

a. The Outdoor Patient Ticket dated 01.12.2015 of Central Jail Hospital Tihar also noted that the Petitioner was suffering from "decreased appetite". The Medical Officer prescribed "Cyproheptadine" for increasing appetite and to be referred to psychiatric.

b. An Outdoor Patient Ticket of Central Jail Hospital Tihar dated 23.12.2015 noted that the Petitioner

was suffering from "periorbital hyperpigmentation", "decreased sleep", "repetitive ruminative thoughts" and "irritability".

He was prescribed "multivitamin B complex tablet" by the Senior Resident Doctor (Skin) but no treatment prescribed for other symptoms.

c. On 06.01.2016, the Petitioner was diagnosed with "Adjustment Disorder" and "decreased sleep". The Petitioner was prescribed "Zolpidem 10mg (x-x-1)", "Quetiapine 100mg (x-x-1)" and "Mirtaz 7mg (x-x-1)" for two months.

d. The Outdoor Patient Ticket dated 08.01.2016 of Central Jail Hospital Tihar also noted that the Petitioner was suffering from "decreased appetite" along with "2-3 instances of vomiting" and "burning micturition". The Petitioner was prescribed "Norflox 400mg", "Vitamin C", "Cyproheptadine", "Buscopan" and syrup "Alkasol" to be mixed with 10mg of water.

e. An Outdoor Patient Ticket of Central Jail Hospital Tihar dated 13.01.2016 noted that the Petitioner was suffering from "decreased appetite" and "headache". He was prescribed "Albendazole 400mg", syrup "Cyproheptadine", "Multivitamin"

and "Sodium Valproate" for 3 days. His prescription of "Zolpidem 10mg (x-x-1)", "Quetiapine 100mg (x-x-1)" and "Mirtaz 7mg (x-x-1)" was also extended for two more months.

- f. On 04.02.2016, the Petitioner, was prescribed to continue psychiatric medication of Zolpidem 10mg (x-x-1), Quetiapine 100mg (x-x-1) and Mirtaz 7mg (x-x-1) for 2 months.
- g. An Outdoor Patient Ticket of Central Jail Hospital Tihar dated 16.06.2016 states that the Petitioner was prescribed to continue the medicines Mirtaz 7.5mg (x-x-1), Zolpidem 10 mg (x-x-1) and Quetiapine 100mg (x-x-1) for two weeks.
- h. On 06.08.2016, the Petitioner was found to have suffered "self inflicted injuries" including an "abrasion".
- i. On 24.08.2016, the Petitioner was admitted to Deen Dayal Upadhyay Hospital after his attempt at "suicidal hanging" and was discharged on 26.8.2016. The Petitioner was prescribed Fluoxetine 20mg (x-x-1), Clonazepam 0.5mg (1-x-x) and the Jail was suggested to follow suicide protocol for 2 weeks.

- j. On 03.09.2016, the Petitioner was diagnosed to be suffering from "depression", "decreased appetite" and "weakness". The Petitioner was prescribed protex powder.
- k. On 07.09.2016, the Petitioner was prescribed medicine "Fluoxetine 20 mg (1-x-x)", "Clonazepam 0.5 mg (1-x-1)", "Ultracet" and "Ca 500". The Petitioner was prescribed to continue the same treatment on 09.09.2016 and 14.09.2016.
- l. On 16.09.2016, the Petitioner was prescribed Fluoxetine 20mg for fifteen days.
- m. On 24.09.2016, the Petitioner was taken to Central Jail Hospital with a complaint of "decreased appetite" and the Petitioner was prescribed to continue the same treatment as dated.
- n. On 26.09.2016, the Petitioner was prescribed the medicine Clonazepam (0.5mg) for 15 days after his psychiatry diagnosis.
- o. On 13.12.2016, the Petitioner was also found to have a "psychiatry illness". The Petitioner was

"Rantac" 1 tab and "Brux gel", and was referred to the specialists of Ortho and Psychiatry.

- p. On 30.01.2017, the Petitioner was taken to Deen Dayal Upadhyay Hospital with a history of "food strike since 4 days" resulting in "weakness".
- q. On 20.03.2017, the Petitioner was found to have "thought disorder" and "high mental functioning" and was prescribed medicine "Mitraz 15 mg (x-x-1)" and "Clonazepam 0.5mg (x-x-1)" for 2 weeks.
- r. On 22.03.2017, the Petitioner was found to have complaints of "decreased sleep" and "headache", and was prescribed medicine "Amitriptyline 25 mg".
- s. On 23.06.2017, the Petitioner was found to have "decreased sleep" and was recommended to continue the same treatment dated 30.05.2017, medicine "Methylcobalamin 500gm" and "Methocarbamol" in addition to a "psychiatric review".
- t. On 08.07.2017, the Petitioner was found to have "decreased sleep" and was recommended to continue the same treatment as 30.05.2017 in

- u. On 12.07.2017, the Petitioner was found to have "decreased sleep" and was recommended to continue the same treatment as 30.05.2017 in addition to the "psychiatric review" and medicine "multivitamin".
- v. On 10.02.2018, the Petitioner was taken to the emergency unit of Central Jail No. 2 where it was recorded he was diagnosed with "physical assault" and "disoriented behavior". It was recorded that he was brought with alleged history of "self inflicted injuries" - "lacerated superficial wound 2cm on right side of head (right parietal scalp)", "swelling" and "tenderness" in "right forehead" and "right shoulder". He was prescribed injections.
- w. On 20.04.2018, the Petitioner was found to have "weakness" and he was prescribed "multivitamin syrup" and "D3 capsule".
- x. On 21.04.2018, the Petitioner was also found to have "decreased sleep". The Petitioner was prescribed medicine "ultracet" and "rantac", and was referred to senior psychiatrist in view of drug dependence (he was being prescribed tramadol).

y. On 29.05.2018, due to complaint of cough and "loss of appetite", the Petitioner was recommended medicine Azithromycin 500 mg, Cetirizine 10mg, Digene 1 tab and syrup Bromhexine 2 tbsps .

z. On 17.07.2018, the Petitioner was taken to Central Jail Hospital Tihar with complaints of "decreased sleep" and "anxiety" and was recommended to continue the same treatment as 10.07.2018 and be referred to a psychiatrist.

Z. Based on the above medical records, the Petitioner has been on psychiatric medication and was diagnosed with Adjustment Disorder, and was prescribed Mitraz (antidepressant), Zolpidem (sleeping pill) and a low dose of antipsychotic medicine, Quetiapine, which is also used to treat depression. As per the fifth edition of the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Adjustment disorder is a cluster of symptoms, the onset of which is in response to a stressful event where the individual experiences more stress than would normally be expected. Adjustment disorders can occur with depressed mood, or anxiety and are "associated with an increased risk of suicide attempts." (DSM-5, Page 287).

AA. On 03.09.2016, the Petitioner was further diagnosed with depression and was prescribed antidepressant (Fluoxetine) and anxiety medication (Clonazepam). In the Petitioner's psychiatric records, the most common symptoms recorded were "decreased appetite", "decreased sleep", "repetitive ruminative thoughts" and "irritability". In addition to these, documents dated 06.08.2016, 24.08.2016 and 10.02.2018 show multiple attempts of suicide and self harm by the Petitioner.

BB. The diagnostic guidelines of 'The ICD-10 Classification of Mental and Behavioural Disorders' by the World Health Organisation, accepted as a diagnostic manual under Section 3 of the Mental Healthcare Act, 2017, defines a "severe depressive episode" as when "sufferer usually shows considerable distress or agitation, unless retardation is a marked feature. Loss of self-esteem or feelings of uselessness or guilt are likely to be prominent, and suicide is a distinct danger in particularly severe cases."

CC. The Petitioner's symptoms of anxiety and self-harm indicate considerable distress. The Petitioner has expressed feelings of low self-esteem, uselessness, guilt and burdensomeness in his mercy petition. These, along with multiple instances of self harm and suicide indicate that the Petitioner suffered from 'Severe Depressive Episodes' during

the period of his incarceration in addition to persistent 'Adjustment Disorder' and 'Depression'.

DD. In line with the legislative policy on treatment of persons with mental illness, the Hon'ble Supreme Court in several decisions has commuted the death sentence of prisoners sentenced to death who had developed mental disorders or illnesses during the period of incarceration. In *Shatrughan Chauhan* (supra), the Hon'ble Court acknowledged India's obligations under UN General Assembly resolutions and ICCPR and concluded that prisoners with "insanity, mental illness or schizophrenia" cannot be executed and their sentence must be commuted. Amongst the 15 death row convicts before the Hon'ble Court in *Shatrughan Chauhan* (supra), two of them had a mental illness and this factor was considered by the Hon'ble Court while commuting their sentences.

EE. In *Accused X v. State of Maharashtra* (2019) 7 SCC 1, the Hon'ble Supreme Court held that mental illness which arises as post-conviction should be considered as a ground for commutation. The Hon'ble Court held that, "It is pertinent for us to understand the phenomenon of post-conviction mental illness. As the phrase itself suggests, it is only after being proven guilty, that the convict has developed such illness. It is well-acknowledged fact

throughout the world that, prisons are difficult places to be in. The World Health Organisation and the International Red Cross, identify multiple circumstances such as overcrowding, various forms of violence, enforced solitude, lack of privacy, inadequate healthcare facilities, concerns about family, etc., can take a toll on the mental health of the prisoners. Due to the prevailing lack of awareness about such issues, the prisoners have no recourse and their mental health keeps on degrading day by day. (Accused X, Para 47). The Hon'ble Court further notes that the "realities within prison walls" may lead to the development of a broad-spectrum of mental illnesses amongst prisoners (Accused X, Para 77).

FF. While reiterating the right to live with dignity for prisoners with mental illness, the Hon'ble Court also notes that, "The right to dignity of an accused does not dry out with the Judges' ink, rather, it subsists well beyond the prison gates and operates until his last breath. In the context of mentally ill prisoners it is pertinent to mention that Section 20(1) of the Mental Healthcare Act, 2017, Act 10 of 2017, explicitly provides that "every person with mental illness shall have a right to live with dignity" (Accused X, Para 58) .

GG. In Md. Mannan @ Abdul Mannan v. State of Bihar Review Petition (Crl) No. 308 of 2011 decided on 14.02.2019, the Hon'ble Court held that "mental illness is a relevant factor which warrants commutation of death sentence to life imprisonment". In this case, based on the psychiatrist's report that the accused might be suffering from "organic (neurological) and/or mental health issues", the Hon'ble Court commuted the death sentence while deciding the review petition.

HH. Based on the above decisions of the Hon'ble Supreme Court, it is clear that if a prisoner sentenced to death develops a mental illness during his period of incarceration, then that should be considered as a ground for commutation of the death sentence. It is humbly submitted that the Petitioner was given access to his medical records only after his Special Leave Petition and Review Petition had been decided by the Hon'ble Supreme Court. Therefore, so far, no court has considered the Petitioner's mental health while deciding the appropriateness of the death sentence imposed on him.

II. Given the brutal forms of physical and mental torture and cruel, inhuman and degrading treatment that the Petitioner suffered during his incarceration, he developed mental illnesses, which also led him to attempt suicide and inflict

self harm on several occasions. Further, in paragraphs 32 and 34 of his mercy petition, the Petitioner narrates that he did not receive adequate healthcare either, which would have caused his mental illness to persist or worsen. Therefore, in light of the decisions of the Hon'ble Supreme Court, the Petitioner death sentence may be commuted developed as he has developed mental illness during his incarceration in Tihar Central Prison as per the jurisprudence of the Hon'ble Supreme Court.

**GROUND OF JUDICIAL REVIEW OF MERCY PETITIONS
AVAILABLE TO THE PETITIONER UPON EXAMINATION OF
RELEVANT RECORDS**

JJ. That the Hon'ble Supreme Court in *Shatrughan Chauhan* (supra) has further clarified that judicial review in such cases also extends to an examination of supervening circumstances such as inordinate delay, mental illness and procedural lapses, which are infringements on the right to life of the prisoner on death row, and entitle the prisoner for a commutation by a constitutional court.

KK. The Supreme Court in *Shatrughan Chauhan* (supra) has referred to criteria set out by the Union Government by way of circular which refers to relevant material for determination of mercy petition. Relevant considerations

include age, fixation of responsibilities etc. [Para 55-56] The Court has also referred to procedure published by the Ministry of Home Affairs regarding handling of petitions for mercy in death sentence cases [Para 98, 98.2, 99.2] Only upon the detailed perusal of the original file of the Respondents, the Petitioner can ascertain whether the procedure as set out by the Ministry of Home Affairs has been duly followed.

LL. Further, the Supreme Court in *Shatrughan Chauhan* (supra) set out guidelines [Para 240] for disposal of the mercy petition, and upon examination of the original file of the Respondents, the Petitioner would be in a place to argue whether such guidelines have been followed. Guideline 3 and 4 also cover the procedure for providing legal aid, ensuring procedural compliance, communicating the decision of the Governor etc. [Para 240, Paras 261-263]

MM. The Petitioner seeks to make detailed submissions with respect to relevant grounds of judicial review in the instant case which can only be made after the disclosure of materials placed before the President for consideration along with the Petitioner's mercy petition. The disclosure of the documents except the factum of advice by the final authority (i.e. the Home Ministry or Department in this

case) to the Petitioner is therefore necessary for arguments in the instant case, and the same are prayed for.

BIAS AND NON-APPLICATION OF MIND

NN. It is submitted that public statements made by several ministers in the Council of Ministers in the Delhi Government as well as the Union Government reflect that they strongly support the execution of the Petitioner and had therefore, pre-judged the outcome of his mercy petition, even before it was filed by the Petitioner. A few examples of these reported statements are provided below:

- a. An article published on 07.01.2020 by Republic World reported a statement by Ms. Smriti Irani, Union Minister for Women and Child Development as follows, *"Smriti Irani speaking about Nirbhaya's parents said, 'Knowing them personally, I know the ordeal they have undergone to ensure that justice is done to their daughter and their family and bring this whole case to closure, at least judicial closure. I can only say this that the family has had hopes pinned on the judiciary to ensure that the rapists do not take undue advantage of the procedure and I am hopeful that the justice that has been delivered today*

and as I earlier said that I do not have an order copy with me but let alone as a minister, as a woman, as a mother, I can understand the sense of relief the mother feels today who has fought for justice for her daughter. In my association with the Nirbhaya family, her mother particularly and her father, I saw them shed tears of frustration. There are wounds which will take time to heal. She has partially got the justice she sought from the court as there cannot be a complete justice as she has lost her child. Today, the verdict that has been pronounced, I think irrespective of people's ideology or their politics or the governments they have served in, as a nation today, there is a sense of somewhere, a national satisfaction that yes, justice though delayed has not been denied to this family."

- b. An article published on 14.12.2019 by the Daily Pioneer reported the statement of Mr. Arvind Kejriwal, Chief Minister of Delhi, "All remaining formalities to carry out the capital punishment awarded to the convicts should

country wants punishment for the convicts of the 2012 Nirbhaya gangrape and murder case immediately."

- c. An article published on 16.01.2020 by India Today reports Mr. Prakash Javadekar, Union Minister for Environment, Forest and Climate Change and Union Minister for Information and Broadcasting stating that *"The hanging of the convicts in 2012 Nirbhaya gangrape case is now delayed because of Delhi government's negligence. AAP is responsible for this delay in justice. Why did the Kejriwal government not give notice to the convicts for filing mercy plea in the last 2.5 years?"*
- d. An article published on 16.01.2020 by India Today reports that Mr. Manish Sisodia, Deputy Chief Minister, Delhi responded to the allegations of delay in execution by the Delhi Government raised by Mr. Prakash Javadekar stating that, *"Javadekar ji the police is under you, the responsibility of law and order is under you, the Home Ministry is under you, the Tihar DG and administration are under*

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you and you are blaming us? Please don't stoop so low on a sensitive issue. This is a clear attempt to instigate people. I want to ask you (Javadekar) why are you not taking responsibility. If you are not able to handle law and order of Delhi, give us Delhi police and law and order responsibility for two days and we will hang Nirbhaya convicts."

e. An article published on 17.12.2019 by the India Today reported the statement of Mr. Arvind Kejriwal, Chief Minister of Delhi responding to the allegations of delay by the Union Minister Mr. Prakash Javadekar, "All the work that was under the Delhi government was completed by us within hours. We never delayed any work related to this case. Delhi government hardly has any role in it. We want convicts to be hanged at the earliest."

OO. Considering the above statements, it is humbly submitted that the "aid and advice" tendered by the Council of Ministers of Delhi to the Lieutenant Governor under Article 239AA(4) or by the Council of Ministers in the Central Government to the President of India under Article 74(2) of

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the Constitution has been vitiated by apparent bias.

Therefore, it is submitted that the decision of the President which would be based on such aid and advice suffers from the same bias and is also rendered bad in law.

PP. The test for likelihood for bias as laid down by this Hon'ble Court in *Ranjit Thakur v. Union of India* (1987) 4 SCC 611 is whether a reasonable person, in possession of relevant information, would have thought that bias was likely, and whether the matter was likely to be disposed only in a particular way. Similar test for real danger of bias was upheld by this Hon'ble Court in *State of Punjab v. V.K. Khanna* (2001) 2 SCC 330.

QQ. Considering the apparent bias manifested in the statements made by the Council of Ministers for Delhi Government and Union Government, there also appears to be a non-application of mind on the part of the President. This must also be considered in light of the hurried rejection of the mercy petition by the President on 31.01.2020, within 48 hours of filing of the Petitioner's mercy petition. Therefore, the decision of rejection of Petitioner's mercy petition is malafide in law and therefore, violates the letter and spirit of the Constitution.

12. That the Petition has been filed bonafide and in the interests of justice.
13. That the Petitioner craves leave to add, alter or amend any or all of the above grounds at a later stage, when the complete documents and file notings are available

with the Petitioner

14. That no such petition has been filed earlier before this Hon'ble Court or pending before this Hon'ble Court.

PRAYER

The Petitioner humbly prays that this Hon'ble Court may be pleased to:

- a. Issue an appropriate writ declaring the order of the President rejecting the Petitioner's mercy petition to be unconstitutional and bad in law; and
- b. Commute the sentence of death imposed upon the Petitioner to life imprisonment; and
- c. Pass such further or other orders as this Court may deem fit, in the interest of justice.

**AND FOR THIS ACT OF KINDNESS THE HUMBLE
PETITIONER AS IN DUTY BOUND SHALL EVER PRAY**

Drawn & Signed by
DR. A.P. SINGH, ADV.
MR. V.P. SINGH, ADV.
MS. GEETA CHAUHAN, ADV.

SADASHIV
Advocate for the Petitioner