

## India: Delay In Execution Of The Death Row Convicts In Nirbhaya Case Explained

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We are all aware of the horrible, dreadful, cruel, ghastly, gruesome and heinous offence of rape coupled with a bone chilling murder of a young girl (**Nirbhaya case**) which shocked the conscience of the entire nation? The convicts though played the game of cat and mouse hard to escape the noose, however, failed eventually and were executed on 20.03.2020 at 5 a.m. Many question the reason why they were able to play this game of cat and mouse with the law?



This brings us directly to Delhi Prison Rules, 2018 (Rules) and discuss 1) why all the four convicts were directed to be executed simultaneously and 2) whether article 21 of constitution of India is available to the death row convicts even at the stage of execution of the death warrants.

In Nirbhaya case, the first death warrant was issued for 22.01.2020 at 7:00 am, which could not be executed as a curative petition was filed and pending by first of the convict- Vinay Sharma, and thereafter of co-convict Mukesh. The second death warrant was issued for 01.02.2020 at 6 am, which also could not be executed due to pendency of a mercy petition of one of, co-convicts namely Vinay Sharma. Eventually, the convicts were hung at their death warrant reissued for the fourth time.

There were primarily two reasons why the death warrants could not be executed – one pursuant to Rule 858 of the Rules which mandates a clear period of 14 days to be provided to a death row convict after dismissal of their mercy petition, which is in line with the guidelines framed by the Supreme Court in *Shatrughan Chauhan and Anr. Vs. Union of India and Others*, and second, pursuant to second proviso of Rule 836 and the note appended to Rule 854 of the Rules which, if interpreted, purportedly provides simultaneous hanging of all accused persons. Rule 836 (Rule 854 is similar to Rule 836 and hence, not being reproduced) reads as follows:

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

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

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

That prior to Delhi Prison Rules, 2018, Delhi Prisons (Treatment of Convicts Sentenced to Simple Imprisonment, Death Female Prisoners, Youthful Prisoners, Leper Prisoners and Lunatic Prisoners) Rules, 1988 (hereinafter referred to as "**Old Rules**") provided for the procedure for hanging death row convicts. As per rules 14, 15 and 16 (analogous to rules 836, 837 and 838 of the Delhi Prison Rules, 2018) of the Old Rules, upon intimation of the dismissal of the appeal, the prison authorities were required to inform the death row convicts of their right to file a mercy petition within 7 days from the date on which the sentence of death was confirmed by the High Court and any appeal against the said confirmation was dismissed by the Hon'ble Supreme Court. It appears that rules 14,15 and 16 of the Old Rules (analogous to rules 836, 837 and 838 of the Delhi Prison Rules, 2018) had initially been inserted/ introduced pursuant to the judgment of Supreme Court in *Harbans Singh vs State of Uttar Pradesh, 1982(2) SCC 101*, whereby it was held that benefit of commutation to life imprisonment if given to one must be extended to the co convicts. Similarly the genesis of the second proviso of Rule 836 and the 'note' to Rule 854 can be traced to the said judgment.

Delhi High Court considered the effect of Rule 836 of the Rules in the Nirbhaya case and came to the conclusion that the Rule requires all convicts to be hanged simultaneously. The Delhi High Court, while holding the above position referred to **Sher Singh & Ors. vs. State of Punjab (1983) 2 SCC 344**, discussing the rights guaranteed to the convicts under Article 21 even at the stage of execution of the death warrants. It was held therein that "Article 21 stands like a sentinel over human misery, degradation and oppression. It reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence must be just, fair and reasonable. So even if the question of sentence is finally settled by the Supreme Court, Article 21 will not cease to operate at subsequent stages, even though sentence of death was justified...". Another reason that weighed with the Delhi High Court was the reason that the State (Delhi Administration) was itself lackadaisical in seeking death warrants for the accused persons. The matter is now pending before the Supreme Court of India.

This brings us to the interpretation of the proviso to Rule 836/854 of the Rules. The well established rule of interpretation of a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. In other words, a proviso cannot be torn apart from the main enactment/ Rule nor can it be used to nullify or set at naught the real object of the main enactment. To Sum up, the Supreme Court in **S. Sundaram Pillai & Ors vs V.R Pattabiraman & Ors , (1985 AIR 582)** laid down four different purposes of a proviso:

1. qualifying or excepting certain provisions from the main enactment.
2. it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
3. it may be embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
4. it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

Having said so, we go back to Rule 836. The first paragraph of Rule 836 refers to '...sentence of death has been passed by any Court or Tribunal...' giving an indication that it applies to all the prisoners who have been sentenced to death by a court or a tribunal. Similar words have been used in the second proviso '...all such persons...'. However, the wordings in the proviso are very specific and limited i.e. '...if a petition for mercy... by or on behalf of a prisoner sentenced to death, the execution...shall further be postponed...' clearly indicating that if a mercy petition is filed, the death sentence of that particular prisoner shall be deferred and not all. The other point that could be considered is whether a mercy petition or a curative petition is an appeal or an application, which allows a convict to delay the execution of sentencing. A mercy petition is decided on its own peculiar facts and circumstances and may not ultimately lead to commuting of sentence for all convicts.

Thus, in our opinion, the Second proviso of Rule 836 only protect the co-accused when an appeal is pending before the Supreme Court as it has been held by Delhi High Court in the Nirbhaya Case "*that in Rule 834 of Delhi Prison Rules, 2018, 'appeal' and 'application' are specifically mentioned but that does not include any petition other than that petition pending before the Supreme Court*".

Delay in executing a death sentence not only affects the mental health of the convict and victim/ its families but also the mindset of the society at large, thereby diminishing the confidence in the legal system prevalent in the country. Thus, time has come to clarify this aspect, either through the judicial process as both the Nirbhaya case and *Shatrughan Chauhan and Anr. Vs. Union of India and Others*, are pending before the Supreme Court of India for framing further guidelines in this regard or through the legislative process.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*