

Justice for Delhi Rape Victim: A Case for Quality Control Post-Conviction

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1. The Problem

Earlier issues in the *Policy Brief Series* have considered a range of issues linked to sexual violence in India.¹ In this brief, the focus is on some post-conviction challenges regarding sexual violence in India. Even after the confirmation of a death sentence by the Supreme Court of India, the Indian legal system affords legal remedies that a convict can avail him- or herself of, in order to commute the sentence. Unfortunately, it seems that the objective of these remedies – the prevention of injustice to the convicted person – has become an instrument in the hands of convicted persons, causing further injustice to the victim and to society. The gruesome Delhi gang rape has become a classic example of how post-conviction remedies are manipulated, threatening to make a mockery of the legal system. It has been a tough battle for the victims' families and society to win in the face of never-ending petitions.

This policy brief discusses the multiple frivolous petitions filed by four convicted persons; the excessive leniency adopted by the court in condoning prolonged delays; and the negligence of prison authorities in not applying for the execution of the black warrant in a timely manner. The brief argues for better quality-control post-conviction in the Indian criminal justice system.

¹ See Usha Tandon and Sidharth Luthra, "Rape: Violation of the Chastity or Dignity of Woman? A Feminist Critique of Indian Law", FICHL Policy Brief No. 51 (2016), Torkel Opsahl Academic EPublisher, Brussels ('TOAEP'), 2016 (<http://www.toaep.org/pbs-pdf/51-tandon-luthra>); Shikha Chhibbar, "Sexual Violence in Private Space: Marital Rape in India", FICHL Policy Brief No. 52 (2016), TOAEP, 2016 (<http://www.toaep.org/pbs-pdf/52-chhibbar>); and Pooja Bakshi, "Sexual Violence in Conflict Zones and State Responses in India", FICHL Policy Brief No. 53 (2016), TOAEP, 2016 (<http://www.toaep.org/pbs-pdf/53-bakshi>).

2. The Monstrous Crime

In the cold winter night of 16 December 2012, around 21:00, a 23-year-old girl² along with her boyfriend boarded a private bus in New Delhi. The bus had already been boarded by six men including the driver and a juvenile. A few minutes later, the lights of the bus were switched off; the girl was taken by four of them to the rear side of the bus, while her boyfriend was beaten up badly on the front side of the bus. In a sadistic manner, "the girl's clothes were torn over and she was slapped repeatedly over her face. She was bitten on her face, lips, jaw, near the ear, on the right and left breasts, left upper arm, right lower limb, right upper inner thigh (groin), right lower thigh, left thigh lateral, left lower anterior and genital".³ She was kicked over her abdomen again and again. The victim was brutally gang-raped by the accused, one after the other, and was also subjected to anal sex as well as oral sex. The accused, in a most inhumane and brutal manner, "inserted iron rod in the rectum and vagina of the girl and took out her internal organs from the vaginal and anal opening while pulling out the said iron rod".⁴ She was treated as "an object, an article for experimentation and prey to the pervert proclivity"⁵ of as many as six men. After their cruel lust was satisfied, she, with her friend, was thrown off from the moving bus. On 29 December 2012, the girl succumbed to her injuries and died in a hospital in Singapore where she

² The Indian law prohibits the disclosure of the identity of rape victim, see Section 228A, Indian Penal Code, 1860 (<https://www.legal-tools.org/doc/a6b87c>). The victim in this case has been honoured with the name 'Nirbhaya' (meaning fearless girl, as she fought back against the accused).

³ Supreme Court of India ('SCI'), *Mukesh Kumar & Anr. v. State of NCT of Delhi & Ors.*, (2017) 6 SCC 1, para. 356 (<https://www.legal-tools.org/doc/lxk6h6>).

⁴ *Ibid.*, paras. 151-152, 157.

⁵ *Ibid.*, para. 4.

was taken for treatment.⁶

As aptly observed by Justice Dipak Misra:

It sounds like a story from a different world where humanity has been treated with irreverence [...].⁷

3. The Importance of the Case

That such a crime of extreme brutality occurred in the capital of India – assumed to be governmentally and infrastructurally superior to other parts of the country – sent shivers down the spine of every citizen, many of whom protested the callousness with which the State protects women. The citizenry took to the streets, demanding strict action against the suspects in the case, along with stricter laws and effective measures for the protection of women in the country against sexual violence. The public outrage shook the State out of its complacency and compelled it to take immediate steps and policy decisions.

The unprecedented massive public outrage to the incident marked an important point in the history of the women's movement in India, as it has led to a transformation in the criminal justice system of the country and an overhauling of statutory laws related to sexual offences against women.⁸

4. From Trial to Conviction: Fast Track Court but Delayed Constitution Bench

While recognising the long-standing issue of prolonged trials and delayed justice, the ghastly incident and subsequent public outrage led to the setting up of Fast Track Courts for speedy adjudication of sexual violence cases. Within eight months of its formation, a Fast Track Court sentenced the four convicted persons to life imprisonment for rape and death penalty for aggravated murder.⁹ Under Indian law, it is mandatory for the High Court of the Indian State in question to confirm the sentence awarded by the trial court for the punishment of death to be carried out.¹⁰ The High Court of Delhi, within six months of receiving the case from the trial court, confirmed the death sentence, referring to the “gravest crime of extreme bru-

tality”.¹¹ The Supreme Court reaffirmed the judgment of the High Court of Delhi in May 2017.

It is pertinent to mention that substantial delay was caused at the stage of the Special Leave Petition before the Supreme Court which was filed in March 2014. Unfortunately, the Supreme Court nullified the existence of a Fast Track Court, as it took more than a year and seven months just to form their Constitution Bench to hear the case.¹²

5. From Conviction to Execution: Manoeuvring with Legal Safeguards to Evade Justice

Understanding and appreciating the value of life and the irreversibility of the death penalty, the Indian legal system has in place multiple safeguards for the accused even after a death sentence has been finally confirmed by the Supreme Court. However, discontent may arise if the safeguards cause inordinate delay. In this case, it was only in March 2020 that the execution of the sentence was carried out.¹³ A case intended to reaffirm public faith in Indian criminal justice, became an unfortunate instance of abuse of law by the convicted persons. Let us see how they tried to elude the law.

1.1. Review Petitions

A review petition¹⁴ can be filed in the Supreme Court within 30 days from the date of judgment sought to be reviewed.¹⁵ In this case, the review petitions for all four convicted persons were filed after as many as 186 to 950 days.¹⁶ Unfortunately, such protracted delays have been condoned by the Court in entertaining these petitions. One appreciates the Court's liberal approach in such matters, but the fairness of justice demands that there should be reasonable leniency. Otherwise, the courts will be criticised for facilitating abuse of due process of law.

⁶ *Ibid.*, para. 1.

⁷ *Ibid.*, para. 356.

⁸ See India, Criminal Law (Amendment) Act, 2013 (<https://www.legal-tools.org/doc/a6b87c>).

⁹ The juvenile, a 17-year-old boy, was tried by the Juvenile Justice Board. The fifth accused person, Ram Singh, had committed suicide in prison so proceedings against him stood abated. The four convicted persons were: Mukesh Kumar, Pawan Kumar Gupta, Vinay Sharma and Akshay Kumar Singh. See India, Delhi District Court, *State v. Ram Singh*, SC no. 114/2013 (<https://www.legal-tools.org/doc/pqfoer>).

¹⁰ See Criminal Procedure Code, 1973, Sections 366 and 28 (<https://www.legal-tools.org/doc/29b68e>).

¹¹ India, High Court of Delhi, *State through Reference v. Ram Singh & Ors.*, Death Sentence Reference No.6/2013, CRL. APP. NOS. 1398/2013, 1399/2013 and 1414/2013, p. 340, para. 25 (<https://www.legal-tools.org/doc/jgabfz>).

¹² In view of Order VI Rule 3 of the 2013 Supreme Court Rules, cases of persons convicted to death are to be heard by a Bench of three judges (<https://www.legal-tools.org/doc/7doeus>).

¹³ The Wire, “Nirbhaya Convicts Hanged in Tihar”, 20 March 2020 (available on its web site).

¹⁴ Constitution of India, 1950, Article 137 (<https://www.legal-tools.org/doc/9ov6kt>).

¹⁵ Supreme Court Rules, 2013, Part IV, Order XLVII, “Review”.

¹⁶ Mukesh Kumar filed the petition on 6 November 2017, after 186 days; Pawan Kumar Gupta and Vinay Sharma filed on 15 December 2017, after 225 days; and Akshay Kumar Singh filed on 10 December 2019, after 950 days. *Union of India & Anr. v. Vinay Sharma & Ors.*; *Union of India & Anr. v. Akshay Kumar Singh & Ors.*; *Union of India & Anr. v. Mukesh & Ors.*, 5 February 2020, Crl.Rev.P.104/2020, 105/2020 and 106/2020, para. 64.

1.2. Curative Petitions

After the dismissal of the review petition, a curative petition¹⁷ can be filed in the Supreme Court within a “reasonable time”.¹⁸ Taking undue advantage of the expression, the convicted persons were able to file their curative petitions more than 500 days after the dismissal of their review petitions.¹⁹ When the review petition is filed after as much as 950 days of the final order, the delay is bound to spill over to other available remedies. The entertainment of curative petitions by the Court after such long delays lays down a bad precedent for the interpretation of “reasonable time”.

1.3. Mercy Petitions to the President of India²⁰

The real travesty of justice can be witnessed in how each of the convicted persons waited for the rejection of the mercy petition of the other convicted persons before filing their own petitions. One of them even waited for the rejection of a co-convict’s mercy petition before filing his curative petition. After the convict Mukesh Kumar’s mercy petition was rejected on 17 January 2020, Vinay Sharma filed his mercy petition on 29 January 2020. Following the rejection of all the petitions of Vinay Sharma, the other two convicted persons filed their mercy petitions.²¹ The mercy petition of Pawan Kumar Gupta was rejected by the President on 4 March 2020, and a further mercy petition was filed on 18 March 2020²² (two days before the execution), to delay the execution of death sentences

of all the other convicted persons.²³

1.4. Judicial Review of the Rejection of Mercy Petitions²⁴

The Delhi convicts did not stop there. They sought to shuttle justice between the Supreme Court and President of India. First, they applied to the President of India seeking mercy on the finality of the sentence by the Supreme Court. When their petitions were rejected by the President, they again paraded to the Supreme Court, challenging the ‘rejection of mercy’ by the President. Though seeking the same relief, they opted different dates to stage a final gamble together.²⁵ While cruising through a sea of petitions, the Supreme Court – in an extraordinary late-night hearing that started at 02:30 – dismissed the last judicial review petition of Pawan Kumar Gupta, a mere two hours before the execution of the death warrants of the four convicted persons.²⁶

1.5. Other Frivolous Petitions

In the garb of exhausting legal remedies, the convicted persons pursued the filing of other implausible petitions before various courts. For instance, Pawan Kumar Gupta filed an application on 30 August 2018 in the Trial Court, claiming juvenile status as a ground for fresh proceedings against him, even though the Supreme Court had already dismissed this claim.²⁷ In a desperate attempt to make a case of torture against prison authorities, Vinay Sharma hit his head against a wall and approached the local court on 20 February 2020 complaining that he had sustained grievous injuries.²⁸ Furthermore, four days before the execution of

¹⁷ The concept of ‘curative petition’ originated from the Supreme Court judgement in *SCI, Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.

¹⁸ Supreme Court Rules, 2013, Part XLVIII (<https://www.legal-tools.org/doc/7doeus>).

¹⁹ Mukesh Kumar filed his curative petition on 9 January 2020 after 550 days; Vinay Sharma and Pawan Kumar Gupta filed their curative petitions on 8 January 2020 and 28 February 2020, 549 days and 599 days respectively; and Akshay Kumar Singh filed 28 January 2020, *Union of India & Anr. v. Vinay Sharma & Ors.; Union of India & Anr. v. Akshay Kumar Singh & Ors.; Union of India & Anr. v. Mukesh & Ors.*, 5 February 2020, CrI.Rev.P.104/2020, 105/2020 and 106/2020, paras. 8-11.

²⁰ The executive power of the President of India to grant pardon is enshrined in Article 72 of the Constitution. A mercy petition can be filed once all other remedies before a court of law have been exhausted.

²¹ *Mukesh Kumar v. Union of India*, Writ Petition (CRL.) D No. 3334/2020; *Pawan Gupta v. State of NCT Delhi*, Writ Petition (CRL.) No. 122/2020; *Vinay Sharma v. Union of India*, Writ Petition (CRL.) No. 65/2020.

²² *Pawan Gupta v. State of NCT Delhi*, Writ Petition (Criminal) No. 122/2020. As per Rule VIII (A) of the Instructions regarding procedure to be observed by the States for dealing with petitions for mercy petitions issued by Ministry of Home Affairs, even if the President of India has rejected the mercy petition, a fresh mercy petition can be moved due to change in circumstances.

²³ If there are more than one convict in the same case, they cannot be hung separately. See Delhi Prison Manual 2018, Rules 836 and 854.

²⁴ The power of judicial review of the decision taken by the President of India in mercy petitions is very limited. See *Epuru Sudhakar and Another v. Govt. of A.P. and Others*, (2006) 8 SCC 161, paras. 34 and 35.

²⁵ Mukesh Kumar’s petition for judicial review of the rejection of the mercy petition was dismissed on 29 January 2020; Vinay Sharma’s petition was dismissed on 14 February 2020; Akshay Kumar Singh’s petition was dismissed on 19 March 2020; and Pawan Kumar Gupta’s petition was rejected on 20 March 2020. *Mukesh Kumar v. Union of India*, Writ Petition (CRL.) D No. 3334/2020; *Pawan Gupta v. State of NCT Delhi*, Writ Petition (CRL.) No. 122/2020; *Vinay Sharma v. Union of India*, Writ Petition (CRL.) No. 65/2020; *Akshay Kumar Singh v. Union of India*, Writ Petition (CRL.) No. 121/2020.

²⁶ The Wire, “Nirbhaya Convicts Hanged in Tihar Jail”, 20 March 2020 (available on its web site).

²⁷ With this, he was able to file five more pleas from the lower to the highest court, see *Pawan Gupta v. State of NCT of Delhi*, Writ Petition (Criminal) No. 122/2020.

²⁸ See The Hindu, “Delhi Court Rejects Nirbhaya Convict Vinay Sharma’s Plea Claiming Mental Illness”, 22 February 2020 (avail-

the death warrant, Mukesh Kumar filed a plea before the Supreme Court stating that he was misled by his lawyer and hurried into filing a curative petition.²⁹ Finally, two days before the execution of the death warrant, the wife of Akshay Kumar Singh filed a farcical divorce petition in a local court.³⁰

6. The Negligence of Prison Authorities

While discussing the manoeuvrings of the convicted persons in playing one forum against another, it is important to mention the role of the prison authorities in facilitating the exploitation of the legal system. Justice Suresh Kumar Kait has aptly observed that “after the dismissal of criminal appeals on 05.05.2017 by the Supreme Court, nobody had bothered to execute the death warrants. They waited for the reasons best known to them”.³¹

While the Delhi Government had not taken any step for approximately two and a half years after the Supreme Court judgment in 2017, the victim’s family sought the issuance of the death warrants from the Trial Court in February 2019.³² During this period, no one moved any application to expedite the proceedings until the rejection of the review petitions.³³

7. Conclusion

The Delhi gang rape convicts sexually abused and killed a woman in the most barbaric manner. They proceeded to exploit the Indian legal system most audaciously. This tested the patience of justice, which ultimately triumphed over various delaying tactics. Inordinate delay in the administration of justice caus-

able on its web site).

²⁹ LiveLaw, “You Are Saved By Grover’s Curative Plea’: SC Rejects Mukesh’s Plea Alleging Conspiracy By Amicus Curiae”, 16 March 2020 (available on its web site).

³⁰ Amarnath Tewary, “Nirbhaya case convict’s wife moves court for divorce”, *The Hindu*, 18 March 2020 (available on its web site).

³¹ See *Union of India & Anr. v. Vinay Sharma & Ors.*, CRL.REV.P. 104/2020 with CRL.M.A. 2478/2020, 5 February 2020, para. 64.

³² Business Standard, “Nirbhaya Case: HC Critical of Authorities for Delay in Seeking Death Warrants”, 5 February 2020 (available on its web site).

³³ *Union of India & Anr. v. Vinay Sharma & Ors.*; *Union of India & Anr. v. Akshay Kumar Singh & Ors.*; *Union of India & Anr. v. Mukesh & Ors.*; *Union of India & Anr. v. Vinay Sharma & Ors.*, 5 February 2020, Crl.Rev.P.104/2020, 105/2020 and 106/2020.

es distress, unrest and frustration in the minds of the people. As a result, people may start to take the law into their own hands, as we saw in the December 2019 Hyderabad police shooting of four rape suspects.³⁴

It is indeed necessary that post-conviction remedies should be provided to cure gross miscarriage of justice. But it is nonetheless vital that timely and dignified justice be provided to the victim and society at large. The remedies invoked in the Delhi gang rape case after the final conviction were without merit or prospect of success. Some of these petitions could well be called vexatious. They wasted precious time of the Supreme Court and the President of the country. They shook public faith in timely justice, inviting a critical review of quality-control tools in post-conviction litigation in India.

We should strive to enhance the quality of criminal justice for sexual violence in India, including during the post-conviction phase. Each phase of post-conviction remedies should be streamlined. The stages and timeline of such remedies should be clearly prescribed and strictly adhered to by the courts, prison authorities, and other stakeholders. The relevant law and procedure – currently scattered in statutes, Supreme Court Rules, prison manuals, and judicial precedents – should perhaps be consolidated into a separate code on post-conviction remedies.

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³⁴ See Abhinay Deshpande, “Hyderabad veterinarian case: Rape, rage, and an exchange of fire”, *The Hindu*, 14 December 2019 (available on its web site).



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