Death Reference Cases

WAITING TO BE EXECUTED – DELAY AS A MATTER OF LIFE OR DEATH*

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PRELIMINARIES

A large number of statutes, over the last quarter of a century, have provided for death sentence as punishment for various crimes. The Penal Code of 1860, our primary criminal law, contains only 7 crimes which are punishable by sentences of death. In comparison, one of the most recent penal statue, Nari O Shisu Nirjatan Domon Biswes Ain 2000, enacted in February of this year, prescribes death sentences for as many 9 crimes. However, this ultimate sentence is imposed primarily in crimes of murder. Though the number of crimes, particularly the heinous ones, are certainly on rise and the sentences of death are being provided for increasingly large number of crimes, these issues of crimes and punishment have not attracted academic attention. In fact, besides news reports on gruesome murders and sometimes on verdicts in sensational murder cases, the issue of sentence of death does not seem to have attracted figured at all in academic analysis and articles and we have found only one previously published article on death sentence.[1]

As for imposition of the sentence of death, there were (in September of 2000) 174 'condemned prisoners' in the jails of the country. The Daily *Bhorer Kagoj* (on the 4th September, 2000) reported that of these 174

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1 Shahnaz Huda, "Death Penalty – The Continuing Controversy", II:1 (1991) The Dhaka University Studies, Part F, 137. This article, however, discusses the controversy regarding death penalty, without any reference to the situation in Bangladesh. On a historical note, see Shahdeen Malik, "Law of Homicide in the Early Nineteenth Century Bengal: Changed Law and Unchanged Application", .2:1 (1998) Bangladesh Journal of Law, p. 85.

prisoners sentenced to death by different trial courts of the country, six were sentenced more than five years ago while another 21 had been sentenced more than 3 years ago.

According to the available information, one Khaleq Mir was the last person to be executed. He had murdered his daughter and attempted to implicate an innocent person in that murder. The murder was committed on 26th May, 1988 and the convict was executed on 22nd July, 1997 in Barisal Jail,[2] more than 9 years after the crime.

Similarly, a report on the Daily Star on October 16, 2000, captioned under "Condemned prisoners confined in congested cells: 166 on death row, some being detained for over 3 years" reported that these condemned prisoners were confined to 47 cell in all the jails of the country, with more than three prisoners to each cell (with the maximum of 36 square feet area), in some jails. It also supported the above Bhorer Kagoj report regarding the last execution on 22nd July, 1997 in Barisal jail. The Daily Star reported that 16 condemned prisoners were confined to eight condemn cells in Dhaka, 14 in 6 cells in Jessore, 28 in 3 cells in Comilla, 39 in 2 cells in Mymensingh, 6 in 2 cells in Sylhet, 18 in 14 cells in Rajshahi, 8 in 2 cells in Khulna and 24 in 6 cells in Barisal Central jails. Besides, 10 more condemned prisoners are kept in Rangpur, and 1 each in Faridpur, Kushtia, and Bagerhat jails though there are no condemn cells in these four jails. Among these condemned prisoners, 1 is being detained for over six years, 4 for over five years, 6 for over four years, 15 for over three years, 29 for over two years, 45 for over one year and the rest 66 below one year.[3]

If a sentence of death is imposed by the trial court, section 374 of the Criminal Procedure Code provides for mandatory appeal to the High Court Division for confirmation of the sentence of death. Thus, any sentence of death passed by any trial court in the country would be appealed against in the High Court Division, even if the condemned prisoner does not wish to prefer an appeal. In such a case, the state files the appeal.

In the early 1970s, it needs to be mentioned, section 34 of the Special Powers Act, 1974 purported to restrict the power of the High Court Division to hear appeal against sentences of death, by providing that

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2 Daily *Bhorer Kagoj* of the 4th September, 2000, page 1, lead news.

3 The Daily Star, 16th October, 2000, page 2 columns 2 and 3.

the Special Appeal Tribunal formed under this Act would be the final court of appeal for all sentences, including the sentence of death.

However, in *Sahar Ali vs A.R.Chowdhury*[4] it was held by the High Court Division that that "there is no Commonwealth country where a sentence of death has been normally kept out of the scrutiny of the highest court of the Country",[5] and the Court ruled that section 30 was unconstitutional. Following the judgement, section 30 was amended by Ordinance XXXIII of 1985 to provide that a sentence of death pronounced for crimes under the Special Powers Act, 1974, "shall not be executed unless it is confirmed by that Division."[6]

Thus, mandatory appeals are filed to the High Court Division against all sentences of death which are commonly termed as 'death reference cases'.

This article looks into an aspect of these death reference cases, namely, the plea of delay at the appeal stage and offers an analysis of judicial interpretation of this plea which, as we detail below, is far from uniform.

DEATH REFERENCE CASE

For the purpose of this article, we undertook to collect judgements delivered in these appeal cases (death reference cases) by the High Court Division from 1985 to 1995. Over a two year period, we were able to collect 124 such judgements. Secondly, a number of these 'death reference' judgements were published in various law reports of the country[7] and we collected these published judgements, as well. These

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4 32 (1980) DLR HCD 142.

5 Ibid., at p.151.

6 See Shahdeen Malik, "Bangladesh" in Andrew Harding and John Hatchard (eds), Preventive Detention and Security Law: A Comparative Study, Dordrecht/Boston/London, 1993, p. 41, at pp. 47-8.

7 Dhaka Law Report (DLR) is being published since 1948. Bangladesh Bar Council started publishing Bangladesh Legal Decisions (BLD). Earlier, in the 1970s, Bangladesh Institute of Law and International Affairs initiated a publication under the title Bangladesh Supreme Court Case Report (BSCR), which has been published intermittently. More recently, in the 1990s, four new law reports Bangladesh Law Times (BLT), and Bangladesh Law Chronicles (BLC) and Mainstream Law Report (MLR) are being published by different publishers, all following the format and the monthly frequency

two sources provided us with a total of 160 judgements, though the actual number of judgements gathered was higher as some of the judgements collected from the High Court Division were already or subsequently published by the law reports. We have also looked up a few published judgements from earlier years to seek more evidence for our propositions, though these earlier judgements have been used sporadically, with more reliance on the judgements between 1985-1995. Needless to say, the choice of this 11 year period is somewhat arbitrary. However, it is assumed that this is a long enough period to provide sufficient indication of a long term understanding of the relevant interpretations and approaches of the Court. Secondly, this is a recent enough period to render our analysis relevant for our times.

If a convict is sentenced to death, section 374 of the Criminal Procedure Code, 1898 provides that:

> When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

In other words, as indicated, all sentences of death are automatically appealed to the High Court Division of the Supreme Court of Bangladesh. This mandatory appeal is filed by the government even if the convict who has been sentenced to death prefers not to file any appeal or can not afford to file one. Also, the sentencing judge is required to forward his judgement and sentence of death to the High Court Division.

We calculate that around 275 'death reference cases' were heard on appeal during the period 1985 to 1995 by the High Court Division. Of these, our total number of 160 such cases constitute almost 60% of all decisions,[8] giving us sufficient materials for our inferences. Also, not all the 'death reference cases' filed during the period (i.e., our estimate of 275) have been adjudicated as yet, leading to the fact that all judgements are not available.[9]

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set by DLR. However, we have not considered the last three law reports as these are being published from the early 1990s only.

8 Ours is not a statistical or empirical exercise and hence this numbers are indicative only.

9 According to available unofficial figures a total of 214 persons have been executed in the Dhaka central jail since 1972, three-fourth of whom were executed for crimes against the state (treason, waging war, etc. tried under

Of the judgements scrutinised, it needs to be mentioned that not in all of these cases the plea of delay was advanced.[10] This was for two reasons: first, the convict had either been acquitted and, secondly, the sentence of death was reduced to other lesser sentences for other reasons. The plea of delay, therefore, was relevant only in those cases where the convict's sentence of death was not being changed to any other sentence by the High Court Division.

THE PLEA OF DELAY

Towards the end of oral arguments in a number of these cases, the defence had pleaded for commuting sentences of death to lesser punishments on the ground of delay in confirming the death sentence by the High Court Division. Understandably, in these cases, it could have become clear to the defence that the High Court Division was likely to confirm the conviction and the sentence of death pronounced by the trial courts (in technical terms – accept the reference). In such instances the plea of delay for commutation of the sentence of death to a lesser punishment was, perhaps, an attempt to save the lives of the convicted-condemned criminals.

The 'plea of delay' submitted that the long delay in disposing these death reference cases by the High Court Division, after the initial convictions and sentences of death pronounced by the trial (Sessions) court, had caused the convicted prisoners "mental agony of death". Such sufferings are tantamount to extenuating circumstances for commuting the death sentence to a lesser punishment.

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various laws concerning the armed forces) and they were mostly members of the armed forces of the country. Only one fourth or so of the executed criminals were convicted of murder and dacoity with murder.

10 For example, among the reported cases from the 1990s, the plea of delay was not submitted in *Abdul Quddus vs State*, 43 (1991) DLR (AD) 235; neither was this plea advanced in *State vs Abdul Khaleque*, 46 (1994) DLR (HCD) 353; *Mojibur Rahman Gazi vs State*, 46 (1994) DLR (HCD) 423; *State vs Kalu Bepari*, 10 (1990) BLD (HCD) 373 (though in this case the sentence of death was commuted on acceptance of the submission that there was no premeditation for the murder and the condemned prisoner had two minor children, ibid., at p. 380); *State vs Tuku Biswas*, 13 (1993) BLD (HCD) 306; *Abdul Awal vs State*, 14 (1994) BLD (AD) 224; etc.

Surprisingly, the reaction of the Courts to this plea of delay are far from uniform. Our examination of these cases in which the plea of delay was advanced indicates a bewildering assortment of approaches not only to the specific plea submitted on behalf of the condemned prisoners, but also to the larger issue of death sentence. The inevitable result is an absence of any discernible consistency in the decisions reached by the High Court Division on this issue. In a macabre fashion, the issue of delay has, thus, become a matter of life or death.

In analysing these judgements, we found that these cases can be broadly divided into three categories:

(a) in some cases the plea of delay by itself had been accepted as an extenuating factor. Consequently, the sentences of death had been commuted to transportation/imprisonment for life;[11]

(b) in some other cases the plea of delay in conjunction with other extenuating circumstances have also led to a commutation of the sentence of death; and

(c) in other instances the plea was rejected and the sentences of death was confirmed, i.e., orders opposite to the above (a) and (b) group of judgements.

This essay, in view of this diversity, offers:

(a) a critical account of the relevant cases to emphasise the converging and diverging aspects of their legal reasoning, with a view to

(b) underscore the necessity of adopting a coherent interpretation of 'delay' in the specific circumstances of a 'death reference case'.

It needs to be mentioned that moral, ethical, pennological and other related ramifications of capital punishment are deliberately left out of our purview in this essay. The focus is only on the legal reasoning aspect of the judgements of the appellate court. Consequently, we are consciously attempting a 'black-letter law' approach to the issue, despite the obvious limitations of such an undertaking.

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[11] The sentence of 'transportation for life' has now been substituted by life imprisonment.

DELAY BY ITSELF AS AN EXTENUATING FACTOR

The difficulty in laying down a hard and fast rule for the issue under discussion has been pointed out in *Nowsher Ali vs State*.[12] It was acknowledged in that judgement that "different learned Judges hold different views on the subject",[13] with additional frank observation –

> We Judges do not share same view ..... and this is natural because everyone of us has his own philosophy of law and life moulded and conditioned by his own assessment of performance and potentials of law and garnered experience of life."[14]

This clearly echoes the sentiments, if not the rationale and logic, of the Realist School of jurisprudence which was fashionable in America during the first half of this century. Too strenuous emphasis by enthusiastic proponents of this school on the temperament and sometimes even the quirks of individual judges in tracing interpretations of rules and judgements ultimately led to the marginalisation of this school. Nevertheless, there is no denying of the fact that in many instances ethical, moral and legal perceptions of individual judges do sway their interpretations and judgements and the above quote is but one such indication.

The *Nowsher Ali* Court did recognise that ".. capital sentence is troubling the mind of many people in our society"[15] and conceded, at least by implication, the burden of responsibility in pronouncing sentences of death.

Irrespective of the moral dilemma of capital punishment, the very nature of this punishment does necessitate a uniform approach by the Courts to this ultimate sentence. However, there are some dicta in published cases which belies a consistent understanding of this punishment. For example, if we compare the dicta in the *Nowsher Ali* case that

> Though law prescribes alternative sentence for the offence of murder, emphasis should be laid on the proposition that normal sentence in a murder case is death unless there be any extenuating circumstance (underline added for emphasis)

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12 39 (1989) DLR (HCD) 57

13 Ibid, at p.66.

14 Ibid., at p.67.

15 Id.

with a holding in *Nausher Ali Sardar vs The State*[16], wherein it was stated:

> Section 302, which punishes 'murder' does not specify in which case death sentence should be given and in which case transportation for life to be awarded, but leaves the matter to the discretion of the Court.[17]

We can easily notice the divergent positions of the two Courts and this certainly conjures troubling questions in matters of utmost enormity.

Our examination of specific cases indicate that in *The State vs Mossammat Maleka Khatun,*[18] the delay by itself was deemed to be a sufficient enough extenuating factor for commuting the sentence of death -- i.e., a case coming under group (a) of our classification above. The Court reasoned,

> As for sentence, the condemned prisoner has been facing the death penalty since 24.7.83 and has been languishing in the condemned cell for nearly 2 years. That is enough punishment for the condemned prisoner and she need not be visited with actual capital punishment after this long suffering. The ends of justice will be met if the sentence of death is reduced to transportation for life.[19]
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> (underline added for emphasis)

Similarly, in *Shiekh Ahmed vs The State,*[20] the sentence of death was pronounced by the Sessions Court in 1976. The death reference appeal was disposed by the High Court Division in 1977. The Appellate Division delivered its judgement on the appeal from the order confirming death sentence by the High Court Division in 1979 i.e., a little more than 3 years after the capital sentence of the Sessions Court. The defence had pleaded that the condemned prisoner "has been suffering under mental agony and anxiety and the nightmare of gallows around his neck."[21]

This plea was accepted by the Appellate Division:

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16 39 (1987) DLR (AD) 197.

17 Ibid. at p. 200.

18 37 (1985) DLR (HCD) 53.

19 Ibid., at p.58.

20 3 (1979) BSCR (AD) 417.

21 Ibid., at p. 426.

> On giving our anxious consideration to the *submission,* we find that in view of long period of mental torture and agony suffered by the appellant with the sentence of death upon his head, the sentence of the appellant should be altered to that of transportation for life. [22]

The most forceful explication of this proposition that the agony and suffering caused by delay in disposing of a 'death reference case' by the High Court Division is an extenuating factor for commuting the sentence of death was offered by Justice Ruhul Islam in *State vs Abdur Rahman*. [23] In this case the sentence of death was pronounced by the trial court on 28th November, 1972 and the death reference appeal was heard by the High Court Division on 17th July, 1973. Thus, as the Court pointed out:

> But by this time about 7 months had already elapsed from the date when the capital sentence was passed. When execution of the death sentence has been unreasonably delayed due to want of confirmation of the sentence which is no fault of the appellant, it becomes an extenuating circumstance for converting capital sentence into a lesser sentence. In this case spectre of death has been haunting the appellant for more than seven months, because, the death sentence remained suspended over his head on account of want of confirmation by this court. This provides sufficient extra punishment which calls for reduction in the sentence. [24]
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> (underline added for emphasis)

In this case, however, "the prosecution failed to establish conclusively beyond any reasonable doubt" [25] that the appellant had caused the death of the deceased. As such he "is not guilty of the charge under section 302 of the Bangladesh Penal Code." [26] Since the conviction for murder was set aside, the issue of commuting his death sentence on the plea of delay became moot. Nevertheless, it is evident from the passage quoted above that a 7 months delay was considered by the Court to be an extenuating circumstance.

Many of these cases had referred to *State vs Noab Ali Biswas,* [27] as precedent for commuting a sentence of death on the ground of delay. In

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22 Id.

23 *27* (1975) DLR (HCD) 77.

24 Ibid., at p.82.

25 Ibid., at p. 92.

26 Id.

27 13 (1961) DLR (Dac) 646.

the *Noab Ali Biswas* case, the sentence of death was commuted on the ground that the 3 month that had elapsed between the sentence and its confirmation by the High Court had caused enough mental agony and extra punishment to the condemned prisoner.

These cases clearly indicate that the suffering and mental agony caused to the condemned prisoner by the delay (2 years, 3 years, 7 months, and 3 months, respectively) in confirming their sentences of death constitute extenuating circumstance justifying lesser sentences.

For an interesting rationale to commute the sentence of death to life imprisonment, we may refer to the unreported case of *Noabul Alam and others vs State*.[28] In this case a total of 10 persons were convicted and sentenced to death for the murder of Eklasuddin Biswas and his son Ehsanul Huq Tipu. The High Court Division in it's judgement dated 17th and 18th March, 1988 acquitted 6 of the 10 accused and commuted sentences of death of the other 4 accused to life imprisonment. In commuting their sentences, the Court held that:

> But in view of the fact that these appellants have suffered agonies in the death cell for about three years and by circular No.6/P-70/90-Kara dated 14.12.1990 by the Ministry of Home Affairs reduced various sentences upto sentence of transportation for life, we are of the view that ends of justice will be met in the present case if the sentence of death of accused appellant Noabul Alam, Khalilur Rahman, Mawser Munshi and Idris Sk. be commuted to transportation for life." [29]

Interestingly, the Home Ministry Circular referred to as a justification for commuting sentences of death to transportation for life does not seem to be applicable in pronouncing sentences upon conviction by a trial court. This Circular was issued on 14th January, 1991 (a little more than three months before this judgement) by the then Caretaker Government of Justice Shahabuddin Ahmed. Under the power conferred upon the Government and the President to suspend or remit sentences by section 401(1) of the Criminal Procedure Code, this Circular reduced the sentence of different categories of prisoners such

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[28] Death Reference No. 2 of 1988, being Criminal Appeal No. 37 of 1988 and Jail Appeal Nos. 38, 47 of 1988. However, there is another judgement with the same Death Reference No. 2 of 1988 (*Khalilur Rahman vs State*), and Criminal Appeal No 90 of 1988 and Jail Appeal No. 91 of 1988. Evidently, for some unknown to us reason, both these cases have been serialised as Death Reference Case Nos. 2 of 1988.

[29] Ibid., at pp. 59-60.

as those who have served half of their sentences be released, those who will serve half of their sentence will be released, those under the age of 16 years on 6.12.1990 will be released, those sentenced to life imprisonment before 6.12.1990 will serve twenty years of imprisonment, etc. Clearly, this Circular does not contain any clause or savings for commuting sentences of death to life imprisonment. In fact there is no mention of any favourable treatment of any sentence of death in this circular.[30] Hence, it is clear that the Court, as it were, was clutching at straws to justify the commutation of life sentence. Convicted prisoner Nawabul Alam was accused in another murder case in which the victims of this murder case were *tadbirkars* and this particular murder was committed by a groups of more than a dozen persons, who killed the father and son and injured others. Hence, there could hardly be any extenuating circumstances such as the young age of the offender, absence of previous criminal records, and so forth as we have found in other cases of commutation of sentences of death to life imprisonment. Nevertheless, this is another case in which the delay of three years with questionable reference to an inapplicable Circular led to the commutation of the sentence of death.

Another case in which the plea of delay was not only accepted but the judge found a way to distinguish it from a similar case decided by the Appellate Division was *Abul Kashem vs State*.[31] The Court in this case did hold that "As regard the sentence the court awarded a normal death penalty for the offence of murder."[32] The defence cited *Sheikh Ahmed vs State*[33] for commutation on the ground of delay. The State, however, cited the then unreported judgement in the case of *Abed Ali vs State*[34] in which in the absence of any extenuating circumstances the Appellate Division refused to commute the sentence of death. The delay in the *Abed Ali* case was for two years. However, in the *Abul*

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30 See Annexrue Kha, at pp. 120-21 for full text in Altaf Parvez, *Karajibon, Karababostha, Karabidroho: Onushandhan O Projalochona* (in Bengali), Dhaka, 2000.

31 42 (1990) DLR (HCD) 378. This was Death Reference No 1 of 1987, decided on 16th April, 1990.

32 Ibid., at p. 390.

33 3 (1979) BSCR 417.

34 Subsequently reported as *Abed Ali vs State*, 42 (1990) DLR (AD) 171 = 10 (1990) BLD (AD) 89.

Kashem case, the delay was for almost three years. The *Abul Kashem* Court seemed to have relied on this difference to commute the sentence of death, holding:

> .... we are of the view that the accused appellants who are under the peril of death sentence for almost 3 years, their life may be spared. They have been in the death cell suffering serious mental agony and torments and thereby they have partially purged their guilt. .... we consider it a fit case for commuting the sentence. [35]

In another unreported case, that of *Hamayet Khan and others vs State*, [36] five persons were convicted for killing a boy. The convict-appellant had kidnapped the boy, demanded ransom, but the dead body of the boy was found before any ransom was paid. The Court held:

> In this case the prisoners have been in the condemned cell two years and a half. In our opinion two years and a half in the death cell is not enough for commutation of the capital sentence to life imprisonment. Still in the facts and circumstances of the case, we consider it fit to commute the capital sentence in respect of appellants ..... to imprisonment for life. [37]

Interestingly, there was no mention of any extenuating fact or circumstances and the Judges did not consider "two years and a half in the death cell is not enough for commutation". Nevertheless, the death sentence was commuted.

Similarly, in the unreported case of *Sk. Shamsur Rahman alias Shamsu vs State* [38], the sentence of death was commuted to life imprisonment as the accused appellant had been in death cell for over two and a half years and "...considering all the aspects of the facts and circumstances.." [39] which, however, were not elaborated, the sentence was commuted. In this case the victim and the convict set out together in two motorcycles on the day of the murder and on the way the convict Shamsu asked the victim to stop his motorcycle and shot the victim when he stopped, firing three shots from a revolver. There was no indication of sudden provocation or any other factor. If anything, it

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35 42 (1990) DLR (HCD) 378, at p. 390.

36 Death Reference Case No. 2 of 1995, being Criminal Appeal No. 463 of 1995 along with 464 of 1995 and Jail Appeal no, 508 of 1995.

37 Ibid., at pp. 38-9.

38 D.R. No. of 14 of 1986, with Criminal Appeal No. 456 of 1986 and Jail Appeal No. 457 of 1986.

39 Ibid., at p. 36.

is a premeditated murder and the guilt was proven by the dying declaration of the victim.

Lastly, in the unreported case of *Abdul Majid and others vs State,*[40] two of the convicts were sentenced to death while three others were sentenced to life imprisonment. The High Court Division held:

> But so far as the sentence is concerned we find no reason to distinguish amongst the accused appellants who were convicted under section 302/34 of the Penal Code. Furthermore, the appeal of the appellants Abdul Majid and Chan Miah who have been condemned to death by the learned Session Judge has suffered the agony of the sentence in the condemned cell for 4 years. In consideration of these facts, we are inclined to reduce the sentence of these two accused-appellants to imprisonment for life.[41]
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> (underline added for emphasis)

As for Appellate Division, we found one case in the 1990s in which delay by itself was considered sufficient extenuating factor. This was the case of *Wajer Rahman Moral vs State*[42] from 1991 in which the Appellate Division held:

> In view of the peculiar circumstances of the case where the death sentence has not been executed after more than four years from the date of confirmation of the sentence by the High Court Division and the appellant has suffered a prolonged agony for latches of others we commute the sentence of death to one of life imprisonment.[43]

The 'peculiar circumstances' referred to above seem to be the delay in disposal of the case by the Appellate Division as no other specific factor has been mentioned

These cases, thus, suggest unsettled law on this score. The period of 'delay' has been varied and different periods have been found by different judges to justify commutation of death sentence to that of life imprisonment. If variations in the period spent in 'death cells' be the only uncertain aspect of these death reference cases, it would perhaps have been understandable, as (at least) a couple of years in the death

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[40] Death Reference No. 2 of 1988 (Comilla), renumbered as Death Reference No. 47 of 1991 (Dhaka), with Criminal Appeal No. 2305 of 1991 (Dhaka) and Jail Appeal No. 2300-2307 of 1991 (Dhaka).

[41] Ibid., at p. 47.

[42] 43 (1991) DLR (AD) 25.

[43] Ibid., at p. 27.

cell could be considered as the threshold for such commutations, with certain deviations in some cases. However, as the following group of cases illustrates, in a much larger number of cases the period of delay only was not considered sufficient for commutation of sentences of death. In these cases the delays, coupled with other factors, have been considered extenuating ones to justify commutation. But then again, these extenuating factors are so varied and different from case to case that one would be hard pressed to glean a policy or rule of interpretation or certain uniformity in treatment of this plea of delay and agony of death suffered by the condemned prisoners in their death cells.

DELAY WITH OTHER FACTORS AS EXTENUATING CIRCUMSTANCES

We now consider those cases where delay in conjunction with some other extenuating factors resulted in the imposition of lesser punishment instead of the sentenced of death pronounced by the trial courts. Unlike the above group (a) cases, in these cases --- group (b) cases in our classification --- delay and the resultant suffering and mental agony was one of a number of extenuating circumstances for commuting the sentence of death.

AGE OF THE CONDEMNED PRISONER

In *Hazarat Ali & Abdur Rahman vs State,*[44] the plea of delay and agony of death was buttressed by the tender age of the convict. In this case the murder was committed was in 1982, the prisoners were convicted and sentenced to death by the trial Court in 1985, and their appeal was disposed by the High Court Division in 1989, i.e.

> about 4 years have already elapsed, not due to any laches of the condemned prisoners, in making the reference and the appeals ready for disposal as a result of which also the condemned prisoners have undergone the mental agony and anxieties of gallows around their neck for a long period. Thus on giving our careful consideration to the delay in disposal of the reference and appeals along with other factors as extenuating circumstances ..... we hereby commute the sentence the sentence of death of the condemned prisoners to imprisonment for life.[45]

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[44] 42 DLR (1990) HCD 177.

[45] Ibid., at p. 188.

The "other factor as extenuating circumstances" indicated in the above quote refers to the age of 22 years of one of the condemned prisoners (Hazarat Ali), and the fact that both of the condemned prisoners had confessed to their crime. These two factors, i.e., age and the confession seem to have facilitated the acceptance of the plea of delay (4 years) though, from the language of the judgement, it is difficult to assign primacy to any one of the above three factors.

The age of the condemned prisoner figures prominently in a number of cases as an extenuating circumstances, coupled with the delay and the consequent 'agony of death'. However, our scrutiny indicates that the issue of what exactly is an appropriate age to evoke lenient consideration by the Courts is far from uniform. For example, the age of the condemned prisoner and the delay of about 2 years were deemed sufficient enough to justify commuting the sentence of death in *State vs Masudur Rahman.*[46] In this instance, the murder was committed on 10-8-1981, the death sentence was pronounced on 2-6-1982, and the High Court Division disposed of the appeal on 11-4-1984 i.e., "... it is, after about two years that we are disposing of the appeal and the reference."[47] Tender age of the convicted prisoner, as indicated, was the other extenuating factor: "We find that the condemned prisoner will be less that 16 years of age at the time of commission of offence..."[48] These two factors persuaded the Court to conclude:

> In the present case, the delay is about 2 (two) years and further we find that the condemned prisoner is a young school boy of about 16 years, so considering his young age and the delay in disposal of his reference we commute the sentence to transportation for life.[49]

Similarly, in the unreported case of *Golaf Rahman and another vs State*[50], though the plea of delay does not seem to have been taken,[51] yet the sentence of death was commuted on the ground of tender age:

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46 14 (1984) BLD HCD 230.

47 Ibid., at p. 235.

48 Id.

49 Ibid., at p. 236

50 Death Reference Case No. 7 of 1989 (Noakhali), being Criminal Appeal No. 604 of 1989 and Jail Appeal No. 672 of (1989)

51 The sentence of death was pronounced by the Additional Sessions Judge, Noakhali on 23.11.1989 and the judgement by the High Court Division on 28.11.1991, i.e., two years and a few days later.

> .. according to the learned Additional Sessions Judge who tried the case the age of accused Golaf Rahman at the time of occurrence was below 16 years which is an extenuating circumstances to be taken into consideration in the matter of awarding the sentence of death.
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> On the aforesaid ground that the age of accused Golar Rahman at the time of occurence was below 16 years the sentence of death passed against him should be reduced to imprisonment of life. [52]

Thus, in a number of cases plea of delay not by itself but in conjunction with other extenuating factors led to the commutation of sentences of death to the lesser punishment of transportation for life. A prominent factor among these extenuating ones was the age of the convict. However, as the above cases indicates, 'tender age' of the convict has a rather wide range – 16 in the *Masudur Rahman* case; 22 in the *Hazrat Ali* case.

On this issue of age, on the other extreme, we have found the unreported case of *Tayab Ali Kha vs State*.[53] It was a case of murder of the 11/12 year old son by his father on a fit of anger. On the plea of delay and age, the Court Held:

> It further appears to us from examination of the condemned prisoner .... that he was 50 years old at the time of delivery of the judgement by the learned Sessions Judge. It further appears that the sentence of death was imposed on the condemned prisoner on 30.6.1990 and since then till

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[52] Ibid., at pp. 22-3. This is a troubling judgement in view of the fact that the Children Act, 1974 provides for trial of under 16 by the Juvenile Court only. The fact that there was an adult accused (Yakub Ali, who was subsequently acquitted by the High Court Division, though initially convicted by the trial court under section 302/109 of the Penal Code and sentenced to imprisonment for life) in this case is another questionable aspect of this jdugement. This trial should been vitiated by the holding in *Md. Nasir Ahmed vs State* 42 (1990) DLR (AD) 89 which had held that Nasir ought to have been tried by Juvenile Court. Trial of child along with adult is forbidden by law. The trial of the appellant being held not by Juvenile Court is hit by want of jurisdiction." Also, in *State vs. Deputy Commissioner*, 45 (1993) DLR 643, "No child is to be charged with or tried for any offence together with an adult. The child must be tried in the Juvenile Court and not in the ordinary court", and in *Kadu vs State*, 43 (1991) DLR 163: "Joint trial of appellant Suni, a child, along with the appellants being adults was illegal."

[53] Death Reference No. 13 of 1990.

> today[54] the condemned prisoner is in a condemned cell in the jail. It appears to us that he has been suffering pangs of death in the condemned cell for the last two years at an old age of over 50 years. This fact appears to us to be an extenuating circumstances deserving mercy from this court. As such, we are inclined to reject the reference and convert the sentence of death imposed on the condemned prisoner to life imprisonment.[55]

Another case in which the 'age' of the convict was stretched quite far is the unreported *Sadhu @ Shohidul Islam vs State*[56] in which the convict was below 30 years of age and had suffered mental agony for near about 3 years, leading to commutation of his sentence of death to that of imprisonment for life.[57]

An earlier case, in 1983, similarly found tender age, along with delay as grounds for commutation of the sentence of death.[58]

A revealing case in terms of which age, in conjunction with delay, justified commutation is that of *Amjad and Nawab Ali @ Naba vs State.*[59] Here one of the convicts, Amjad, was 25 years old while Nawab Ali was 20 and they were in condemned cell for 3 years and a half.

> Nevertheless, in our opinion this can not be taken as inordinate delay constituting an extenuating circumstance and in view of the decision in 1990 (BLD) (AD) 89[60] we are not inclined to direct commutation of the death sentence on this ground. Again the age of 25 years (of appellant Amjad) does not deserve any consideration in the matter, as it can not be called a tender age. But the ago of 20 years (of appellant Nawab) may be treated practically an age within teens and tender age. From the decision reported in 1983 BLD 304[61] ... it appears that the young age of 22 years has been taken to be a mitigating circumstance in favour of commutation. Further, from the confession of Nawab he appears to have

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54 The judgement of the High Court Division was delivered on 18th June, 1992. Ibid., at p.1.

55 Ibid., at p. 11.

56 Death Reference No. 56 of 1991, and Jail Appeal No. 3154 of 1991.

57 Ibid., at p. 24.

58 *Abdul Majid vs State*, 3(1983) BLD (HCD) 304, at p. 308.

59 D.R. No. 10 of 1986, with Criminal Appeal No. 337 of 1986 and Jail Appeal No. 354 of 1986

60 i.e., *Abed Ali vs State*, 10 (1990) BLD (AD) 89 = 42 (1990) DLR (AD) 171

61 i.e., *Abdul Majed vs State*, 3 (1983) BLD (HCD) 304

> played comparatively a minor role ..... All these facts in favour of the Appellant Nawab do constitute an extenuating circumstance for commuting the sentence .." [62]

Clearly, according to this judgement, the age of 25 "does not deserve any consideration", but 20 does ("practically an age within the teens and tender age"). Unlike other judgements, this one was specific as to what age may evoke sympathy and which would not. The fact that Nawab played a minor role was also relevant.

Thus, the age justifying commutation may vary from 16 to 50 years. Admittedly, in some of these cases, precise indication of the role of age may not be crystal clear, yet it can not be denied that 'age' has been used quite liberally to commute sentences of death.

AGE WITH OTHER FACTORS

Now we move on to cases in which age and other facts have led to commutation of sentences of death to life imprisonment.

A case before 1985, i.e., from 1983, *Majibar Rahman vs State* [63], commuted the sentence of death -- "considering the facts and circumstances of the case and also considering the fact that the accused is a young man and his death sentence has remained pending for over two years" [64] – to life imprisonment.

In *State vs Shahjahan Manik and Farida Akhter Rina* [65], Farida Akhter was a young woman of 24 and she had a child of four and a half years, and she had confessed, expressing her repentance. The Court held that

> It has also been represented that both the accused have suffered the pangs of death sentence for about three and a half years and these are extenuating circumstances for sparing them from the extreme punishment of death. It has also been submitted that it has been held by this court in several decisions that these can be considered as extenuating. We accept the aforesaid contention and, therefore, we hold that a sentence of imprisonment for life for both the accused will meet the ends of justice. [66]

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62 Ibid, D.R. No. 10 of 1986, at p. 26.

63 3 (1983) BLD (HCD) 145.

64 Ibid. at p. 148.

65 42 (1990) DLR (HCD) 465.

66 Ibid., at p. 473.

However, the fact of the case indicate that the other accused, Shahjahan Manik, was (obviously) neither a mother, nor did he confess to the killing. The conviction was substantially based on the confession of Farida Akhter Rina, who along with Shahjahan Manik, had killed Farida's husband. Therefore, there was no extenuating circumstances for Shahjahan Manik. Nevertheless, his sentence of death was also commuted to life imprisonment and the delay of three and a half years clearly operated as extenuating circumstances for him.

Another case in which delay in conjunction with other extenuating circumstances led to commutation of the sentence of death was *Abdur Rauf vs State*.[67] In this case the condemned prisoner, Abdur Rauf, confessed his guilt in 1977, the death reference was made in 1983 and High Court Division's judgement was delivered on 11.12.1984 with the observation that,

> .. about one year and 5 months were spent to make the reference ready for disposal .... delay for the disposal of this reference may also be taken as extenuating circumstance to commute the death sentence to transportation for life.[68]

Abdur Rauf, the condemned prisoner, was

> about 29 years old at the time of recording his confession ..... There is also evidence that he had participated in the liberation was of Bangladesh as a Freedom Fighter.[69]

Considering these three factors, viz., the delay of 1 years and 5 months, the age of the condemned prisoner, and his participation in the liberation war, the Court modified "his sentence from death to transportation for life."[70]

Another case in which delay, coupled with the fact that differing verdicts were reached at different stages in the trial, were considered as extenuating circumstances was that of *State vs Ful Mia*.[71] In this case,

> There is no dispute of the fact that condemned prisoner is in custody on the murder charge since 15-6-76. Previously he was once before sentenced to death on 31-5-78. On hearing the appeal and the Death

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67 38 (1986) DLR (HCD) 188.

68 Ibid., at p. 204.

69 Id.

70 Id.

71 9 (1988) BLD (HCD) 79.

> Reference, the order of former conviction was set aside on 17-7-79. He was retried and again he has been sentenced to death on 11-5-85. In view of these facts we hold that the condemned prisoner is in mental agony for over last 10 years and accordingly we are inclined to commute the sentence of death to imprisonment for life.[72]

Similarly, in an earlier case, *Aijuddin Matbar vs Fagu Matbar,*[73] the initial conviction and sentence of death passed by the trial court was overturned and the prisoner was acquitted by the High Court Division. This acquitted was overruled by the Appellate Division. Here the trial court had reached the guilty verdict and passed the death sentence on 26-9-1974. The High Court rejected the death reference on 25-6-1975. But the Appellate Division, on a re-examination and reassessment of the entire evidence, set aside the order of acquittal by the High Court Division and restored the judgement of the trial Court.[74] The Appellate Division's judgement was delivered on 22-3-1978.

Only *Fagu Matbar,* of several other co-accused, had been sentenced to death by the trial Court. But after restoring the conviction and sentence of death of the trial Court, the Appellate Division went on to hold that "Death sentence against respondent Fagu Matbar can not be confirmed in view of lapse of long period since the order of acquittal passed by the High Court. On that ground the sentence is commuted to transportation."[75]

Among our unreported cases from the mid 1980s, we found that in Death Reference No. 1 of 1988 (Dhaka)[76] (*Mahiruddin and anothers vs State*) the defence, in pleading commutation of the ground of delay cited *State vs Abdur Rahim and Hakim*[77] in which case the sentence of death was commuted to a lesser sentence on the ground of unreasonable delay in disposal of the reference. Similarly, the defence

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72 Ibid., at pp. 84-5.

73 31 (1979) DLR (AD) 101.

74 Ibid., at p. 109.

75 Id.

76 Initially it was numbered as No. 3 of 1988 of Rangpur; Criminal Appeal No. 176 of 1988 and Jail Appeal No. 177 of 1988.

77 27 (1975) DLR (HCD) 77.

also cited the *Shahjahan Manik and Rina Akhter*[78] case to justify commutation of the sentence. The Court then held that

> In the instant case, we find that the condemned prisoner is in death cell for about 4 (four) years and further more there is no evidence or material to show that he was a habitual offender or a harboured (sic) criminal having ill reputation from before. The condemned prisoner Mahiruddin has been suffering from mental agony counting his days in the death cell for his own misdeeds. In that view of the matter we think that the sentence of death awarded to the condemned prisoner Mahiruddin be commuted to the sentence of imprisonment for life as has been awarded to the other accused appellant Abdul Khaleque.[79]

In this case the murder was committed on the 27th February, 1986, Mahiruddin was convicted and sentenced to death sentence by judgement and order dated the 14th March, 1988 and the death reference case was heard by the High Court Division in the 3rd and 4th week of April of 1992 and the judgement was delivered on the 28th, 29th and 39th April, 1992. Thus a little more than four year had elapsed after the sentence of death by the trial court and the disposal of appeal by the High Court Division. Secondly, the Court mentioned that in addition to this delay of four years, the accused was not a habitual offender nor a hardened criminal. Evidently, the delay and the absence of past criminal activity by the accused led to his partial reprieve.

In *Abdur Rahman Syed vs State*,[80] the convict had confessed his crimes and "this aspect of the character of the accused needs to be kept in view when confirming the sentence of death after 6 years of its pronouncement..." and "... this aspect of human agony for long 6 years had to be considered to be a mitigating circumstance for commuting the sentence of death to imprisonment for life ..."[81]

Similarly, in *Tota and 10 others vs State*[82] confession by the condemned prisoner, along with his age of 28 years were considered extenuating circumstances for commutation of the sentence of death to

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78 42 (1990) DLR (HCD) 465, see supra.

79 At pp. 47-8 of the judgment.

80 44 (1992) DLR (HCD) 556.

81 Ibid., at p. 574.

82 D.R.No. 4 of 1994, with Criminal Appeals Nos. 406 and 437 of 1994 and Jail Appeal No 696 of 1994

life imprisonment.[83] Though delay as such was not pleaded, in this case the trial court had pronounced the sentence of death on 22nd March, 1994[84] and the judgement in the Death Reference Case was delivered on 1st December, 1997, i.e., the condemned prisoner had spent more than three and a half years in the condemned cell.

The problem with taking confession into account is that most convictions in murder cases are based on confession, though the confessions are sometimes retracted. The courts, we have found, are often reluctant to give credence to the retraction of confession, insisting that the confessions were made voluntarily at the time of making of such confessions and, as such, attempts to retract are construed by the High Court Division as 'after-thoughts at the time of the trial'. Hence, retractions are not, usually, accepted.[85] If the retractions of confessions are not accepted, all confessions must remain voluntary and on the

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83 In the words of Mohammad Golam Rabbani J:

Furthermore, before making the confessional statement he expressed his regret and repentance to the recording Magistrate. He must, therefore, be treated leniently."

Ibid., at p. 14.

84 Ibid., at p.2.

85 A glaring example of judicial treatment of retraction of confession may be found in *Abul Khair vs State*, Death Reference No. 1 of 1985, being Criminal Appeal No. 42 of 1985 and Jail Appeal No. 32 of 1988; date of judgement: 5th March, 1989. In this case Abul Khair was arrested on 17.3.1979, he confessed before the Magistrate on 19.3.1979. But he submitted an application for retraction of his confession on 28.3.1979, alleging torture by Police to extract his confession. A medical report, on the urging of the defense lawyer, was sent to the Court from the jail on 3.4.1979, "showing several injuries on the person of Abul Khair" (ibid., at p. 40). However, for various technicalities, the allegation of torture for eliciting confession was not accepted by the court. Later, in the same vein, the Appellate Division also held that:

"... although Mr. Ahmed Ali tried to make out a case of torture by police before the statement was made, he was unable to back up his submission with reference to any evidence on record existing on or before the date of confession."

In *Abul Khair vs State*, 44 (1992) DLR (AD) 225 at, 227, underline added for emphasis.

See below on other aspects of this case.

logic of this case (*Abdur Rahman Syed)*, most convict ought to benefit for commutation of their death sentence to life imprisonment.

In the case of *State vs Golam Rabbani*,[86] a young son had killed her mother and seriously injured his sister who later died in the hospital. The prosecution case was that the convict "... murdered his mother and injured his sister with a spade ..... as she (mother) did not agree to build a room for him by selling of her paternal land."[87] The victims, along with a younger brother of the convict, slept in the same room. The convict murdered them at the dead of the night with the spade. Though delay specifically was not pleaded in this case, but the age of the convict was a factor. During the examination of the accused under section 342 of Cr.P.C., the age was recorded as 17, but the trial judge recorded his age as 19. In commuting the sentence of death to life imprisonment, the High Court Division held that:

> We have perused the record and given our anxious consideration of the facts and circumstances of the case and the evidence on record and the age as recorded in the confessional statement ..... imprisonment for life .... will be appropriate and meet the ends of justice.[88]

As indicated, the convict murdered his mother and sister at the dead of the night. "Facts and circumstances" do not indicate any special grounds such as provocation, altercation, etc. Hence, age seems to be the only factor, though reliance on vague "facts and circumstances" may not be anything more than routine 'justification' for commuting the sentence. Such reliance on 'facts and circumstances' in fact are better indicator of the reluctance of the Court to confirm a sentence of death, than a reasoned inference.

The confused state of law may be illustratively surmised from *Dipok Kumar Sarkar vs State*[89] in which the judgement, unlike the cases discussed above, went into the factual circumstances leading to the murder for determining the sentence. We may reiterate that in most cases the condition of the convict (i.e, his/her age, the fact of delay, etc.) were the primary concern, not the circumstances leading to the murder. However, in this case the Appellate Division noted that the wife was killed by her husband and theirs was not a 'blissful union'. However

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86 D.R.No. 6 of 1988.

87 Ibid., at pp. 2-3. Words in the parenthesis added.

88 Ibid., at p. 12.

89 8 (1988) BLD (AD) 109 = 39 (1987) DLR (AD) 194.

the Court did iterate that – "It is certainly not our purpose to say, however, that killing of a wife by the husband is to be viewed by some other standard while considering the offence of murder but as in all other cases the circumstances attending the crime have to be taken notice of for inflicting the proper punishment prescribed under the law." [90] In addition to the 'marital state', the convict had confided to his mother about his crime, he was not a hardened criminal, nor did he try to hide his crime, and coupled with the fact that there was a delay of one year and seven months [91] and all these "and in view already taken in the case 39 DLR (AD) 194 we think it will meet the of ends of justice if the sentence of death is commuted to imprisonment for life." [92]

Admittedly, the Appellate Division seems to have commuted sentences of death when the commission of crime was mitigated by other extenuating factors. However, what constitutes extenuating factor has not been spelled out in general terms. Rather, the Court seem to take each case individually and adjudges different factors as extenuating ones, without indication of any policy or rationale. [93]

DELAY AS NOT AN EXTENUATING FACTOR

After these cases where delay by itself, and delay in conjunction with other extenuating circumstances resulted in lesser sentences, we now turn to the third group of cases --- (c) in our classification --- where the plea of delay for commuting the death sentence were rejected outright.

In the cases of *Abed Ali vs State*, [94] the period that elapsed between the pronouncement of the sentence of death by the trial court and its

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90 Ibid., at p. 197

91 Though the Court had held in this case that High Court Division was right in taking the view that a delay of one year and seven months in disposal of the death sentence could not be taken as an extenuating factor for commutation of death sentence." Ibid., at p. 197.

92 Id.

93 In the case of *Abdul Quddus vs State*, 43 (1991) DLR (AD) 235, it was however held that:

"In the case of Abed Ali (condemned prisoner) vs State, 42 DLR (AD) 171, we have considered as to what constitutes extenuating circumstances and we have further held in that decision that in the facts of each particular case the extenuating circumstances are to be judicially determined."

Ibid., at p. 240. (underline added for emphasis)

94 42 (1990) DLR (AD) 171.

disposal in death reference appeal by the High Court Division was little less then 2 years. But the Appellate Division, relaying on two earlier decisions --- one by the High Court Division in *Nowsher Ali and others vs The State*[95] and another by the Appellate Division in *Nausher Ali Sardar vs The State*[96] --- came to the conclusion that "Thus a delay of about two years or so can not by itself be a ground for awarding the lesser sentence."[97]

The High Court Division in *Nowsher Ali and others vs The State*[98] had rejected the plea of delay. But in rejecting this plea of delay for commuting sentences of death, the *Nowsher Ali Court,* it is submitted, purported to impose an unjustified reading of the rationale of earlier cases which had commuted sentences of death on the ground of delay itself. As mentioned earlier, in *State vs Mossamat Maleka Khatun*[99] the capital sentence was reduced to transportation for life on the ground that the condemned prisoner had suffered the agony of death for 2 years. To distinguish *Mossammat Maleka Khatun* from the case at hand, the *Nowsher Ali* Court had asserted that

> it appears from the Judgement (in State vs Mossammat Maleka Khatun) the commutation of sentence was made on the ground that there was total absence of motive behind the murder and that assailant Mossammat Maleka, wife of the victim, was an epileptic patient. It is a case where wife killed husband at the dead of night without any motive and wife was then suffering form epilepsy. It was not a calculated, cold-blooded, and pre planned murder like the present one with which we are concerned.[100]

But if we scrutinise the judgement in the *Mossammat Maleka Khatun* case, we find that although that Court noted the fact that the condemned prisoner suffered form epilepsy, yet that fact was not relevant in reaching the guilty verdict. Contrary to the imposition of a determining significance to epilepsy by the *Nowsherr Ali* Court, the judgement in *Mossammat Malka Khatun* clearly stated,

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95 39 (1987) DLR (HCD) 57.

96 39 (1987) DLR (AD) 197 = 7 (1987) BLD (AD) 324.

97 Supra note 30, at p. 174.

98 39 (1987) DLR (HCD) 57.

99 37 (1985) DLR (HCD) 55.

100 Ibid., at pp. 65-6.

> In the present case all we know is that the condemned prisoner was an epileptic patient. She suffered frequent seizures, [was] of violent temper. She lost control of her senses when she became angry. There is however absolutely no evidence on record that in the night of occurrence she had suffered any epileptic fits or that the murder in question was done in a frenzy of epileptic attack when the condemned prisoner lost all control of her senses.
>
> We, therefore, do not think that any reasonable doubt has been created as to whether the condemned prisoner committed the murder with a guilty mind or not. On the contrary, the prosecution has proved beyond reasonable doubt that the condemned prisoner committed the murder with a guilty mind. The order of conviction passed against the condemned prisoner, therefore, cannot be interfered with. [101]

We have quoted the pertinent portion of the *Mossammat Maleka Khatun* judgement in detail to indicate that the *Nowsher Ali* Court's construction of this judgement is not tenable due to the apparent fact that epilepsy was not considered as a determining factor. As indicated earlier, the sentence was reduced to transportation for life on consideration of the delay and not epilepsy of the convict, as construed by the *Nowsher Ali* court.

We have mentioned that in *State vs Abdur Rahman*, [102] the Court had considered that a delay of 7 months would constitute an extenuating factor for commuting the sentence of death. Later, a Division Bench, in *State vs Punardhar Joydhar & Shepali*, [103] differed from the above holding of the *Abdur Rahman* Court, stating

> With due respect we should like to observe that the proposition has been too broadly stated in the aforesaid case and is against the trend of decisions of the superior Court of the Sub-Continent ..... There is no doubt that extremely excessive delay in the disposal of the case of a condemned prisoner would be sufficient ground for imposing a lesser sentence of transportation for life, as it was held in the case reported in AIR 1971 SC 1584. In that case condemned prisoner has been for more than six years under the fear of sentence of death ..... [104]

There is no indication as to the basis or rationale for the statement that "the proposition has been too broadly stated", except that it "is

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[101] 37 (1985) DLR (HCD) 53, at p. 85.

[102] 27 (1995) DLR (HCD) 77.

[103] 31 (1979) DLR (HCD) 312.

[104] Ibid., at p. 320.

against the trend of decisions of the superior Court of the Sub-Continent". But an examination of the recent decisions of the Indian Supreme Court and relevant legislation do not substantiate the implication that delay is not considered to be an extenuating factor in India to justify a commutation of death sentence.

THE INDIAN CRIMINAL PROCEDURE CODE OF 1973

It is worth recalling that the Criminal Procedure Code of 1898, in section 367(5), had provided that Courts had to state their reasons if the sentence of death was not imposed in a case of murder. This requirement of subsection 5 of section 367 was interpreted to imply that ordinary sentence under section 302 of the Penal Code is death while a lesser punishment of imprisonment** for life was appropriate where there were extenuating circumstances. In India, this sub-section (5) was deleted in 1955, after which life imprisonment for murder came to be interpreted as the 'normal' sentence and death sentence could be imposed only if there were aggravating circumstances.

With the enactment of the new Criminal Procedure Code in India in 1973 (coming into force on 1.4.1974), the shift away from death penalty became much more pronounced. Section 354(3) of this new Criminal Procedure Code provided that

> When the conviction is for an offence punishable with death or, in the alternative, imprisonment for life or imprisonment for term of years, the judgement shall state the reasons for the sentence awarded, and, in the case of sentence of death the special reasons for such sentence.

It is evident that death sentence is no longer the 'normal' sentence in India but can be imposed only if there are special reasons for it. Mere use of adjectives like 'cruel and brutal' does not supply the special reasons contemplated by Section 354(3), Criminal Procedure Code.

As for more recent development in India, after the Indian Supreme Court's judgement in *Bachan Singh vs State of Pubjab*,[105] the general rule regarding sec. 302 of the Penal Code is that the death sentence can be imposed only in the "rarest of rare" cases.[106] In this case the

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* This section has been amended by Ord. of 1978, coming with force on ... 1979 and now provides that:

105 AIR 1980 SC 898.

106 Ibid., at p. 945.

constitutional validity of death sentence was challenged. After surveying the state of death penalty in all the major jurisdictions of the world, the Supreme Court recognised that "..... the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue...." [107] The Court, however, validated the constitutionality of death sentence. At the same time, this judgement restricted the imposition of death sentence with the following holding:

> ... for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. [108]
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> (underline added for emphasis)

It needs mentioning that Justice Bhagwati dissented from the majority judgement delivered by Justice Sarkaria, stating:

> I am of the view that section 302 of the Indian Penal Code in so far as it provides for imposition of death penalty as an alternative to life sentence is ultra virus and void as being violative of Articles 14 and 21 of the Constitution. [109]

Another note-worthy judgement of the Indian Supreme Court regarding death sentence was delivered in *Methu vs State of Punjab.* [110] Here, the constitutional validity of section 303 of the Penal Code was considered. Section 303 reads: Whoever being under sentence of imprisonment for life commits murder shall be punished with death."

The Supreme Court declared that this section 303 must be struck down as unconstitutional, since:

> 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 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. [111]

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[107] Ibid., at p. 929.

[108] Ibid., at p. 945.

[109] Id.

[110] AIR 1983 SC 473

[111] Ibid., at p. 484

As for our specific issue of delay, in a number of Indian cases in mid 70s, that is prior to the judgement in *State vs Punardhar Joydhar & Shepali*,[112] delay was accepted as one of the extenuating factors for commuting death sentences to lesser punishments. For example, the accused in *Hardyal vs State of Uttar Pradesh*,[113] was sentenced to death on 30.6.1973, and his case was disposed by the Supreme Court on 23.3.1976 i.e., 2 years and 9 months late. This period in which the condemned prisoner was under the sentence of death was accepted as an extenuating factor, prompting the Supreme Court to commute the sentence to life imprisonment – ".. taken in conjunction with the other circumstances of the case, it (i.e., delay) impels the Court to opt for life rather than extinguishing it."[114] In *Gurdas Singh vs State of Rajasthan*,[115] the Supreme Court again commuted the death sentence to life imprisonment on the ground that the condemned prisoner had suffered the agony of death sentence for a long period and he was of 24 years of age at the time of commuting the murder.[116]

Another instance where a 3 years delay resulted in commutation of death sentence to life imprisonment is that of *Bhoor Singh vs State of Punjab;*[117] the Court clearly stating:

> Yet another supervening factor which by the sheer weight of compassion tilts the scale of justice in favour of life rather than extinguishing it, is that the dread of impending execution has been brooding over the head of these condemned prisoners for an excruciatingly long period. They were sentenced to death in 1971. We are now in 1974.[118]

Similar commutation of death sentence was ordered in *Neti Sreeramula vs State of Andhra Pradesh:*[119]

> Assuming the trial court was justified in imposing the capital sentence, the long lapse of time since the imposition of the capital sentence by the trial court and the consideration of the question of sentence by us, in our

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[112] 31 (1979) DLR (HCD) 312

[113] AIR 1976 SC 2055; 1976 CrLJ (SC)1578

[114] Ibid., AIR at p. 2061

[115] AIR 1975 SC 1411; 1975 CrLJ (SC) 1213

[116] Ibid., AIR, at p. 1417

[117] AIR 1974 SC 1256; 1974 Cr LJ (SC) 929

[118] Ibid., AIR at p. 1263

[119] AIR 1973 SC 2551; 1977 CrLJ (SC) 1775

> opinion, constitute a relevant ground for reducing the sentence to life imprisonment. [120]

Thus, it is clear from the above discussion that in a number of Indian Judgements the sentences of death has been commuted to life imprisonment for a delay in confirmation, as well as in conjunction with other extenuating factors. It is, therefore, difficult to agree with the assertion that such commutation "is against the trend of decisions of the superior Court of Sub-Continent."

The issue of delay was dealt with in detail by the Indian Supreme Court in *T.V. Vatheeswaran vs State of Tamil Nadu*. [121] In this judgement a host of relevant Indian cases, along with the most important judgement concerning death sentence by the American Supreme Court in *Furman vs State of Gergia,* [122] were scrutinised. In the *Vatheeswaran* case a Division Bench of the Indian Supreme Court ruled that delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person to demand quashing of the sentence of death. This was later reaffirmed in *Javed Ahmed vs State of Mahrashtra*. [123]

In another case, however, a Full Bench of the Indian Supreme Court rejected the plea of delay. Thus, in *K. Govindaswami vs Govt.of India*, [124] the plea of delay for commuting the sentence of death was rejected on two grounds: first, this proceeding involved, at an earlier stage, a reference to the Supreme Court in 1984. The condemned prisoner then preferred another appeal to the Supreme Court under article 136(1) of the Indian Constitution, and this appeal was also dismissed. This was followed by another review petition which was also dismissed. Thereafter the condemned prisoner sought clemency from the President of the country, which was also rejected:

> Thus the delay has occurred on account of the proceeding taken by the accused himself to have his conviction and sentence set aside. After having agitated his case before various forums, neither the accused nor any one on his behalf can put forward a claim that considerable delay has occurred and on account of the mental anguish undergone by the

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[120] Ibid., AIR at p. 2554

[121] AIR 1983 SC 361

[122] (1972) 408 US 238

[123] AIR (1985) SC 232

[124] 1986 CrLJ (FB) 1326

> accused during the pendency of the proceedings, the sentence of death must necessarily be modified to one of imprisonment for life. [125]

Secondly, the horrendous nature of the crime committed by the condemned prisoner precluded compassion. It was one of the 'rarest of rare' cases in which the condemned prisoner murdered nine persons including his sister, children of 6 months and others:

> The murders were not committed in a berserk frame of mind or within a short span of time ..... the gruesome nature of the offence, which is beyond the limits of human comprehension and tolerance, and the reprehensible conduct of the assailant in not feeling remorse and contrition even at the late stage of matter clearly dis-entitles anyone to seek modification of the sentence. [126]

It was, thus, an exceptional case and the plea of delay was, therefore, dismissed.

Abul Khair vs State [127] is an unreported judgement in which the plea of delay was rejected outright, even though such plea was submitted along with a number of other factors which were considered extenuating in other cases. In this case the principle convict, army personnel Abul Khair, had killed one Shafiuddin Chowdhury, the elected Chairman of No. 4 Char Ruhita Union. The judgement indicates that during the war of liberation this Shafiuddin Chowdhury was alleged to be responsible, as a collaborator of Pakistan Army, for deaths of a number of persons including the brother of the convict Khair. Moreover, Khair had earlier been implicated in an armed case by this Shafiuddin.

As for the plea of delay

> The learned advocate for the condemn prisoner Abul Khair has lastly submitted that since long he had been languishing in jail and counting his days of his life under the sword of the order of death. More so since 1979 he has been under the agony of facing trial [128] and he is the father of minor 5 children...

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[125] Ibid., at p. 1349

[126] Ibid., at p. 1350

[127] Death Reference No. 1 of 1985, being Criminal Appeal No. 42 of 1985 and Jail Appeal No. 32 of 1988; date of judgement: 5th March, 1989.

[128] The murder was committed on 3.12.1978; the trial judge pronounced the sentence of death on 23.5.85 and this judgement by the High Court Division was pronounced on 5th March, 1989, i.e., the condemned prisoner had spent

> The Court of law is to be guided by the principles of legal practice without being biased or influenced from any extenuating circumstances and it should not hesitate to impose the legal penalty for an offence what has been sanctioned by the law. I have arrived at the a clear finding that in a broad day light accused Abul Khair, a well trained armed personnel, took the daring steps of killing the Chairman, Shaifuddin Chowdhury in a planned way. ..... the legal sentence for which is death. [129]

Needless to say, for a conviction under section 302 there must be a 'clear finding'. Clearly, the judge in this case was not ready to be swayed by any consideration for commutation of the sentence – neither the delay, nor the minor children, nor the fact of previous enmity stemming from the alleged murder of the brother of the convict by the victim during the war of liberation. Also, this Court was not aware of several 'bad precedents' of commuting sentence of death to life imprisonment on ground of delay!

This case was appealed to the Appellate Division of the Supreme Court. However, the plea of delay was brushed aside by Justice Mustafa Kamal, as he then was, in the Appellate Division judgement in *Abdul Khair vs State* [130]. The Appellate Division took up the appeal from the judgement of the High Court Division in April, 1992 and delivered it's judgement on 29th April, 1992. In response to the pleas of delay of seven years, Justice Mustafa Kamal held, re-stating first the submission of the defence lawyer:

> ... the condemned prisoner is suffering the agony of death from 22.5.1985, the date of trial court's judgement and in view of the long delay for no fault of his own, his life may be spared and he may be meted out the punishment of imprisonment for life instead.
>
> Delay by itself in the execution of sentence of death is by no means an extenuating circumstance for commuting the sentence of death to imprisonment for life. There must be other circumstances of a compelling nature which together with delay will merit such commutation. We find no compelling extenuating circumstances in this case and therefore find no ground whatsoever to interfere. [131]

In most of the Bangladeshi cases, interestingly enough, only one Indian Supreme Court's judgement in *V. Rodrick vs State of West*

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more than 3 years and 9 months in the death cell.

[129] Ibid., at pp. 76-7.

[130] 44 DLR (1992) AD 225.

[131] Ibid., at p. 228.

Bengal,[132] was considered as a precedent. In this 1971 Indian case the delay in confirmation was of 6 years, leading to a commutation of sentence. Somehow, without any attempt to rationalise their holdings, many a subsequent decisions by Bangladesh Courts came to accept this 6 year period as the bench-mark for refusing to commute sentence on the plea of delay.

As indicated above, a number of post 1971 Indian cases commuted sentences of death to imprisonment for life on account of periods of delay which were substantially less than the 6 year in Rodrick's case. From these Indian decisions it is evident that the 6 year period in one particular case was no more than one instance where delay was considered to justify commutation of sentence, and as such there is no inviolable '6 year rule' for Indian Courts.

In two other cases *Ali Sardar vs The State*[133] and *Salauddin vs State*,[134] the plea of delay was rejected, the delay in the later case being of 7 months.

It needs reiterating that in a number of cases, the Courts have accepted the plea of delay by itself, and in some other cases delay in conjunction with other extenuating factors have also led to the commutation of sentences of death to life imprisonment. However, in some other cases similar plea of delay were dismissed. We have suggested that in order to distinguish these cases, unjustified and imposed readings of earlier cases were attempted in *Nowsher Ali and Others vs The State*[135] and *State vs Punardhar Joydhar & Shepali*.[136] Moreover, recent development in India, as we have indicated, have proceeded along a different path, albeit, away from the sentence of death.

It must be recognised that a specific and pre-determined cut-off period for delay, beyond which sentences of death would automatically be commuted to life imprisonment, as held in *T.V. Vatheeswaran vs State of Tamil Nadu*[137] may turn out to be too rigid a rule.

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[132] AIR 1971 SC 1584; 1971 CrLJ (SC) 1171.

[133] 39 DLR (1987) AD 197.

[134] 32 DLR (1980) HCD 241.

[135] 39 (1987) DLR (HCD) 57.

[136] 31 (1979) DLR (HCD) 312.

[137] AIR 1983 SC 361.

The very nature of the sentence of death compels us not to immunise this ultimate penalty behind the walls of sanctified judicial precedents. Death sentence is surely more than only one form of punishment as it is entangled with moral and ethical fibre of a society. The evolving standards of decency, and societal maturity reflected in our transition from an arbitrary polity to one informed by liberal democratic principles necessitates a reassessment and re-evaluation of this ultimate penalty and the parameters of its application, including the plea of delay.

In **concluding** this article, we may infer that the High Court Division has been more than willing to commute the sentence of death on the plea of delay. Occasionally, the High Court Division has found ingenious ways for not awarding the sentence of death. Sometimes the delay by itself has been found to be a good enough justification for commutation of the death sentence and the issue of age of the convict has been used imaginatively (young age of 29, or old age of 50, along with tender age of 20 or thereabouts). Minor children of the convict had been another extenuating factor for commutation of death sentences. The fact that the convict was a freedom fighter have also found resonance with the judges in commuting the sentence of death.

The Appellate Division, though only a few cases have been decided by this highest Division on appeal, seems more reluctant to accept the plea of delay unless there were other extenuating circumstances as well. However, the holding of the Appellate Division that each case has to be decided on it's merit does provide an avenue for liberal construction of a host of factors as extenuating circumstances, along with the plea of delay.

It may be re-iterated that in the 1970s, the Appellate Division accepted the delay of a little more than 3 years (by itself without any other extenuating factor) for commuting the sentence[138] and even 7 months was indicated to be enough for commutation by the High Court

[138] See *Sheikh Ahmed vs State*, note 24 above.

Division in the early 1970s. [139] However, such a treatment of delay and the agony of death seems increasingly unlikely now and such a position may perhaps be understood in terms of the huge backlog of death reference cases. This backlog led the Chief Justice to form two division benches, from early 2000, for hearing appeals in death reference cases. In the 1990s, most death reference cases were not made ready for disposal by the High Court Division within three years or more after the pronouncement of the sentence of death by trials courts. "Agony of death" for long periods may have become more routine for the condemned prisoners. In these circumstances, it may not be unreasonable to submit that most of the condemned prisoners would have had their sentences commuted to life imprisonment if delay for more than 3 years by itself was considered a sufficiently extenuating circumstance. The fact that most 'death reference cases' are now taking more than 3 years to be heard on appeal by the High Court Division is a poor reflection of the principle that justice delayed is justice denied. The latches of the judicial system can hardly be a rationale to subject a convict to such horrendous uncertainly of agony of death for long periods and more so if, at the end, more than three-fourth of all the sentences of death are reduced by the High Court Division. [140]

Lastly, in instances where this plea of delay was submitted, such submissions do not appear to have been based on the precedents, reported and unreported, as detailed above. Only a few submissions of this plea for commutation of the sentence of death to life imprisonment on accounts of delay and consequent agony of death were based or supported by precedents which took such delay into account, as indicated above, for commutation of the sentence of death. The large number of cases in which the plea of delay was accepted for commutation and the wide variety of factors accepted as extenuating circumstances seem to have escaped the notice of the Bar and it is our

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[139] See *State vs Abdur Rahman*, note 27 above.

[140] My on-going research on the verdicts of the High Court Division in death reference cases indicates that the death sentences of less than one quarter of the condemned prisoners are upheld by the appellate court.

submission that the host of cases, as detailed above, could provide sufficient material to substantiate the plea for commutation on account of delay and more since the period of delay in hearing these death sentence cases are on the increase. It is conceded that in a few cases, the plea of delay was not accepted. Nevertheless, from the fact that in good number of cases in which the plea was accepted, (particularly in which the defence could advance other extenuating circumstances), there is no reason why such a plea should not succeed with much greater frequency if submitted with reference to relevant precedents as outlined above, than has been the case in the past.