

July 28, 2015

MOST URGENT

To,
His Excellency,
The Hon'ble President of India
Rastrapati Bhavan,
New Delhi

Subject: Mercy Petition Urging Stay on My Execution (i.e. Yakub Abdul Razak Memon) Scheduled on 30 July 2015 i.e. day after tomorrow

May it Please Your Excellency:

This is with reference to my execution scheduled on 30 July 2015 i.e. day after tomorrow. I, the undersigned, through this Mercy Petition filed under Article 72 of the Constitution of India seek urgent intervention of the Hon'ble President of India to stay the imminent execution such that the substantive pleas raised herein can be considered on merits.

A. Present Petition Meets Procedural Requirements

A.1. First Mercy Petition filed by the Petitioner

1. This is the first ever Mercy Petition filed by the Petitioner. Earlier Mercy Petition which was dismissed by Your Excellency on 11.04.2014 was filed by my brother, Suleiman Memon and not me. Filing of Mercy Petition by Suleiman Memon does not take away my last right as a death row convict to invoke Your Excellency's mercy jurisdiction under Article 72 of the Constitution of India. I humbly submit that under Indian law, an execution cannot be permitted to take place when a Mercy Petition filed by the death row convict in his own name for the first time, is still pending.
2. Further, I did not prefer a Mercy Petition until now as I have been availing various judicial remedies available to me under law. It is only on 21.7.2015 (i.e. a week ago) that my Curative Petition was dismissed by the Supreme Court and hence I am now petitioning you under Article 72.
3. I also prefer this Mercy Petition as per the course suggested in the letter dated 21.4.2015 addressed to me by Superintendent, Nagpur Central Prison, Nagpur intimating me that pursuant to the dismissal of my Review Petition by the Supreme Court, I have an option of filing a Curative Petition and a Mercy Petition before the President.
4. I have also filed a Mercy Petition before the Governor of the State of Maharashtra some days ago which may have been referred to you. Since I am scheduled to be executed day after tomorrow, I am petitioning you directly through this Mercy Petition.

A.2 Present Petition Raises Fresh Grounds which have not been taken in the Mercy Petition dismissed on 11.04.2014

5. This Mercy Petition is filed as per the law laid down by the Supreme Court in *G. Krishta Goud v. State of A.P.*, (1976) 1 SCC 157¹ and clause VII-(A)² of the *Procedure Regarding Petitions for Mercy in Death Sentence Cases* prescribed by the Home Ministry, Government of India (annexed and marked as **Annexure 1**). My Mercy Petition invokes **fresh grounds** applicable to my case and therefore, satisfies clause VII-(A).
6. I humbly pray before the Hon'ble President of India to consider **new material** which is presented through this Mercy Petition. I bring Clause

1*G. Krishta Goud v. State of A.P.*, (1976) 1 SCC 157 at page 161“**10. Before parting with this special leave petition — which we reject — we visualize the contingency of the petitioners invoking the merciful jurisdiction of the President or Governor, as the case may be, setting out various factors with which the Court may not be concerned while imposing judicial sentence but may still have persuasive value before the concerned Executive. The rejection of one clemency petition does not exhaust the power of the President or the Governor. The circumstances pressed before us about the political nature of the offence, the undoubted decline in capital punishment in most countries of the world, the prospective change in the law bearing on that penalty in the new Penal Code Bill, the later declaration of law in tune with modern penology with its correctional and rehabilitative bias emphasized by this Court in *Ediga Anamma*, the circumstance that the Damocles' sword of death sentence had been hanging over the head of the convicts for around 4 years and like factors may, perhaps, be urged before the President.”** (Emphasis supplied)

2 VII-(A). In cases of death sentences where a petition for grant of pardon etc. has earlier been rejected by the President of India in exercise of his powers under Article 72 of the Constitution of India, it would not be open for the Government of a State to seek to exercise similar powers under Article 161 in respect of the same case. However, if there is a change of circumstances or if any new material is available, the condemned person himself or anyone on his behalf may make a fresh application to the President for reconsideration of the earlier order. Once the President has rejected a mercy petition, all future applications in this behalf should be addressed to and would be dealt with by the President of India.

VII-(A), *Procedure Regarding Petitions for Mercy in Death Sentence Cases*, the Ministry of Home Affairs, Government of India to the attention of the His Excellency which requires the Hon'ble President of India to consider new grounds contained in this petition on merits before my scheduled execution day after tomorrow.

7. I also submit that while this is the first Mercy Petition made by me, this Mercy Petition agitates **fresh grounds and new material** which has so far been not placed before Your Excellency in the Mercy Petition dismissed on **11.04.2014**.
8. I humbly submit that under Indian law, an execution cannot be permitted to take place when a Mercy Petition filed by the death row convict in his own name for the first time, is still pending.

B. Preliminary Grounds for a Immediate Stay on Execution

B.1. Mitigating Circumstances pertaining to My Return from Pakistan to face trial concealed from Court

9. An article written by Shri B. Raman, who as head of Pakistan desk, counter-terrorism division of the Research and Analysis Wing (R&AW) (published posthumously on July 24, 2015) has disclosed some shocking facts pertaining to my case. Raman laments that "the cooperation of Yakub with the investigating agencies after he was picked up informally in Kathmandu and his role in persuading some other members of the family to come out of Pakistan and surrender constitute" is a strong mitigating circumstance which seems to have been hidden by the prosecution in their urge to secure death penalty (Article **titled** "Memon brothers and the Mumbai blasts" by **B. Raman** and other related articles annexed and marked as **Annexure 2**). The

aforementioned article, which has come to light 4 days ago has caused considerable disquiet around the country including an article written by Justice HS Bedi (retired Supreme Court judge) where he has urged the Supreme Court to consider the new material and take a re-look at the case. (articles annexed and marked as **Annexure 3**).

10. The author who oversaw the entire operation as head of the counter-terrorism division of the Research and Analysis Wing (R&AW) during the relevant years, in his account has completely exposed the opportunistic, unethical and illegal conduct of the prosecution in concealing information from the court which would have led to a more complete understanding about the case and would surely have helped me escape the noose.
11. Shri B. Raman's narration of my case has also been corroborated by others in the intelligence community who have firsthand knowledge of the field operations relating to my case (article annexed and marked as **Annexure 4**). Shri Raman's story has since been substantiated by number of articles written by investigative journalists who have been following my case for many years. (articles annexed and marked as **Annexure 5**).
12. I pray before Your Excellency to call for all the material from the relevant departments including the RAW, IB and CBI, and consider my case afresh in light of the same. It is my submission that the disclosures made in Shri Raman's article is new material having a direct bearing on my case and the implications arising from the same favour my case and need urgent consideration before I am dispatched to the gallows. This material contains facts which are at variance from the judicial record and therefore, the courts including the Supreme Court have not had an opportunity to consider the same and therefore, the material needs to be gone into by Your Excellency.

B.2. Issuance of Illegal Death Warrant fixing the date of Execution

13. A death warrant has been issued against me as per which I am scheduled to be executed at the Nagpur Central Jail on July 30 at 7 am. It is my submission that the instant death warrant has been issued in contravention of the principles of natural justice. I was not provided an advance notice of the death warrant hearing and as a result I could not contest the issuance of the death warrant during the hearing. The Supreme Court in the recent decision of *Shabnam v. Union of India & Ors, Writ Petition (Criminal) No. 88 of 2015* (decided on May 27, 2015) (judgment annexed and marked as **Annexure 6**) has laid down extensive guidelines so as to impose constitutional discipline on the procedure of death warrant hearing. The Court has categorically affirmed the following in the last paragraph of the judgment:

"We are affirmatively of the view that in a civilized society, the execution of the sentence of death cannot be carried out in such an arbitrary manner, keeping the prisoner in the dark and without allowing him recourse and information. Essential safeguards must be observed. Firstly, the principles of natural justice must be read into the provisions of Sections 413 and 414 of Cr. P.C and sufficient notice ought to be given to the convict before the issuance of a warrant of death by the sessions court that would enable the convict to consult his advocates and to be represented in the proceedings."

14. The death warrant issued in my case squarely fails the due process standard arising of *Shabnam's case* and is therefore void. As a result, I pray before the Hon'ble President of India to immediately take the present Mercy Petition on record for consideration under Art. 72 of the Constitution of India and issue a stay such that all contemplated measures in execution of the said illegal death warrant may be abated.

B3. Death Warrant issued by TADA Court Deliberately Concealed to Deny Me Time to Explore Judicial and Executive Remedies

15. I wish to draw the attention of Your Excellency to the fraud committed by the state authorities by keeping information regarding the issuance of death warrant by the TADA court and the date of my scheduled execution, for a period of 1.5 months. It is submitted that the TADA court issued the death warrant in my case on 30.4.2015. The TADA court in the said warrant had set 30.7.2015 as the date of execution and thereby giving me 3 full months (90 days) to explore legal remedies etc. In a deliberate act of malafide on the part of the state, the state government only informed me of the issuance of death warrant and the date of execution on 14.7.2015 i.e. 1.5 months (43 days approx.) after the date on which the death warrant was originally issued. The state government by disclosing the date of execution to me only 15 days before the scheduled execution date, has severely limited my chances of effectively accessing judicial, executive and other legal remedies. I pray to Your Excellency to stay the scheduled execution on this ground alone.

B.4. Have Not Exhausted Judicial Remedies as Yet

16. I submit before Your Excellency that I am currently in the process of filing and pursuing judicial remedies including mounting a challenge to rejection of mercy petition on 11.04.2014 by Your Excellency. On account of malafide concealment of scheduled date of execution by the state government, I have been severely hampered in my ability to access constitutional courts in time. Your Excellency, I plead before you

to grant me some time such that I can exhaust all the judicial remedies I am entitled. A hasty execution in blatant disregard to cherished principles of access to court and rule of law will be a blot on our democracy.

B.5. Mentally Unfit for an Execution

17. I submit before Your Excellency that I have been suffering from schizophrenia for the last 20 years which makes me unfit for execution. Jail doctors have certified my deteriorating mental condition. Schizophrenia as a medical condition has been recognized by the Supreme Court to be a medical illness which renders a convict unfit for execution. The Hon'ble Supreme Court in *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1 noted the following in this regard:

" The above materials, particularly, the directions of the United Nations International Conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear, "insanity" is a relevant supervening factor for consideration by this Court.

In addition, after it is established that the death convict is insane and it is duly certified by the competent doctor, undoubtedly, Article 21 protects him and such person cannot be executed without further clarification from the competent authority about his mental problems. It is also highlighted by relying on commentaries from various countries that civilized countries have not executed death penalty on an insane person. Learned counsel also relied on United Nations Resolution against execution of death sentence, debate of the General Assembly, the decisions of International Court of Justice, Treaties, European Conventions, 8th amendment in the United States which prohibits execution of death sentence on an insane person. In

view of the well established laws both at national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment."

18. I pray before Your Excellency to apply the abovementioned Supreme Court ruling to my case and issue a stay order on my execution.

C. Grounds for Mercy

C.1. Case is not yet Closed and potential for my Exoneration

19. I plead before your Excellency to inquire from the State Government and the Union of India about the steps being taken for the arrest of masterminds of 1993 bomb blasts i.e. Tiger Memon and Dawood Ibrahim. I make this submission to Your Excellency in light of the fact that my conviction is entirely based on retracted confessions of my co-accused before the police which are unfortunately admissible under TADA. It has been my stand from the very beginning that I am a complete outsider to the bomb blast conspiracy and that I am innocent of the crimes I have been convicted of. In the event, the main conspirators are brought to stand trial, they may offer to be witnesses and give testimony under oath in court which will prove my innocence. It is my submission that such evidence will be of very high evidentiary value and will dissolve the value of compromised police confessions of my co-accused (since retracted) which is the basis of conviction for which I am being sent to gallows. I plead before the Hon'ble President to not treat this case as closed because the main conspirators are still

absconding and as the recent disclosures from B. Raman tell us, the complete truth in this case is yet to come out.

C.2. Formation of a New Government at the Center

20. The only Mercy Petition relating to my case was rejected by the Hon'ble President on 11.04.2014 on the basis of advice he received from the government of the day. The Hon'ble Supreme Court has observed in *Maru Ram v. Union of India*, (1981) 1 SCC 107 that the Hon'ble President in his exercise of Art. 72 powers is bound by the *advice* of the Council of Ministers he receives on the matter. The Hon'ble Supreme Court has said so in categorical terms in *Maru Ram v. Union of India*, (1981) 1 SCC 107 in the following paragraph:

"61. Are we back to square one? Has Parliament indulged in legislative futility with a formal victory but a real defeat? The answer is "yes" and "no". Why "yes"? **Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advise and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release.** The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision or direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system no serious

encounter was met from the learned Solicitor-General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and *only* on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in *Shamsher Singh case* [*Shamsher Singh v. State of Punjab*, (1975) 1 SCR 814 : (1974) 2 SCC 831 : 1974 SCC (L&S) 550] . **So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clauses Act, 1897, that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government."**

21. It is to be noted that the order of the Hon'ble President dated 11.04.2014 rejecting the Mercy Petition was based on the advice tendered by the UPA Government which has since demitted the office. After the general election of 2014 in the 16th Lok Sabha, the NDA has formed the government. I plead before the Hon'ble President to consider my case afresh and obtain opinion of the Home Ministry under the current dispensation. As per settled practice, any change in Home Ministry leave alone the Government results in sending of the pending files back to the Home Ministry. The practice to send the files back to the Home Ministry such that fresh *advice* can be obtained from the current dispensation holding the office is a salutary one. After all, the power to grant or withhold mercy in a death matter is the pre-eminent

exercise of political sovereignty and the government of the day must afford itself an opportunity to exercise such power either in my favour or against me as the consequences of such a decision will unfold during the tenure of the current government.

22. Further, in light of the new material which has come to light in relation to my case (mentioned earlier in this mercy petition) and that this is the first mercy petition preferred by me, the Home Ministry should take this Mercy Petition on record and consider the same.

C.3. Death Sentence of Convicts in other Terror Cases Commuted

23. It is also worthwhile to note that death sentences imposed on the aides of Veerappan (convicted and sentenced to death under TADA), Rajiv Gandhi killers and Devender Pal Singh Bhullar have been commuted recently by the Hon'ble Supreme Court. While the mercy petitions of Veerappan's aides, Rajiv Gandhi's three killers and Devender Pal Singh Bhullar were decided belatedly thereby giving them the claim of delay jurisprudence, the Home Ministry has moved swiftly to reject my mercy petition. Likewise, the Mercy Petition filed by Balwant Singh Rajoana, the prime accused convicted for the assassination of Beant Singh (former Chief Minister of Punjab) also has been kept pending by the Home Ministry. It seems that machinations of law and its bureaucracy favour a class of people over the other. Secret hangings of Afzal Guru and Ajmal Kasab and now my impending execution begs the conclusion that the heavy hand of punishment and legal misery, somehow, is reserved for Muslims in this country.

24. I pray to Your Excellency to exercise his power of grace and mercy in commuting my death sentence and thereby letting everyone know that the solemn and merciful notions of pardon and commutation are available to all sections of the society including the minorities.

C.4. Long Duration of Trial and Incarceration Suffered Till Date

25. I have served more than 20 years in prison since my arrest. I have never been released on bail. My trial took 14 years to complete. This is a punishment in itself, and a relevant consideration for Your Excellency as per the published guidelines for the adjudication of mercy petitions. Moreover, while the Hon'ble Supreme Court used this long period of incarceration as a mitigating circumstance to commute the death sentences of the other 10 co-accused persons, it applied a different yardstick to my case. The Hon'ble Supreme Court has repeatedly held that lengthy incarceration during pendency of appeal in death cases is a significant mitigating circumstance which ought to be considered in determination of sentence. This prolonged detention (mostly under solitary confinement) under sentence of death has exerted exceptional physical and mental torment and suffering on the prisoner. While the Supreme Court erred in disregarding without good reason this relevant fact, the Government of India must in the interests of justice give it due importance. The government to that extent is not bound by the conclusions arrived at by the Supreme Court [See *Shanker v. State of U.P.* (1975) 3 SCC 851; *Vivian Rodrick v. The State of West Bengal* (1971) 1 SCC 468; *Kehar Singh v. Union of India* (1989) 1 SCC 204 para 10].

C.5. Death Sentence awarded under TADA, a law which was repealed for being Unfair and Discriminatory

26. I have been tried and sentenced to death under TADA, a special law which was repealed by the Parliament on account of it having been used to target the minorities. The Supreme Court in *Vijaykumar Baldev Mishra v. State of Maharashtra*, (2007) 12 SCC 687 para 30 also doubted the legality of prosecutions pursued after the repeal of TADA. The Court observed the following in this regard:

"30. As regards those who have already undergone the entire sentence for which they were convicted under TADA obviously nothing can be done, but regarding those who have undergone only part of the sentence or regarding those who are facing prosecution or investigation under TADA such prosecution or investigation are liable to be quashed in view of the opinion expressed above."

27. Given the highly compromised rule of law credentials of TADA, my execution will perpetuate the dark legacy of this law. After all, nothing challenges the majesty of law and the hallowed institutions of justice more than an execution arising out of an unsafe conviction under a suspect law which was repealed for being discriminatory, excessive and out of line with established principles of criminal law.

C.6. Impending Execution will Vitate Communal Peace and Harmony

28. The Hon'ble Supreme Court has taken note of the role of Pakistan in the 1993 blasts by observing:

453. In the relevant scenario, the accused arrived in Pakistan for training and they were received by ISI operatives who took them out of the airport without observing any immigration formalities. Meaning thereby, they had a green channel entry and exist in Pakistan. Another confession reveals that they received training from the ISI officials themselves on some occasions. **These events unveil the tolerance and encouragement shown by Pakistan towards terrorism.**

...457. A careful reading of the confessional statements of convicted accused exposes that large number of accused including the absconders received training in making of bombs by using RDX and other explosives, handling of sophisticated automatic weapons like AK-56 Rifles and handling of hand grenades in Pakistan which was organized and methodically carried out by Dawood Ibrahim (AA), Anees Ibrahim, Mohd Dossa and Salim Bismillah Khan (since deceased). The training received in Pakistan materialized in the unfortunate serial blasts in Bombay, India on 12th March 1993. A responsible state owes an obligation not only to another state but also to the international community as a whole. We sincerely hope that every State will strive towards the same."

29. In the interest of fairness and justice for those who have been made to pay with their lives for the 1993 bomb blasts, it is pleaded before the Hon'ble President that Pakistan continues to remain a cynical and perverse link to the 1993 bomb blasts as it is presently providing safe refuge to those who have been called the lynchpin for these bomb blasts. I was a complete outsider to the actual operations which led to the bomb blasts. My execution, with unfairness and miscarriage written large on it, would send a very cynical message to the minority community. By unfairly executing me, we are conveying to some sections of this country, that the machinery of justice in this country does not care for equity and facts, and is willing to perpetrate death sentence and torture just to appear tough on crime. It strengthens the belief that the rule of law and fundamental rights remain irrelevant and exist only on paper for a particular community.

One of the main objectives behind the 1993 bomb blasts to which Pakistan was the main contributor, was to put our country into a vicious cycle of communal restlessness and insecurity. My hanging will precisely serve that purpose.

**D. Final Plea: My Constitutional Right to be
Considered for Mercy on Substantive Grounds**

30. The Petitioner who is a death row convict most humbly submits that His Excellency is duty bound under the law of the land to consider the miscarriage of justice in how my case has been treated by the judicial system and executive government of this country. Supreme Court in this regard has held in *Kehar Singh v. Union of India*, (1989) 1 SCC 204 at page 210:

"7...To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. **But, the fallibility of human judgment being**

undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr Justice Holmes, speaking for the Court in *W.I. Biddle v. Vuco Perovich* [71 L Ed 1161] enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context."

More pointedly, the Supreme Court in *Kehar Singh v. Union of India*, (1989) 1 SCC 204 at page 212 held that "it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from

that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it."

I plead that Your Excellency considers my case for mercy with an open mind. I pray to Your Excellency for allowing me time to exhaust judicial remedies (detailed above in section B.3 and B.4). Your Excellency I dare to ask for this relief because I think we live in a modern day democracy bound by the promise of guaranteeing rule of law to one and all including a condemned death row convict.

Yours Sincerely,

Yakub Abdul Razak Memon