

(2010) 08 KL CK 0216

In the High Court Of Kerala

Case No : Writ Petition (C) No. 9401 of 2007 (T)

G. Balachandran Pillai

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 05-08-2010

Acts Referred:

Constitution of India, 1950 — Article 154, 161, 163(1), 166, 367(1)
Criminal Procedure Code, 1973 (CrPC) — Section 160, 203, 378(4), 432, 432(2)
General Clauses Act, 1897 — Section 3(60), 3(8)
Kerala Government Business Rules — Rule 34(1), 34(2)
Kerala Prisons Rules, 1958 — Rule 543, 545
Penal Code, 1860 (IPC) — Section 302, 323, 324, 34, 341

Citation : (2011) CriLJ 2432 : (2010) 3 ILR (Ker) 589 : (2011) 7 RCR(Criminal) 868

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : K. Raveendran, for the Appellant; S. Sreekumar, SC for CBI, for the Respondent

Judgement

V. Ramkumar, J.—W.P.C. 9401 of 2007 is filed by the complainant (G. Balachandran) in C.C. 621 of 1990 on the file of J.F.C.M. II Attingal seeking the following reliefs:

i) To quash Ext.P2 order dated 1-1-2005 as per which the Government in the Home Department granted remission of the sentences of the 6th and 7th respondents herein (Abdul Kalam and E. Subrair Kunju) who were A2 and A3 respectively in C.C. No. 621 of 1990.

ii) to direct the 3rd respondent (Director General of Police) to abide by Ext.P1 judgment of this Court in Cri.Appeal 343 of 1997

iii) to direct the eighth respondent (C.B.I.) to conduct an enquiry as to whether any illegal methods were employed in securing Ext.P2 order of remission or to direct the 2nd respondent (Home Secretary) to consider Exts. P4 and P5

representations filed by the petitioner before the Home Minister.

W.P. C. 27098/07 is filed by C.S. Ramachandran Nair (R5 in W.P.C. 9401 of 2007 and A1 in C.C. 621/1990) for a direction to the State of Kerala to consider Ext.P6 application filed by the petitioner u/s 433 Cr.P.C. for commutation of his sentence. (Pending the said Writ Petition, the Government as per Ext.R1 (a) order dated 13-3-2008 rejected his application).

Crl.M.C. 1617 of 2007 is filed by Subair Kunju (R7 in W.P.(C) 9401 of 2007 and A3 in C.C. 621/1990) u/s 482 Cr.P.C. to quash the non-bailable warrants of arrest issued against him by J.F.C.M. II (Attingal) ignoring Annexure - A1 (Ext.P2 in W.P.C. 9401 of 2007) order of remission and to direct the Director General of Police not to take any action against the petitioner in execution of the sentence in C.C. 621 of 1990.

Crl.M.C. 1747 of 2007 is filed by Abdul Kalam (R6 in W.P.C. 9401/2007 and A2 in C.C. 621/1990) u/s 482 Cr.P.C. for reliefs similar to those prayed for in Crl.M.C. 1617 of 2007.

THE FACTUAL FLASHBACK

2. The events leading to the filing of the above Writ Petitions and Crl. M.Cs are as follows:

THE prosecution CASE

The petitioner in W.P. (C) 9401 of 2007 is one Balachandran hailing from Puthenchanthai, Varkala. His wife is one Meena belonging to Vamanapuram Village in Nedumangad Taluk. Their marriage was in the year 1982. There was a property dispute between the said Meena and her brother Baiju and her paternal uncle Vidhyadhara Kurup. On a complaint preferred by the said Vidhyadhara Kurup against the said Balachandran and his wife Meena, the husband and wife were summoned to the Venjaramoodu Police Station as per a written notice issued to them by the Sub Inspector of Police, Venjaramoodu. Balachandran and his wife Meena appeared before the Sub Inspector of Police, Venjaramoodu at 9 a.m. on 16-9-1988 as directed in the notice served on them. The Sub Inspector directed them to meet the Circle Inspector. One C.S. Ramachandran Nair (the petitioner in W.P.(C.) 27098 of 2007) was the Circle Inspector, Venjaramoodu. In the office of the Circle Inspector, besides Ramachandran Nair, the Circle Inspector of Police, three police Constables by name Abdulkalam (petitioner in Crl.M.C. 1747 of 2007, Subair Kunju (the petitioner in Crl.M.C. 1617 of 2007) and Chandran and Vidhyadhara Kurup the paternal uncle of Meena and Baiju, the brother of Meena were also present. As soon as Balachandran accompanied by his wife Meena (who was seven months pregnant) entered the room of the Circle Inspector, the Circle Inspector (C.S. Ramachandran Nair) caught hold of the lap of Balachandran together with the cloth and slapped him on his cheek and chest asking him whether he would prefer a complaint against him. Seeing this when Meena, the wife of the complainant went to the rescue of her husband, the Circle

Inspector kicked her on the stomach with his boots resulting in Meena falling on the floor. Then Abdul Kalam, Subair Kunju and Chandran the police constables wrongfully restrained Balachandran and beat him on various parts of his body. The said police constables then caught hold of Meena and snatched away her mangalyasoothra and slapped her on the face. The above atrocities were done in the presence of Vidhyadhara Kurup and Baiju who had lodged the complaint before the Sub Inspector. Hearing the hue and cry of Balachandran and his wife the persons who were waiting outside came rushing into the room. The Circle Inspector along with Vidhyadhara Kurup and Baiju abused Balachandran and his wife in filthy language and threatened them with dire consequences in case Meena was not prepared to relinquish her rights over the property in question in favour of Vidhyadhara Kurup and Baiju. A false case was foisted against Balachandran and his wife Meena. Abdul Kalam, the police Constable who had taken Rs. 4,800 from Balachandran subsequently produced only Rs. 1,800/- along with the Mangalyasoothra and other gold ornaments which were taken from Meena. After getting bail Meena was got admitted as an inpatient in S.A.T. Hospital, Thiruvananthapuram for treatment for three days.

Crl.M.P. No. 7452 of 1988 was a private complaint filed by Balachandran before the Judicial Magistrate of the Second Class, ("J.S.C.M". for short) Nedumangad against

- 1) C.S. Ramachandran Nair, Circle Inspector of Police, Venjaramoodu (A1)
- 2) Abdul Kalam, Police Constable, Venjaramood (A2)
- 3) Subair Kunju, Police Constable, (Writer), Venjaramoodu (A3)
- 4) A Chandran, Police Constable, Venjaramoodu (A4)
- 5) Vidhyadhara Kurup, (A5)
- 6) Baiju (A6) - alleging offences punishable under Sections 323, 324, 341 and 379 read with Section 34 I.P.C.

A4 Chandran was subsequently deleted from the array of accused.

27-09-1989 : J.S.C.M. Nedumangad dismissed the complaint u/s 203 Cr.P.C.
23-11-1989 : Crl.R.P. 145/1989 filed by Balachandran before the Sessions Court, Kozhikode, challenging the dismissal of his complaint. 18-01-1990 : Sessions Court allowed the Crl.R.P. and set aside the trial Court's order. Cognizance of offences punishable under Sections 341 and 323 read with Section 34 I.P.C. was taken against A1 to A3 and A5 and A6. After the case went back to J.S.C.M., Nedumangad the case was numbered as C.C. 151 of 1990 08/10/1990 : M.C. (T.P.) No. 725 of 1990 was filed by Balachandran before the Sessions Court, Thiruvananthapuram seeking a transfer of the case from the J.S.C.M. Nedumangad 13-11-1990 : Sessions Court allowed M.C. (T.P.) 725 of 1990 and transferred the Case to J.F.C.M. II Attingal where it was taken on file as C.C. 621 of 1990. The trial was conducted by the J.F.C.M. II Attingal.

P.Ws 1 to 7 were examined on the side of the complainant, Exts. P1 to P7 were marked. On the side of the defence Exts. D1 to D3 were marked. 03/01/1993 : J.F.C.M. II Attingal pronounced judgment acquitting A5 and A6 (Vidhyadhara Kurup and Baiju) but convicted A1 to A3 (Circle Inspector Ramachandran Nair and Constables Abdul Kalam and Subair Kunju) of offences punishable under Sections 341 and 324 read with Section 34 I.P.C. and sentenced each of them to simple imprisonment for one month and simple imprisonment for one year respectively. The sentences were directed to run concurrently. 09/02/1993 : A1 to A3 filed Crl. Appeal 46 of 1993 before the Sessions Court, Thiruvananthapuram, challenging the conviction entered and the sentence passed against them. 21-12-1996 : As per Ext.R7 (c) judgment in Crl.Appeal 46 of 1993 the Sessions Judge acquitted A1 and A3 21-05-1997 : Balachandran the complainant filed Crl. Appeal 343 of 1997 before the High Court of Kerala u/s 378(4) Cr.P.C. 25-05-2004 : The High Court passed Ext.P1 judgment allowing the appeal filed by Balachandran. The conviction recorded by the trial court u/s 323 I.P.C. was sustained. A2 and A3 were directed to undergo rigorous imprisonment for three months each and to pay a fine of Rs. 1,000/- each and on default to pay the fine, to suffer simple imprisonment for two weeks under Section 323 I.P.C. 08/09/2004 : Abdul Kalam (A2) and Subair Kunju (A3) filed separate petitions before the Government of Kerala seeking remission of their sentence u/s 432 Cr.P.C. 06/10/2004 On receipt of Ext.P1 judgment the learned Magistrate issued non-bailable warrants of arrest against A1 to A3 . 13-12-2004 : A1 filed Crl. M.C. 3442 of 2004 before the High Court of Kerala challenging the warrant of arrest issued against him contending that A2 and A3 alone were sentenced to imprisonment by the High Court. 01/01/2005 : The Government issued Ext.P2 G.O. remitting the sentence imposed on A2 and A3. (This is the order impugned in W.P. (C) 940 of 2007). 05/09/2005 : The High Court, noticing that the operative portion of Ext.P1 judgment was not in consonance with the conclusion reached in the earlier part of the judgment and that an inadvertent mistake had crept into the judgment, directed the matter to be placed before the learned Judge who passed Ext.P1 judgment. The said direction was complied with by the Registry. 31/10/2005 : The learned Judge who passed Ext.P1 judgment held that A1 to A3 shall undergo rigorous imprisonment for three months and to pay a fine of Rs. 1,000/- each u/s 323 each. A1 to A3 filed SLP before the Hon"ble Supreme Court against Ext.P1 judgment as modified. 06/02/2006 : Supreme Court passed Ext.R7 (b) order dismissing the SLP filed by A1 to A3 against Ext.P1 judgment. The Supreme Court observed that the petitioners in the SLP had not surrendered. 10/02/2006 : Ramachandran Nair (A1) also filed an application before the State Government for remission of his sentence u/s 432 Cr.P.C. 19-03-2007 : Complainant Balachandran filed W.P.C. 9401 of 2007 before the High Court 23-04-2007 : A1 filed W.P.(C) 13760/2007 before the High Court of Kerala seeking a direction to J.F.C.M. II Attingal not to execute the sentence imposed on him pending his application for remission before the Government. 08/05/2007 : High Court dismissed W.P. (c) 13760/07 as misconceived (Ext.P5

judgment in W.P. (C) 27098/07) holding that no such direction could be issued by the High Court and that in view of the proviso to Section 432(5) Cr.P.C. the application of A1 u/s 432 could not have been entertained unless the applicant was in jail. 11/05/2007 : Subair Kunju (A3) filed CrI.M.C. 1617 of 2007 before the High Court. 30-05-2007 : Abdul Kalam (A2) filed CrI.M.C. 1747 of 2007 11/06/2007 : A1 filed another application before the State Government u/s 433 Cr.P.C. seeking commutation of his sentence. 11/09/2007 : Ramachandran Nair (A1) filed W.P.(C) 27098/07 before the High Court. 13-03-2008 : Government dismissed A1's application under Section 433 Cr.P.C. as per Ext.R1 (a) G.O. after noticing that his application dated 10-2-2006 filed u/s 432 Cr.P.C. was not maintainable in the light of the judgment in W.P.C 13760/07. Ext.R1 (a) order has been passed during the pendency of W.P. (C) 27098/2007 filed by A1.

3. I heard Advocate Sri. K. Raveendran, the learned Counsel appearing for Balachandran, Adv. Sri. Abdul Salam, S. the learned Counsel appearing for Subair Kunju and Abdul Kalam, Adv. Sri. Mathew B. Kurian the learned Counsel appearing for Ramachandran Nair and Adv. Sri. C.S. Hrithwick the learned Government Pleader/Public Prosecutor. I also perused the Government files leading to Ext.P2 in W.P. (C) 9401 of 2007 and the connected files.

ARGUMENTS OF A1 TO A3

4. Adv. Sri. Abdul Salam, the learned Counsel appearing for Subair Kunju and Abdul Kalam and Advocate Sri. Mathew B. Kurian appearing for Ramachandran Nair made the following submissions before me opposing W.P. (C) 9401/07 and in support of the other three cases:

One of the prayers in W.P. (C) 9401/07 filed by Balachandran is for a direction to the 2nd respondent Home Secretary to consider Ext.P4 petition and a direction to the Home Minister to consider Ext.P5 representation both filed by Balachandran. Those representations were dismissed by the Government and Balachandran has not produced those orders. After Balachandran and his wife Meena fell out, Meena had given Ext.R7 (a) statement dated 12-10-2006 before the Home Minister to the effect that it was on account of the continuous harassment by her former husband Balachandran that she was constrained to give evidence against the accused policemen, that she was giving false statement before the Court on account of the compulsion of her husband, that no injury was caused to her or the child in her womb. The Governor has been kind enough to show mercy to Subair Kunju and Abdul Kalam. Balachandran who was attributing malafides and foul play behind the order of remission passed by the Government has not been able to substantiate the said allegation. The power exercised by the Government is a statutory and constitutional power. The right to grant remission is governed by the provisions of Section 432 Cr.P.C. which vests the said power with the appropriate Governemnt and not in any Court. Vide para 7 of K. Pandurangan etc. Vs. S.S.R. Velusamy and Another, . Except for the fact that Abdul Kalam and Subair Kunju who were A2 and A3 respectively were roped in by resort to Section 34 I.P.C., no specific allegation of torture was made against them. Hence, the

benign Government in exercise of its clemency powers was inclined to extend the benefit of remission to A2 and A3. But the very same Government went wrong in not granting commutation to A1 (Ramachandran Nair) who was also similarly placed as A2 and A3. This Court should, therefore, direct the Government to extend the benefit of commutation to A1 and should refuse to interfere with the discretion exercised by the Government under its mercy jurisdiction as against A2 and A3 after evaluating all the relevant circumstances including their family background.

JUDICIAL RATIOCINATION

5. I am afraid that I find myself unable to agree with the above submissions made on behalf of A1 to A3.

THE POLICE ATROCITIES

6. During the trial before the Magistrate the complainant besides examining himself as P.W.1 also examined his wife Meena as P.W.4. P.Ws 2 and 3 were the independent occurrence witnesses. P.W. 5 was the doctor who had examined P.W.4 Meena and issued Ext.P6 wound certificate. P.Ws 6 and 7 were the Sub Inspectors of Police, Venjaramoodu Police Station at the time of occurrence and at the time of trial respectively. A1 had clasped at the loin of the complainant (P.W.1) together with his clothes shouting whether he would prefer a complaint against A1 and slapped him on the face and chest. Seeing this when P.W.1's wife Meena (PW4) went to the rescue of her husband, A1 kicked her on the back with his boots and she fell down. She was in an advanced stage of pregnancy. A2 and A3 had beaten up P.W.1. They also snatched the mangalyasootra of P.W.4 and had slapped her on the face. All these brutalities were committed after securing the attendance of P.Ws 1 and 4 in the room of A1, the Circle Inspector. After a careful evaluation of the oral and documentary evidence, the learned Magistrate who had the unique advantage of seeing the witnesses and assessing their demeanour and credibility held in paragraph 22 of the judgment that both the complainant and his wife were manhandled by A1 to A3 and that A1 had stamped with his boots the complainant's wife who was seven months pregnant and she had fallen down. The evidence of P.W.4 Meena was fully believed to hold that she was brutally manhandled by A1 to A3. After referring to the admission by P.W.6 (Sub Inspector) that he had issued Ext.P3 notice to Meena calling upon her to appear before the Police Station, the learned Magistrate observed that the Sub Inspector was acting in utter disregard of the prohibition u/s 160 Cr.P.C. against summoning women to the Police Station. A1 to A3 were accordingly found guilty u/s 341 and 323 read with Section 34 I.P.C. and sentenced as mentioned earlier. The conviction entered against A1 to A3 for the offence punishable u/s 323 I.P.C. was confirmed by the High Court which, however, reduced the sentence to rigorous imprisonment for three months as against one year awarded by the trial Court.

THE ILLEGALITIES BEHIND THE REMISSION ORDER

7. It was at a time when the SLP filed by A1 to A3 against Ext.P1 judgment of this Court was pending consideration of the Supreme Court that A2 and A3 filed separate petitions before the State Government on 8-9-2004 seeking remission of their sentence u/s 432 Cr.P.C. and the Government issued Ext.P2 G.O. dated 1-1-2005 completely remitting the sentence imposed on A2 and A3. It is pertinent to note that the Supreme Court of India on 6-2-2006 dismissed the SLP filed by A1 to A3 on the ground that they had not surrendered to the jail concerned in pursuance of the sentence passed against them. There is no dispute that it was without entering the portals of the prison even for a day that A2 and A3 submitted their applications for remission which was entertained by the Government in flagrant violation of Clause (a) of the Proviso to Section 432(5) Cr.P.C. as per which the application for premature release can be filed and entertained only if the applicant is in prison. Ext.P2 order of remission was passed without calling for the opinion of the presiding Judge who confirmed the conviction as provided under Sub-section (2) of Section 432 Cr.P.C. All that apart, the concerned file was circulated to the Governor without the aid and advice of the Council of Ministers in blatant violation of the mandate under Article 163(1) of the Constitution of India as detailed herein below .

8. I have perused File No. 52055/B1/2004/Home leading to the issue of G.O. (Rt) No. 04/2005/Home dated 1-1-2005 (Ext.P2). The order of remission was passed mainly relying on the Report of the Dy.S.P., Attingal as endorsed by the Director General of Police, favouring two members of their own tribe. The report of the District Probation Officer or the remarks of the convicting Judge was not obtained. The recommendations of the Jail Advisory Board or the State Prison Review Committee were not obtained before forwarding the file to the Governor. The aforementioned file is seen circulated by the Home Department to the Governor through the Chief Minister (Vide page 22 of the Note File). The points highlighted at paragraphs 22 and 23 at page 21 of the Note File are as follows:

22. In this connection the following points are also to be considered magnanimously.

(a) Police is the most important link in the criminal justice system and have the primary duty of safeguarding human rights.

(b) They should have the skill in mediating and settling problems at the Station House itself.

(c) The offence had been committed while they were doing their duty as policemen.

(d) The Section under which the punishments had been awarded is 323 Indian Penal Code. This Section is applicable for the offence of "causing hurt" and is compoundable. The person by whom the offence can be compounded is the person to whom the hurt is caused.

(e) The Court had imposed only a minor punishment but that may cease their

service as policemen of the State.

(f) Government have the power for remission of the sentence u/s 432 Cr.P.C.

23. In these circumstances for orders whether

(a) The requests of Sri. E. Subair Kunju and Sri. Abdul Kalam for remission of imprisonment and fine awarded by the Honourable High Court of Kerala in Crl. Appeal 343/1997 may be recommended and forwarded to His Excellency the Governor for granting full pardon to the petitioners.

At page 22 of the Note File the Under Secretary of Home Department who put up the notes, her superior, the Addl. Secretary of Home Department and the Principal Secretary, Home have signed. Below that the then Chief Minister has signed on 7-12-2004 with the endorsement "para 23 is approved". The file was then circulated to the Governor who has put his signature on 10-12-2004 after making the following endorsement:

I have considered the recommendations in paragraph 23 and the foregoing notes. In view of the exceptionally deserving circumstances explained, I am inclined to approve the proposal, as a very special case.

The Governor was thus approving the proposal for remission as if it was a matter within his discretionary powers.

9. I have also perused file No. 77694/B1/06/Home in which the representation dated 29-3-2006 submitted to the Governor by G. Balachandran, the complainant to re-consider Ext.P2 order of remission granted to A2 and A3. The file is seen circulated by the Home Department to the present Chief Minister through the Minister for Home, Vigilance and Tourism and a decision was taken on 31-7-2007 at the level of the Chief Minister not to reconsider Ext.P2 G.O. This file has not been circulated to the Governor.

10. The police who are ritualistically submitting negative recommendations in cases of atrocities against women had no qualms in giving positive recommendations in the case of A2 and A3 who are members of their own tribe. When the complainant and his wife who were the injured had not shown any gesture towards compounding the offence, the recommendation given to the Governor that the offence was compoundable was totally irrelevant. Similarly, the noting made in the file that the offence was committed by the policemen while they were doing their duty was also false and misleading since it is no part of the duty of a policeman to summon a lady and that too in an advanced stage of pregnancy, to the police station and assault her and her husband from the room of the Circle Inspector. No doubt, long after the Court verdicts in this case, the complainant and his wife appear to have fallen out and translating the idea (which originated in the warped mind of the police) of exploiting the situation into reality a letter from Meena, the estranged wife of Balachandran was procured to the effect that she was not assaulted as alleged in the complaint and that she was merely yielding to the pressure of her husband. Much strain is not

necessary to discard the said letter and the Government before which the said letter (addressed to the Home Minister) was produced, rightly eschewed the same from consideration.

11. There used to be a Jail Advisory Board constituted under Rule 543 of the Kerala Prison Rules, 1958 with the Addl. Director General of Police (Prisons), as the Chairman and the District Collector, Sessions Judge, Superintendent of Police of the district where the Central Prison concerned is located and some others as members. The role of the said Board was to make recommendations to the State Government for the purpose of passing orders of remission u/s 432 Cr.P.C. By virtue of the Proviso to Rule 545(a) of the Kerala Prison Rules, 1958, the said Jail Advisory Board had no power to consider the cases of those lifers falling u/s 433A Cr.P.C. who had been convicted for offences for which death penalty was one of the punishments prescribed but who, either on account of judicial generosity or on account of executive clemency were either sentenced to life imprisonment only or whose death sentence was commuted in to one of imprisonment for life. All lifers convicted u/s 302 I.P.C. would fall u/s 433A Cr.P.C. and the Jail Advisory Board could not take up for consideration, the cases of such lifers unless and until they had actually served 14 years of imprisonment. But no such restrictions can be placed on the Governor's Constitutional powers under Article 161 of the Constitution. The only bridle on the said power of the Governor is that while exercising the extraordinary Constitutional power under Article 161 of the Constitution, he should act in conformity with the Constitutional philosophy. The Governor cannot exercise his power arbitrarily, mala fide or in absolute disregard of the finer canons of Constitutionalism. See Para 12 of Swaran Singh Vs. State of U.P. and Others, . That is why a Constitution Bench of the Apex Court in Maru Ram and Others Vs. Union of India (UOI) and Others, desired the State Governments to lay down guidelines for the exercise of the said Constitutional power and ruled that until such guidelines are set out, the relevant State Prison Rules will serve as the guidelines. The need for laying down the guidelines was emphasised by a Division Bench of this Court also in Suo motu Proceedings u/s 482 Cr.P.C. v. State of Kerala 2002 (2) KLT 695 , even though the view taken therein that the power of the Governor under Article 161 of the Constitution of India is subject to Section 433-A Cr.P.C. is, with due respect, open to debate in view of the observations in Maru Ram's case itself and in view of the ruling of the Supreme Court in paragraph 8 of State (Govt. of NCT of Delhi) Vs. Prem Raj, .

12. Strictly speaking, proposals for remission u/s 432 Cr.P.C. and commutation u/s 433 Cr.P.C. need not be circulated to the Governor because such proposals if forwarded to the Governor, the latter can act only on the aid and advice of the Council of Ministers as will be seen hereafter. It is only as a measure of Constitutional courtesy that the Rules of Business make it obligatory that the signature of the Governor should authorise the pardon, commutation or premature release.

13. In order to enable the Governor to exercise his extra ordinary Constitutional power under Article 161 of the Constitution of India, the State Government had, as per executive orders constituted a State Prison Review Committee to recommend the premature release of life convicts who had completed 8 years of actual incarceration as desired in Maru Ram's Case (supra). Proposals for premature release containing the recommendations of the State Prison Review Committee were invariably placed before the Council of Ministers and then forwarded to the Governor for the exercise of his mercy jurisdiction under Article 161 of the Constitution. But proposals for premature release of convicts based on the recommendation of the Jail Advisory Board also used to be circulated to the Governor through the Chief Minister, as was done in this case, but without the advice of the Council of Ministers. Even if it could be said, by placing reliance upon Section 3(60)(b) of the General Clauses Act, 1897 and Article 154 of the Constitution of India and also the decisions of the Apex Court in The State of Uttar Pradesh Vs. Mohammad Naim, and Subhas Chandra and Others Vs. Municipal Corporation of Delhi and Another, , that the Governor, as the repository of the executive power of the State, is the State Government himself, then also the Governor can act in exercise of his executive functions only on the aid and advice of the Council of Ministers as enjoined by Article 163(1) of the Constitution of India, unless it be a matter falling under the discretionary power of the Governor. In paragraphs 57 and 88 of the seven Judges' Constitution Bench decision of the Supreme Court, in Samsher Singh Vs. State of Punjab and Another, , the Apex Court speaking through Chief Justice Ray held that in all executive actions the Governor can act only on the aid and advice of Council of Ministers (the Cabinet) and that the Governor cannot in such matters act personally without or against the aid and advice of the Council of Ministers. In paragraphs 138 and 140 of the concurring decision rendered by Justice V.R. Krishna Iyer, the limited areas of the discretionary powers of the Governor where he could act on his own judgment, have been indicated. The clemency jurisdiction of the Governor under Article 161 of the Constitution of India is not one falling under the discretionary powers made mention of by the Supreme Court. Six years later, in the celebrated Maru Ram's case the Supreme Court, speaking through V.R. Krishna Iyer, J. observed as follows:

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 advice 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 *Samsher Singh Vs. State of Punjab and Another*, . 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-a-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.

14. Thus, if the order of remission or pre-mature release were to be passed at the Governor's level whether u/s 432 Cr.P.C. or under Article 161 of the Constitution of India, the Governor can do so only on the aid and advice of the Cabinet.

RULES OF BUSINESS - NOT A CONFIDENTIAL DOCUMENT

15. Rules of Business of the Government of Kerala were issued by the Governor in exercise of his powers under Clauses 2 and 3 of Article 166 of the Constitution of India. It is quite strange that even after the advent of the Right to Information Act providing for transparency in the business of public functionaries, the State Government continues to treat the Rules of Business as a confidential and classified document. But notwithstanding the secrecy maintained by the State, there are ever so many judicial verdicts advertent to and even interpreting one Rule or the other of the Rules of Business. It is high time that the said rules were de-classified and made public as has been done in many other States.

RULES OF BUSINESS TO BE AMENDED

16. Going by Rules 34(1)(i) and 34(2)(i) of the Rules of Business of the Government of Kerala proposals for the grant of pardons, reprieves, respites or remissions of punishment or the suspension, remission or commutation of a sentence in pursuance of Article 161 of the Constitution of India, or for the suspension, remission of a sentence u/s 432 or commutation of sentence u/s 433 Cr.P.C. have to be submitted to the Chief Minister who in turn has to submit the

same to the Governor before issue of orders. The above procedure in the Rules of Business shortcircuiting the cabinet and providing for circulating the file to the Governor without the aid and advice of the Council of Ministers is unconstitutional calling for immediate amendment of the Rules of Business. I know it for sure that a former Law Secretary to the Government had given his advice to the Government requesting to amend the Rules of Business in tune with the constitutional mandate and judicial verdicts. It is learnt that the said advice of the Law Secretary was received with some reservation, if not resentment, by the Governor's Office. That explains the need for a competent legal advisor to the Governor in addition to a bureaucrat as the Secretary so that the high office of the Governor is not exposed to the risk of easy intervention by Courts on account of palpable infirmities in law. The scope of judicial review over the gubernatorial orders in the realm of the clemency jurisdiction of the Governor has been elucidated by the Apex Court in Swaran Singh's Case (Supra) and in Epuru Sudhakar and Another Vs. Govt. of A.P. and Others, .

17. The result of the foregoing discussion is that Ext.P2 order dated 1-1-2005 passed at the level of the Governor without the aid and advice of the Council of Ministers is bad for this reason also and the same is accordingly, quashed. Consequently, the warrants, if any, of arrest issued against A1 to A3 are liable to be executed and, therefore, CrI.M.C. Nos. 1617 and 1747 of 2007 are liable to be dismissed and I do so.

18. In the case of Ramachandran Nair, the first accused, the Government have in G.O. (Rt) No. 819/2008/Home dated 13-3-2008 [Ext.R1(a) in W.P.(C). 27098/07] given valid reasons as to why his application for commutation of sentence was liable to be rejected. I do not find any good ground to interfere with the said order and W.P.(C). 27098/07 is accordingly dismissed.

CONCLUSION

In the result, W.P.(C) 9401 of 2007 is allowed and Ext.P2 order is quashed. W.P. (C) 27098 of 2007 and CrI.M.C. Nos. 1617 and 1747 of 2007 are dismissed.

Dated this the 5th day of August, 2010.