
(1998) 12 AP CK 0058
In the Andhra Pradesh High Court
Case No : Writ Petition No. 2834 of 1998

K. Manohar Rao

APPELLANT

Vs

Govt. of A.P. and others

RESPONDENT

Date of Decision : 08-12-1998

Acts Referred:

Andhra Pradesh Prisons Rules, 1979 — Rule 318, 320, 321, 324(A)(B), 326
Constitution of India, 1950 — Article 14, 161, 21, 32, 72
Criminal Procedure Code, 1973 (CrPC) — Section 401, 432, 433A
Penal Code, 1860 (IPC) — Section 55

Citation : (1999) 1 ALD 214 : (1999) 1 ALT 316 : (1999) CriLJ 1551

Hon'ble Judges : Motilal B. Naik, J; J. Chelameswar, J

Bench : Division Bench

Advocate : Mr. K. Balagopal and Miss. P.A. Kamaleswari, for the Appellant; Addl. Advocate-General, for the Respondent

Judgement

1. Chelameswar, J.—The petitioner's father-in-law one Sri Korukanti Rama Rao who is aged about 70 years, was sentenced to undergo imprisonment for life in Sessions Case No.88 of 1986 on the file of the Additional Sessions Judge, Karimnagar. On appeal, the same was confirmed by this Court by judgment dated 3-2-1988 and by the Supreme Court of India subsequently.

2. The petitioner complains that the respondents are under legal obligation in view of Rules 320.321 etc., of the Rules contained under Chapter XXII of the Andhra Pradesh Prisons Rules, 1979, to consider the premature release of the abovementioned convict and for the purpose of reaching such a conclusion, an Advisory Board is required to be constituted, which should recommend the cases of the eligible prisoners for the purpose of premature release. The petitioner, however, complains that the State Government has not been constituting such Advisory Boards and consequently there is a dereliction of the statutory obligation.

3. In this context, it is necessary to examine the Scheme of Chapter XXI of the

Andhra Pradesh Prisons Rules, 1979. Rule 318 provides that the Rules of the said Chapter govern the grant of remission to prisoners. Rule 320 provides that the cases of various categories of prisoners mentioned therein "shall be placed before the Advisory Board as constituted for consideration as to whether their premature release will be recommended." The categories of prisoners contemplated under Rule 320, insofar as it is relevant for the purpose of the present case, include prisoners sentenced to imprisonment for life, who have served half of their sentence including remission and have served not less than seven years of actual sentence. Another category is, prisoners who are over 65 years of age and have served not less than two and half years of sentence including remission, provided that they are serving the sentence for the first time only on conviction. Under Rule 321, the meeting of an Advisory Board is required to be held atleast once in a quarter. The Rule further stipulates the composition of the Advisory Board, which should contain atleast half of the members who do not belong to the Government Executive.

4. Remission is declared to be of three kinds, viz., ordinary, special and Government. From the Scheme of the Rules, it appears, "ordinary remission" accrues to the benefit of the prisoner every month on the prisoner fulfilling certain stipulations. "Special remission" is granted as a reward for special services enumerated under Rule 351 and such a "special remission" is to be awarded by the Superintendent of the Prison upto a period of 30 days and by the Inspector-General of the State upto 60 days. Though the Rules do not speak definitely as to how the "remission by the Government" is to be granted, presumably the Rules are referring to the "remission granted by the Government under the provisions of the Code of Criminal Procedure.

5. The functions of the Advisory Board are not clearly defined under the Prisons Rules. However, a reading of Rules 324 and 326, by necessary implication, leads to the conclusion that the Advisory Board shall consider the reports contemplated under Rule 324(A) and (B) and recommend the release of a prisoner on the basis of the material placed before it in the light of the Rules. After receiving such a recommendation, it is for the Government in exercise of its statutory power under Section 432 of the Code of Criminal Procedure, to pass an order of remission, provided the Government is satisfied that it is safe to release the prisoner.

6. The case of the petitioner is that though the Prisons Rules mandate, the constitution of Advisory Board for each . prison, the Government has not in fact constituted the Advisory Boards; hence there is a dereliction of the statutory duty and which dereliction offends Articles 14 and 21 of the Constitution, by which Fundamental Rights are guaranteed under the Constitution.

7. Counter-affidavits are filed by the respondents 2 and 3. In the counter-affidavit filed on behalf of the second respondent by the Additional Inspector-General of Prisons, the respondent submitted that there are 148 Sub-Jails, 10 District Jails and 7 Central Prisons in the State of Andhra Pradesh and by virtue

of Rule 8 of the Prisons Rules, convicts who are sentenced to imprisonment upto 2 years are confined in the District Jails and Sub-Jails and convicts who are sentenced to suffer imprisonment for the period exceeding 2 years are confined in the Central Prisons. It is further stated in the counter-affidavit, that there is no obligation for constituting an Advisory Board with regard to the District and Sub-Jails, which proposition is not disputed by the learned Counsel for the petitioner and at any rate it does not fall for the consideration of this Court in the present case, in view of the fact that the prisoner in question is a life convict and undergoing imprisonment in Central Prison, Warangal.

8. With reference to the Warangal Central Prison, the second respondent stated in the counter-affidavit, that the Government by G.O. Rt. No.2938 Home (Prisons-B) Department, dated 14-11-1997, appointed four persons as non-official members of the Advisory Board to the Central Prison for a period of three years and therefore an Advisory Board as far as the Warangal Central Prison is concerned, does exist. With reference to the other Central Prisons, the counter-affidavit is silent, but the learned Government Pleader Sri Ratnesh Ranganathan, representing the learned Additional Advocate-General, fairly stated that no Advisory Boards have been constituted, in the sense, that no non-official members were nominated by the Government and in the absence of such nominations, the composition of the Advisory Boards is incomplete.

9. Coming to the facts of the case, the second respondent in his counter-affidavit stated that the prisoner-Sri Korukanti Ratna Rao completed 3 years 2 months and 18 days of actual sentence as on 6-10-1998 and has undergone 7 years 2 months and 23 days including remission. Therefore, in view of Section 433A of the Code of Criminal Procedure, which stipulates, a convict falling under either of the two categories mentioned in the said Section, shall not be released from the Prison unless he had served atleast 14 years of imprisonment. The case of the petitioner cannot be considered for premature release as it falls squarely within the prohibition u/s 433-A of the Code of Criminal Procedure. Further, it is the stand of the second respondent that whatever be the stipulations for premature release of a prisoner as contained in the Prison Rules, the same being repugnant to an express provision of the Code of Criminal Procedure, which is a law made by the Parliament, to that extent the provisions of the Prisons Rules must give way to the mandate of the Parliament and hence the petitioner cannot claim any benefit under the Prisons Rules.

10. The learned Counsel for the petitioner-Sri K. Balagopal, submitted that the respondents have clearly misconstrued the scope of the power of premature release provided under the Prisons Rules. Further, the Prisons Rules are made by the State in exercise of the power under Article 161 of the Constitution of India, read with rule making power of the Prisons Act and therefore the question of the provision u/s 433-A of the Code of Criminal Procedure, overriding the beneficial provisions of the Prisons Act does not arise; therefore, the prisoner is still entitled to the benefit of the provisions of the Prisons Rules. Lastly he submitted

that even if it is held that the Prisons Rules are overridden by Section 433 of the Code of Criminal Procedure, the power under Article 161 of the Constitution of India and the power u/s 432 of the Code of Criminal Procedure, to remit the sentences of those life convicts beyond the period of 14 years of imprisonment is still to be guided by some principles and the exercise of the power without any such rules would still be an uncanalised and arbitrary power. G.O. Ms. No.193, dated 11-8-1997 having been issued by the State, directing the release of certain prisoners, after granting remission of sentence of the unexpired residue of the sentence to certain enumerated categories of prisoners is arbitrary and illegal and only the procedure contemplated under the Prisons Rules must be followed by the State for exercising the power of remission. In support of his submission, the learned Counsel for the petitioner relied heavily on a judgment of the Supreme Court in Maru Ram and Others Vs. Union of India (UOI) and Others, . Before we proceed to examine the implications of the argument of the learned Counsel and the judgment relied upon by him, it is worthwhile noting that G.O. Ms. No. 193 dated 11-8-1997 reads as follows:

"Order:

On the occasion of the Golden Jubilee Celebrations of India's Independence the Government have decided to grant Remission of sentence to certain categories of prisoners who have been convicted for offences against laws relating to matter to which the Executive Power of the State extends.

(2) In exercise of the powers conferred by Article 161 of the Constitution of India, the Governor is pleased to remit the unexpired residue of sentence of the following categories of prisoners in the State who have been convicted by Civil Courts of Criminal Jurisdiction:

(a) All the convicted prisoners sentenced to imprisonment for life and governed by Section 433-A Cr.PC, and who have undergone an actual sentence of 7 years and total sentence of 10 years as on 15-8-1997; and

(b) all convicted prisoners sentenced to imprisonment for life and governed by Section 433-A Cr.PC, aged more than 65 years and have undergone an actual sentence of 7 years as on 15-8-1997.

(3) All prisoners eligible for release as on 15-8-1997 under para (2) above shall be released.

(4) The remissions and reduction of sentences ordered in para (2) above, shall also apply to prisoners who have been convicted by Courts situated within the State of Andhra Pradesh and are undergoing sentence in other States, but shall not apply to the following categories of prisoners, namely:

(i) Prisoners convicted and-sentenced by Courts situated outside the State of Andhra Pradesh;

(ii) Prisoners convicted of offences against laws relating to a matter to which the

executive powers of the Union extends;

(iii) Prisoners involved in and convicted for offences related to communal incidents;

(iv) Prisoners convicted under the Essential Commodities Act, and

(v) Prisoners convicted under the Protection of Civil Rights Act, 1955.

(5) The Director-General and Inspector-General of Prisons and Director of Correctional Services, A.P., Hyderabad is requested to take action accordingly to release the prisoners as shown in Annexure I and II to this order.

(By order and in the name of the Governor of Andhra Pradesh) V.S. Ravi, Prl. Secretary to Government."

11. It can be seen from the above, the said G.O., is purported to have been issued in exercise of the power conferred on the Governor of the State of Andhra Pradesh, by virtue of Article 161 of the Constitution of India.

12. In contra-distinction to Rule 320(g) of the Andhra Pradesh Prisons Rules, which provides that prisoners who are over 65 years of age and have served not less than two and half years of their sentence including remission, are entitled to be considered by the Advisory Board, G.O. Ms. No. 193, dated 11-8-1997 provides that only those of the convicts who are above 65 years of age, but have undergone an actual sentence of seven years as on 15-8-1997, be released. The occasion for such an exercise is for the Golden Jubilee Celebrations of India's Independence.

13. In the above factual background, the submissions of the learned Counsel for the petitioner are to be examined. The first submission of the petitioner that the Prisons Rules are made by the State in exercise of the powers under Article 161 of the Constitution, read with rule making power of the Prisons Act, is to be rejected straightaway in view of the decision of the Supreme Court in Maru Ram's case (supra). At para 16 of the said judgment, their Lordships held that the Prisons Rules are made in exercise of the power conferred on the State Government u/s 59 of the Prisons Act, 1894. Apart from the fact the very Rules expressly declare that they are made in exercise of the power u/s 59(5) of the Prisons Act, 1894. Though the Prisons Act, 1894, is deemed to be a Central Act, the rule making power thereunder, is vested with the concerned State Governments, as the Act has All India application and the local conditions of each one of the States will have to be taken into consideration while framing the rules for effective implementation of the Central Act. Such a rule making power has been vested with the State Government. Even the tenor of the Rules indicates that while granting the benefit of remission under the Rules, the final order of release is required to be passed by the State Government in cases where the convict is undergoing a sentence for an offence against any law relating to a matter to which the executive power of the State and such an order is to be passed by the Central Government, if the convict is undergoing imprisonment for

an offence relating to a matter to which the executive power of the Central Government extends. The Rules do not refer to either the Governor or the President in the matter of passing of such orders, whereas under Articles 72 and 161 of the Constitution, the power is vested with the President or the Governor, as the case may be, although they are required to exercise the power of clemency on and only in accordance with the advise of the respective Council of Ministers.

14. There is a clear difference between the statutory power of the State Government to grant remission and the constitutional power of either the President or the Governor. The Supreme Court categorically observed in Maru Ram's case (supra) at para 59:

"59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are co-extensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and unapproachable and cannot suffer the vicissitudes of simple legislative processes....."

15. The State Government's power is circumscribed by the relevant law i.e., in the provisions of the Code of Criminal Procedure or the provisions of the Prisons Act and the Rules made there under, the constitutional power of the President and the Governor is not subjected to any such factors. Looking at the Scheme of the Prisons Rules, it is very clear that remission is to be granted for good conduct during the course of the imprisonment at a stipulated scale or special remission as a reward for exemplary conduct as already noticed above, whereas the constitutional power to remit, need not be exercised on such limited consideration. Dealing with the nature of the clemency power, the Chief Justice Taft on behalf of the Supreme Court of America in *Ex Parte Grossman*, 267, US, Page 87 said:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the Courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to prevent it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."

Hamilton wrote justifying the need for the existence of such power in the executive held:

"..... in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall."

16. So, from the above, it appears the considerations for the exercise of the executive clemency are too wide and cannot be restricted by any legislative prescriptions. In this context, it is also worthwhile noting that the Supreme Court in Morn Ram's case (supra) at para 72 also held:

"(4) We hold that Section 432 and 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power and Section 433A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like."

If the power under Sections 432 and 433 of the Code of Criminal Procedure, are not manifestations of the constitutional power under Articles 72 and 161, it would be illogical to hold that the Remission Rules, which are expressly claimed to have been made under the statutory power of the Prisons Act, are a manifestation of the executive clemency power under Articles 72 and 161 of the Constitution.

17. Therefore, we are of the view that the Prisons Rules are made only in exercise of the statutory power conferred under the Prisons Act, 1894 and not in exercise of the constitutional power vested with the President or the Governor, either under Article 72 or Article 161 respectively.

18. The second submission made by the learned Counsel for the petitioner is inextricably inter-linked with the first submission. In view of our finding that Rules under the Andhra Pradesh Prisons Rules are made only in exercise of the power conferred on the State Government u/s 59 of the Prisons Act, 1894, the second submission of the petitioner that the Prisons Rules override the provisions of Section 433A of the Code of Criminal Procedure, is to be rejected and in the very judgment relied upon by the learned Counsel for the petitioner in Mam Ram's case (supra), their Lordships of the Supreme Court in fact made a categoric declaration to that effect. At para 72 of the said judgment, their Lordships observed:

"(2) We affirm the current supremacy of Section 433A over the Remission Rules and short-sentencing statutes made by the various States."

19. In the context of a prisoner who is sentenced to suffer imprisonment for life; the effect of Remission Rules was also discussed by their Lordships of the Supreme Court in Maru Ram's case (supra), at para 25:

"25. Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant-release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of the sentence which has been highlighted in *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, a . Where the sentence is indeterminate and of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment (sic) a la Section 55 IPC. On the basis of a rule which did make that equation. Godse sought his release through a writ petition under Article 32 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order u/s 401 of the Criminal Procedure Code, 1898, (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Articles 72 and 161 of the Constitution, *Godse (supra)* is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life". The legal position has been set out in the context of remissions in life sentence cases thus *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, a :

Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions-ordinary, special and State -and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appropriate Government to remit the sentence u/s 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government;....."

From the above, it can be seen that only an order of the State Government u/s 432 of the Code of Criminal Procedure, would enable the convict, sentenced to imprisonment for life to be set at large and any amount of remission earned, would not enable him to claim premature release. The Parliament by an express provision u/s 433A of the Code of Criminal Procedure, limited the discretion available to the "appropriate government" in the specified classes of cases, of which sentence of imprisonment for life is one. If that is the latest expression of the will of the sovereign law making body, the contention that in view of Rule 320(g) of the Prisons Rules, prisoners over 65 years of age should be considered for premature release on their serving two and half years sentence including remission, cannot be accepted and is opposed to all canons of statutory interpretations and the principles of constitutional law. A piece of subordinate legislation cannot override the provisions of an enactment made by the sovereign law making body.

20. The last submission of the petitioner is that the power under Article 161 of the Constitution or Sections 432 and 433 of the Code of Criminal Procedure, are still to be guided by some principles and there cannot be any arbitrary exercise of such power. In principle, there cannot be any dispute with this submission, as the Supreme Court categorically laid down that such power cannot be exercised arbitrarily, on the facts of the present case, can it be said that the power is exercised arbitrarily. As we have already noticed that the impugned G.O., which is purported to have been issued in exercise of the power vested in the Governor under Article 161 of the Constitution, purports to remit the unexpired residue of the sentences of the convicted prisoners, sentenced to imprisonment for life, who could not be released in view of the express provision u/s 433A of the Code of Criminal Procedure, within 14 years, but for the exercise of the clemency power. While exercising such power with reference to the said category of prisoners who are aged above 65 years, the G.O., stipulates that only those who had undergone an actual sentence of 7 years as on 15-8-1997, would be entitled to the benefit of the G.O., the application of the benefit is uniform to all the prisoners falling in the class i.e., who are above 65 years of age. We do not see how such a stipulation could be characterised as arbitrary or illegal. We, therefore, reject this contention also.

21. Having regard to the above discussion, we do not see any merits in this writ petition and the same is accordingly dismissed.

22. During the course of the hearing of the writ petition, it has been fairly stated before us that constitution of Advisory Boards as required under Prisons Rules is not yet completed. We, therefore, direct the first respondent-Government of Andhra Pradesh to constitute the required number of Advisory Boards in terms of Prisons Rules preferably within a period of six months from the date of receipt of a copy of this order enabling the concerned authorities to recommend the cases of such of those prisoners for remission of the sentences.