

(2024) 04 CAL CK 0024
In the Calcutta High Court
Case No : WPA No. 5036 Of 2024

Kanchi @ Sanjit Makhal And Another

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 09-04-2024

Acts Referred:

Indian Penal Code, 1860 — Section 376(g)
Code Of Criminal Procedure, 1973 — Section 432, 433, 433A

Citation : (2024) 04 CAL CK 0024

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Uday Sankar Chattopadhyay, Dibakar Sardar, Trisha Rakshit,
Rajashree Tah, Aishwarya Datta, Sk. Md. Galib, Tamal Taru Panda

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioners were convicted and sentenced, respectively on June 28 and June 29, 2010, for the commission of gang-rape under Section 376(g) of the Indian Penal Code. Since prior to that, the petitioners have been in incarceration.

2. After spending about two decades in jail, the petitioners applied for premature release. On September 2, 2022, a meeting was held by the State Sentence Review Board (SSRB), West Bengal, where the petitioners were not recommended for premature release. This Court, vide order dated January 10, 2023 passed in WPA No. 28437 of 2022, set aside the recommendation of the SSRB, which was followed by a special meeting of the SSRB for reconsideration of the issue of premature release and again rejected the petitioners' plea for premature release on February 17, 2023.

3. Another writ petition bearing WPA No. 20731 of 2023 preferred against the said rejection was disposed of on October 11, 2023 directing a further reconsideration.

4. Thereafter, on December 6, 2023, the SSRB again rejected the petitioners' request for premature release, prompting the petitioners to file the present writ petition.

5. Insofar as the petitioner no. 1, Kanchi alias Sanjit Makhal is concerned, his case was considered and rejected by giving certain reasons by the SSRB on December 6, 2023.

6. Kabu Malik's case was, however, not considered in the said meeting. It was merely recorded that the request of Kabu Malik (petitioner no. 2 herein) was considered and rejected in the 69th meeting of the SSRB held on September 2, 2022. The minutes of the proceedings of the meeting dated September 2, 2022, however, indicate that 99 life convicts were recommended for premature release. 14 cases, including that of Kabu Malik, it was decided, would be reviewed again in the next meeting after obtaining reports with regard to advisability of release from the jurisdictional police authorities where the crimes occurred and the place where the convicts concerned desired to reside after their release. Thus, insofar as petitioner no. 2, Kabu Malik is concerned, no decision was taken at all on September 2, 2022 but his case was merely postponed, on the ground that the same would be reviewed upon getting reports from the jurisdictional police authorities.

7. However, in the meeting dated December 6, 2023, insofar as Kabu Malik is concerned, it was merely stated that the prayer of premature release in respect of the said convict was considered and rejected in the 69th meeting held on September 2, 2022, which finding was patently perverse. As such, contrary to the finding of the SSRB dated September 2, 2022 that Kabu Malik's case would be reviewed upon obtaining reports from the jurisdictional police authorities, there was no such review at all. Thus, Kabu Malik's request for premature release was not considered at all despite the direction of this Court.

8. Hence, insofar as the petitioner no. 2 is concerned, there was virtually no consideration of his prayer for premature release at all. Such inaction on the part of the SSRB with regard to the petitioner no. 2 is deplorable, to say the least.

9. Insofar as petitioner no. 1 is concerned, his case was considered and rejected primarily by considering the nature of the crime and the impact of the case on the victim and her family. The SSRB proceeded on the premise that one of the victims had no other option but to commit suicide within a few days of the incident. The "criminal mindset" and "pre-meditated commission of offence" at the relevant juncture formed the premise of the SSRB recording its apprehension that the petitioner no. 1 has mental and physical potentiality to commit similar nature of organized crime. On such ground and such ground alone, the Board unanimously refused to recommend the premature release of petitioner no. 1.

10. Let us now consider the relevant yardsticks which are to be taken into consideration in cases of premature release.

11. The parameters of premature release were considered in *Ram Chander v. State of Chhattisgarh* and another, reported at(2022) 12 SCC 52. In the said judgment, the Supreme Court recorded, on the issue of proper exercise of the remission power by the Executive and the scope of judicial review thereof, that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions because the Administrative Rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Penal Code, 1860. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 432, Cr.P.C.

12. The Supreme Court observed that the appropriate Government has the undoubted discretion to remit or refuse to remit and when it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner.

13. However, the said general guidelines provided the broad contours of the interplay between the executive power of remission and the scope of judicial review. More appropriate in the present context is the judgment of *Rajo alias Rajwa alias Rajendra Mandal v. State of Bihar and others*, reported at 2023 SCC OnLine SC 1068, which was rendered by a Bench of co-equal strength as *Ram Chander* (supra), considering, among other precedents, the proposition laid down in *Ram Chander* (supra).

14. The Supreme Court, in *Rajo alias Rajwa* (supra), flagged certain issues pertaining to premature release. It was observed that a report by the Presiding Judge (of the court which tried the case of the convict) is only one of the factors and overemphasis cannot be laid on the same. Such a report cannot be relied on as carrying predominance, if it focuses on the crime with little or no attention to the criminal. While so observing, the Supreme Court highlighted that the Presiding Judge would not be the same Presiding Judge who had occasion to observe the convict at a much earlier point of time and thus form an opinion. At this stage, the Presiding Judge would only look into the records leading to conviction. Relevant factors such as post-conviction conduct, particularly resulting in the prisoners' earned remissions, their age and health, work done, length of actual incarceration, etc., rarely fall within the said judge's domain. It was stressed that as has been repeatedly emphasized, the aim and ultimate goal of imprisonment even in the most serious crime is reformatory after the offender undergoes a sufficiently long spell of punishment through imprisonment.

15. In *Maru Ram v. Union of India and others*, reported at(1981) 1 SCC 107, it was held that had his in-prison good behaviour, if rewarded by reasonable remissions linked to improved social responsibility, nurtured by familial contacts and liberal parole, culminated by predictable, premature release, the purpose of habilitation would have been served. If law, Section 433-A of the Code of Criminal Procedure in the said case, rudely refuses to consider the subsequent

conduct of the prisoner and forces all convicts, good, bad and indifferent, to serve a fixed and arbitrary minimum, it is an angry fiat untouched by the proven criteria of reform.

16. The Supreme Court flagged in *Rajo alias Rajwa* (supra) another issue in respect of the "latent (not always) prejudices of the crime" that the police as well as the investigating agency may be citing especially in case of heinous crimes. These biases, it was held, may inform the report of the police and cannot be given determinative value. Doing so will potentially deflect the appropriate Government from the facts relevant for consideration for premature release and instead focus almost entirely upon facts which evoke a retributive response.

17. The Supreme Court sounded an alarm that apart from the other considerations on the nature of crime, whether it affected the society at large, the chance of its recurrence, etc., the appropriate Government, while considering the potential of the convict to commit crimes in the future, whether there remains any fruitful purpose of continued incarceration and the socio-economic conditions, review: the convict's age, state of health, familial relationships and possibility of reintegration, extent of earned remission and the post-conviction conduct including, but not limited to, whether the convict has attained any educational qualification whilst in custody, volunteer services offered, job/work done, jail conduct, whether they were engaged in any socially aimed or productive activity and an overall development as a human being. The Board, thus, should not entirely rely either on the Presiding Judge or the report prepared by the police. The Supreme Court in fact opined that it would also serve the aims of justice if the appropriate Government had the benefit of a report contemporaneously prepared by a qualified psychologist after interacting/ interviewing the convict that has applied for premature release. Special remission for good conduct was also highlighted.

18. The Supreme Court underlined the need to balance societal interest with the rights of the convict, to the tune that the sentence should not be unduly harsh or excessive.

19. The minority view in *Union of India v. V. Sriharan alias Murugan and others*, reported at (2016) 7 SCC 1 was also taken into consideration in *Rajo alias Rajwa* (supra), which had cautioned the court from making sentencing rigid. It was held in *Sriharan's Case* that any order putting the punishment beyond remission will prohibit exercise of statutory power designed to achieve the same purpose as under Section 432/433 of the Code of Criminal Procedure. In the view of the Court, it cannot and ought not to deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner would be condemned to live in the prison till the last breath without there being even a ray of hope to come out. This stark reality will not be conducive to reformation of the person and will in fact push him into a dark hole without there being semblance of a light at the end of the tunnel.

20. The Supreme Court also considered Ram Chander's case in *Rajo alias Rajwa alias Rajendra Mandal (supra)*. It also took into consideration the decision in *State of Haryana and others v. Jagdish*, reported at (2010) 4 SCC 216, where it was recognized that if a more liberal policy exists on the date of consideration, the benefit should be provided.

21. Thus, *Rajo alias Rajwa (supra)* is a landmark in the roadmap of Indian jurisprudence on premature release of convicts.

22. In the above context, the views of the National Human Rights Commission (NHRC) as reflected in its proceedings dated October 20, 1999 are also relevant. Annexure-A thereto speaks about premature release of prisoners undergoing sentence of life imprisonment. Apart from laying down the composition of the State Sentence Review Board (SSRB), the eligibility criteria for premature release are also considered. The said report lays down a full-fledged ecosystem of consideration, with its own checks and bounds, which is to precede premature release decisions.

23. At the first instance, the Superintendent of Jail is to prepare a comprehensive note. The contents thereof must include the following:

- i) The family and societal background of the prisoner;
- ii) The offence for which he was convicted and sentenced and the circumstances under which the offence was committed;
- iii) The conduct and behavior of the prisoner in jail during the period of incarceration;
- iv) Behaviour/conduct during the period he was released on probation leave;
- v) Change in his behavioral pattern and jail offence, if any, committed by him and punishment awarded to him for such offence;
- vi) Physical/mental health or any serious ailment with which the prisoner is suffering, entitling his case special consideration for his premature release.

24. The Jail Superintendent's recommendation as to whether he favours the premature release is also to be contained in the note.

25. The matter is to be next referred to the Superintendent of Police of the District where the prisoner was ordinarily residing at the time of commission of the offence for which he was convicted or where he is likely to be re-settled after his release from the jail.

26. The Superintendent of Police is to cause an enquiry, following his recommendation. The recommendation shall not be a mechanical act and oppose the premature release of the prisoner on untenable and hypothetical grounds/apprehensions. In case the Superintendent of Police is not in favour of the premature release, he shall justify the same with cogent reasons and materials.

27. The Superintendent of Jail shall also make a reference to the Chief Probation Officer of the State who shall either hold or cause to be held an enquiry by a Probation Officer in regard to the desirability of the premature release of the prisoner, having regard to his family and social background, his acceptability by his family members and the society, prospects of the prisoner for rehabilitation and leading a meaningful life as good citizen. He will also not act mechanically and recommend each and every case for premature release but justify his recommendations by reasons/materials.

28. Another layer of consideration is an examination by the Inspector General of Prisons, bearing in mind the reports/recommendations of the Superintendent of Jail, Superintendent of Police and the Chief Probation Officer.

29. It has been highlighted in Clause 6.3 that while considering the case of premature release of a particular prisoner, the Board shall keep in view the general principles of amnesty/remission of sentence as laid down by the State Government or by Courts as also earlier precedents in the matter. The paramount consideration before the SSRB shall be the welfare of the prisoner and the society at large. The Board shall not ordinarily decline a premature release of a prisoner merely on the ground that the police have not recommended his release on certain far-fetched and hypothetical premises. The Board has also to take into account the circumstances in which the offence was committed and whether the prisoner has the propensity and is likely to commit similar or other offence again.

30. Although certain categories of convicted prisoners undergoing life sentence (including rape, which is relevant to the present case), according to the report of the NHRC, may not be considered ineligible for premature release, the said rider is only by way of a guideline and does not absolutely debar prisoners convicted under the said offence to be considered for premature release, as reflected in the philosophy propounded in Rajo alias Rajwa alias Rajendra Mandal (supra).

31. Hence, while considering a case of premature release, all the above factors have to be kept in mind, the underlying refrain being that the purpose of punishment is predominantly reformatory and not retributive.

32. Let us now consider the present case in the light of the above yardsticks.

33. In the case of petitioner no. 1, Kanchi alias Sanjit Makhal, the vital criteria as laid down by the Supreme Court and in the NHRC guidelines were utterly overlooked.

34. The family and societal background of the petitioner, his conduct and behaviour in jail and during parole, change in behavioural pattern and jail offence as well as physical and mental health were not taken into account at all.

35. The Supreme Court has repeatedly reiterated, particularly in the case of Rajo alias Rajwa alias Rajendra Mandal (supra) that a more liberal policy has to exist in cases of premature release. It was observed that any order putting the

punishment beyond remission will prohibit exercise of statutory power designed to achieve the same purpose as under Section 432/433 of the Code of Criminal Procedure. It cannot and ought not deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner would be condemned to live in the prison till the last breath without there being even a ray of hope to come out, which stark reality would not be conducive to reformation of the person and push him into a dark hole without there being a semblance of a light at the end of the tunnel.

36. Two important issues were flagged by the Supreme Court, which are relevant in the present context as well. The first was that any observation in the report by the Presiding Judge regarding the conviction would only be a reflection of the opinion of the Presiding Judge who decided the matter two decades back, when the circumstances were entirely different. The Supreme Court has observed in *Rajo alias Rajwa alias Rajendra Mandal* (supra) that over-emphasis cannot be laid on such factors and such report cannot carry predominance if it focuses on the crime with little or no attention to the criminal. In the present case, the SSRB is guilty of precisely the same approach, focussing primarily on the nature of the crime and not the criminal.

37. The relevant factors such as post-conviction conduct, particularly resulting in the prisoner's earned remissions, work done, length of actual incarceration, etc., have not been considered at all. The Supreme Court also cautioned about placing over-reliance on the police report, since "latent (not always) prejudices of the crime" inflicts the police as well as the investigating agency in citing the heinous nature of the crime. These biases, it was held, may inform the report of the police and cannot be given determinative value. Doing so will potentially deflect the appropriate Government from the facts relevant for consideration for premature release and instead focus almost entirely upon facts which evoke a retributive response.

38. The total focus of the SSRB in the impugned rejection for the request of petitioner no. 1, was, unfortunately, on the details of the crime which has been deprecated by the Supreme Court. The bias which may inform the report of the police, it was held, cannot be given determinative value but such has been the case here.

39. The petitioners committed the crime for which they have been convicted and imprisoned for over 22 years. Two decades back, a crime was committed by them which was undoubtedly heinous and might have had an impact on the victim and her family causing one of the victims to commit suicide subsequently. However, there is no reflection in the SSRB report as to whether the said impact still continues.

40. The criminal mindset and pre-meditated commission of offence 22 years back cannot be a ground for refusing premature release now. The only basis of apprehension of mental and physical potentiality of the petitioners to commit

similar crime was the nature of the crime committed 22 years back which is not a valid consideration at all. The more important considerations are the family and societal background of the petitioners, the conduct of the petitioners throughout incarceration and in parole and whether the petitioners have acquired any further skills or qualifications during the period of incarceration. The change in behavioural pattern is also a guiding principle.

41. In the impugned decision of the SSRB, it is recorded that the records of the correctional home where the petitioner no. 1 was incarcerated do not show any instance of undisciplined act. Nothing adverse is reported while availing parole too. Thirdly, the family members of the petitioner no. 1, according to the impugned decision itself, are also eager to accept the convict if released. Hence, the petitioner no. 1 wins on all relevant counts to justify premature release. The very fact that there was no undisciplined act over 22 years and nothing adverse is reported during parole inspires confidence that the petitioner no. 1 has been substantially reformed during his long period of incarceration and there has been a change in his behavioural pattern during custody for the better. If the conduct and behavioural pattern of the petitioner in jail was beyond reproach, there cannot be any reason why the petitioner should be refused premature release only by adverting to the shadows of his past, doubly penalizing him with a vengeance for a crime committed two decades back.

42. Since the family of the petitioner no. 1 is eager to take him back, there is a safety-net waiting to provide succour and support to the petitioner in his attempts at reintegration into mainstream society.

43. It is also to be kept in mind that if the mere age of the petitioner was a sufficient consideration for physical potentiality to commit a repeat crime, by the same logic all people of the same age as the petitioner would be susceptible to such inclination. Rather, when a person who has tasted the bitterness of two decades of imprisonment and knows fully well the possible repercussions of a repeat crime seeks premature release, he would be doubly cautious that he does not commit the same or any other crime again, which would send him back to a dark abyss and a point of no-return during the rest of his life. Thus, mere citing of the nature of the crime committed so long back is not a valid consideration at all.

44. Notably, the SSRB brushes aside the relevant considerations, all of which go in favour of the petitioner, but merely resorts to a vague mention of the details of the crime committed a long time back to refuse premature release, which is palpably contrary to the NHRC guidelines as well as the views of the Supreme Court.

45. The SSRB attributes pre-meditation behind the commission of offence. We find from the judgment of conviction of the petitioners passed on June 28, 2010, when the petitioners were already in custody for many years, that the learned Trial Judge relied on preponderance of probabilities to hold that before the

occurrence, the accused petitioners remained annoyed against PW1 and her family for their driving out one Badal Naskar from the village with announcement and threat to the accused person that they would not refund the advance money amounting to Rs. 30,000/- to one Basistha Bar. Again, the Trial Judge held that the accused persons had hopelessly failed to establish their defence "by preponderance of probability" when the prosecution successfully proved its case beyond reasonable doubts.

46. Insofar as the political perspective is concerned, it was observed by the learned Trial Judge that the PW1 was a supporter of a particular political party and the accused persons were supporters of the opposite party. There is no reflection in the impugned decision of the SSRB as to whether such animosity can still survive after the petitioners being out of touch for more than 22 years with any political party or having any other political connection. Thus, the dual factors of "criminal mindset" and "pre-meditated commission of offence" were given undue emphasis whereas they were entirely redundant after the passage of so many years and had a feeble base of preponderance of probability even in the judgment of conviction.

47. Thus, the very premise of the decision of the SSRB was bad.

48. Insofar as the petitioner no. 2 is concerned, the SSRB is guilty of palpable perversity since it deferred the consideration of premature release in its meeting dated September 2, 2022 awaiting police report but was careless enough to observe on December 6, 2023 that the case of the petitioner no. 2 was already considered and rejected in the said meeting of September 2, 2022, which is patently contrary to the records and thus perverse. Despite having deferred the matter for review on September 2, 2022, the SSRB relied on the said meeting of September 2, 2022 to hold absurdly that Kabu Malik's case was rejected in the said previous meeting, whereas it had not been so. Hence, insofar as petitioner no.2 is concerned, there was no consideration at all of his prayer of premature release. It is rather unfortunate that the SSRB, of which considerable sensitivity is expected in view of the personal liberty of a person being involved, adopted such a casual approach in deciding the fate of the petitioners.

49. It must be noted here that there is often a prevalent perception that in laying emphasis on the human rights of convicts or criminals, the rights of the victims and their families are overlooked. However, such notion, if applied to the present petitioners, will be completely misplaced. Here, both the petitioners have not only been convicted but have already suffered imprisonment for more than 22 years during the prime of their lives. As stressed again and again by the Supreme Court, punishment in modern criminology is not retributive at all, which would take us to a primitive barbarianism, but entirely reformatory, which is also reflected in "jails" being renamed as "correctional homes". Hence, the petitioners should not suffer twice over by virtual non-consideration of their requests for premature release, thereby denying them a second chance in life. Human resources in the form of reformed criminals are a valuable input to society and

ought not to be wasted in the dark confines of prison cells unnecessarily. The society cannot take up the cudgel for the victim on an inflated and misplaced notion of justice, since law has already taken up the cudgel and punished the convicts for over 22 years. Although premature release is not a matter of right but a matter of discretion of the State, the said discretion has been exercised most injudiciously in the case of the two petitioners herein.

50. Thus, the decision of the SSRB in refusing premature release to the petitioner no.1 and glossing over the non-consideration of the request of the petitioner no. 2 cannot be sustained at all. Although it is tempting to set the petitioner no. 1 free from here, since the exercise has been repeated for him all over at least thrice, the Court is inclined to exercise judicial restraint by giving another chance to the State through the SSRB to apply the correct yardsticks, elaborately dealt with above, and lay proper stress and weightage on the correct yardsticks instead of meandering along false leads which are not required to be emphasized at all in such considerations.

51. Accordingly, WPA No. 5036 of 2024 is allowed on contest, thereby setting aside the impugned decision of the State Sentence Review Board to reject the requests for premature release of the petitioners. The matter is sent back to the State Sentence Review Board to reconsider the cases of both the petitioner nos. 1 and 2 in the light of the yardsticks and observations as made above.

52. It is expected that such reconsideration shall be done at the earliest, positively by June 15, 2024.

53. There will be no order as to costs.

54. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.