

(1983) 07 KL CK 0008
In the High Court Of Kerala
Case No : O.P. No. 4438 of 1983

Krishnan Nair alias Manian

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 27-07-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 161, 21, 226, 72
Criminal Procedure Code, 1973 (CrPC) — Section 432, 432(1), 432(3), 433, 433A
Penal Code, 1860 (IPC) — Section 227

Citation : (1983) KLJ 649

Hon'ble Judges : P. Subramonian Poti, C.J.; K.S. Paripoornan, J

Bench : Division Bench

Advocate : K.S. Rajamoni as Amicus Curica, for the Appellant;

Judgement

Subramonian Poti, C.J.—One Krishnan Nair alias Maniyan son of Velayudhen Nair who is now undergoing a sentence of imprisonment in Central Jail, Trivandrum as convict No. 9266 sent a letter dated 4-3-1983 to this court, He stated therein that he had been convicted by the Sessions Court, Trivandrum in S. C. 46 of 1966 on 25-11-1969 and was sentenced to life imprisonment, that he was subsequently released, and that he was residing in his house pursuant to such release for more than a year when he was again arrested and sent back to jail. He pleads that in the circumstances he may be released from the prison. Thereupon we took notice of the complaint by him as an Original Petition under Article 226 of the Constitution and directed notice to the State and also called upon the learned Advocate General to furnish us all materials relating to the premature release of the petitioner and his re-arrest. Accordingly such materials have been made available to us. As stated, the petitioner was undergoing the sentence of life imprisonment in the Jail when he happened to be one of those prisoners whose cases were considered for premature release. Prisoners who had run long terms were proposed to be released prematurely. The council of Ministers took a decision on 1-2-1980 to grant special remission to such prisoners in the State. In exercise of the powers conferred by Article 161 of the

Constitution the Governor of Kerala ordered the premature release of 98 prisoners undergoing imprisonment in the various prisons of the State remitting the unexpired portion of their sentences. This order passed by the Governor in exercise of the power under Article 161 of the Constitution was pursuant to the decision taken by the council of Ministers in that behalf. The petitioner here was one of those covered by that order and consequently he was released on 24-12-1980.

2. It would appear that it was the practice of the jail authorities to take bonds from those who were being released prematurely to abide by certain conditions. The bond required those who were being prematurely released to be under the supervision of a probation officer for the rest of the term which covered by the sentence or 4 years whichever was shorter. One of the conditions of the bond is said to be that the released prisoner will have to present himself before the Probation Officer and must keep in contact with him periodically. The petitioner here seems to have been under the impression that since he was released he was not under such obligation. Consequently he did not visit the Probation Officer. It appears from the report available in the file of the Regional Assistant Director of Social Welfare, Trivandrum that the petitioner seemed to be under the impression that the Probation Officer was giving him unnecessary trouble by keeping contact with him. This was taken to be a violation of the condition of the bond and on that basis he was arrested forthwith and produced before the Chief Judicial Magistrate, Trivandrum, on 6-4-1982. The Chief Judicial Magistrate is seen to have remanded him to the Jail on such production. Thus he was back in Jail on 6-4-1982. It was nearly one year thereafter that he thought of writing to this court. Action was taken by this court on that petition. The facts ascertained disclose that the Government passed the order cancelling petitioner's remission of sentence on 5-2-1982 observing that the Inspector General of Prisons had reported that the petitioner had violated the condition of release and hence the order regarding premature release was being cancelled. Evidently the Government had only the report of the Inspector General of Prisons and the report of the Regional Assistant Director of Social Welfare, Trivandrum accompanying it when it passed the cancellation order and it is not disputed that there were no other materials and not even the response of the petitioner to such report, for, the petitioner was never notified about it.

3. Since the question involved consideration of many matters which would be of consequence to prisoners in general we thought that we would hear the matter in extenso. We have been assisted in this case by the very elaborate and considered arguments of learned Advocate General and equally assisted by Sri. K. S. Rajamony, Advocate who has argued at the court's request supporting the case of the petitioner. We record our thanks to both counsel.

4. The decision in this case in the light of the facts disclosed is easy though the case has brought up many questions for consideration by the court to which we will advert.

5. The power to grant remissions is conferred on the Governor of a State under Article 161 of the Constitution. This power is absolute and being a constitutional power is not liable to be restricted by any legislative provision.

Article 161 reads thus:

161. Power of Governor to grant pardons, etc. and to suspend, remit or commute sentences in certain cases:-The Governor of a State shall have power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

There is a similar power vested in the State Government u/s 432 of the Code of Criminal Procedure. When any person has been sentenced to punishment for an offence the appropriate Government is authorized under that Section to suspend the execution of such sentence or remit the whole or any part of the punishment without conditions or upon any conditions which the person sentenced accepts. Section 432(3) provides that if any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the government may cancel the suspension or remission and thereupon the person in whose favor the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence. While Article 161 speaks of grant of reprieves, pardons remission etc., it does not speak of imposition of conditions for the grant whereas Section 432 speaks of remissions or suspension with any condition or subject to any condition. Article 161 of the Constitution does not speak of any cancellation of remission or of any consequence of violation of any conditions of any remission nor does it expressly provide for exercise of any power to revive the execution of sentence under any circumstances whatsoever. S. 432(3), on the other hand, specifically provides for consequences in case the conditions are not fulfilled, conditions which are contemplated under Sec. 432(1) and contemplates remanding the person so subjected to remission to jail once again. If the case before us is one of remission under Sec. 432 the scope of our enquiry would have been much larger than what it has to be in this case. That the power under Article 161 of the Constitution is independent of power under Article 432 is a matter well settled. Reference may be made to *Maru Ram and Others Vs. Union of India (UOI) and Others*, . The conclusions were succinctly summarized in paragraph 72 of that decision. Finding No. 4 there is:

We hold that Section 432 and Section 433 are not a manifestation of Article 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.

The power is exercised by the Governor not on his own but on the advice of the council of Ministers. This again is positively found in the decision. In finding No. 8

the court holds thus:

The power under Article 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State.

The council of Ministers took a decision not in regard to any individual prisoner but generally in regard to a number of them. That again is permissible as found in the above said decision. It is the decision of the council of Ministers that culminated in the order issued in the name of the Governor. It is conceded by learned Advocate General and also seen from the file that neither at the time the council of Ministers decided the question of remission nor at the time the Governor okayed it was there any contemplation of imposition of any condition with regard to the remission. Therefore the decision of the Governor under Article 161 was a decision for unconditional remission. But ultimately when it was processed through the secretarial machinery and the resultant product emerged it referred to the remission "subject to Rules 547 and 548 of the Kerala Prison Rules, 1958" This we are told is a ritualistic recital normally incorporated in all cases of release, perhaps on the assumption that such a release can only be subject to such condition. In fact it is inappropriate in a case of remission under Article 161 for Rule 547 and 548 will operate only in relation to a release pursuant to the advisory Board's deliberations and premature release thereupon. That is not the case here. A reading of the above said rules would show that they deal with such a situation and not a situation arising from the exercise under Article 161. We are not going into it further, for, this is not a matter not in controversy here and the learned Advocate General also conceded that these rules will have no application when the remission order was under Article 161 of the Constitution. The plain consequence is that the petitioner must be taken to have been released without any condition. Remission of his sentence is not conditional upon compliance with the terms of any bond. Assuming that some bond has been taken from him nevertheless that bond will be inoperative and will not justify cancellation of the remission, re-arrest and remand to jail once again. Consequently we have to hold that the order of the Government passed on 5-2-1982 cancelling the remission granted to the petitioner as if he violated a condition imposed on him is inoperative. If so his arrest and detention in jail must be found to be not warranted by law. This would be sufficient to dispose of the petition.

6. Nevertheless we are embarking upon the consideration of many other questions in deference to the very learned arguments presented by both sides and since that may serve to alert the Government to the need for looking into this question expeditiously lest in other cases there may be tragic results by inattention to these matters.

7. It is necessary to advert to Rules 547 and 548 which may perhaps be said to have been framed with reference to S. 432(3) of the Criminal Procedure Code. That Section, as we have already indicated, enables (1) cancellation of remission

(2) arrest by any Police officer of the person who had been sentenced and whose sentence had been remitted and (3) remand to jail to undergo the unexpired portion of the sentence. When a prisoner is released in exercise of the power under S. 432(1) it is a release to which he is legitimately entitled, for, such a treatment is meted out to all similarly placed as he is. Normally a person who is sentenced does not undergo the whole term of his sentence. It is only in cases where the conduct in jail has been such as to merit no remission or forfeiture of remission that a person has to suffer the full length of his term. The Kerala Prison Rules envisage a scheme by which inducements are offered to prisoners to behave in a disciplined manner by offering them remissions for good conduct. Remissions earned under the various provisions accelerate their release. Cases of prisoners come up for consideration periodically before the Advisory Boards when such prisoners have undergone a specified portion of their sentences. Under the Kerala Prison Rules, in the case of lifers and long termers, when they have served 2/3rd of the sentences including remissions the Advisory Board considers their cases. In the normal course if there be not much of adverse remarks against them they get their premature release. Conditions are normally imposed for such release these being the conditions enumerated in the form referred to in Rule 547 of the Kerala Prison Rules. We are told that these forms in use are in English. Naturally this may be so for the reason that the Rules prescribe the form in English. The prisoners, on violation of conditions of this form, are said to be liable to forfeit the remission and consequent remand to jail. The main question urged before us is that the procedure adopted in this case and the procedure contemplated in Rule 547 and 548 cannot be said to be procedure that could be said to be just, fair and reasonable. The executive action contemplated under S. 432(3) of the Code, as also Rules 547 and 548 of the Prison Rules would be arbitrary action. There is no provision for deliberation at any stage. There is no provision calling upon the Government to consider any particular aspect of the matter and come to a finding of its own. There is also no provision enabling the person who is sought to be arrested and remanded to jail to answer any case against him or to produce any material or answer any material that the Government may have in its possession. There is no machinery for adjudication. This is particularly of considerable significance when we notice that the consequence of the action is to imprison man who legitimately and in accordance with law has been released in exercise of the power under S. 432 of the Criminal Procedure Code or Article 161 of the Constitution. Could that be done by resort to such arbitrary procedure? Would it not be violative of Article 21 of the Constitution? Article 21 has been understood in recent decisions as comprehending even reasonableness of procedure. We need only refer to *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another, Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, and *D.S. Nakara and Others Vs. Union of India (UOI)*, . Equally important is the question whether a bond would be of any consequence when the contents of the bond is perhaps not known to the prisoner at all. Merely asking a prisoner to sign a bond should not bind him to an obligation particularly when the bond is in a language foreign to the prisoner. If

he is to be held by the conditions of the bond it is necessary that the conditions of the bond is brought home to him. He must be supplied with a copy of the bond. He must be told what are the conditions to which he has subscribed as conditions for his release. The learned counsel Sri. Rajamony brought to our notice some of the conditions of the bond which, according to him are not relevant at all. That again is a matter which calls for consideration by the Government. The conditions which are imposed should not be vague but specific, for, the only violation of specific condition should, if at all, give rise to a case for action. Our attention is drawn to a discussion of this question in "Probation And Parole: Selected Readings" by Carter and Wilkins at page 441 where guidelines for revocation based on violation of condition of Probation is discussed by the Authors. There is a more difficult point we might have had to resolve in this case if we had not found on other material that the petitioner is even otherwise entitled to release. When the law provides for the consequence of an act by viewing such act as an offence what would be the scope of a provision such as S. 432(3) is the matter with which we are concerned here. S. 227 of the Indian Penal Code makes it a specific offence on the part of any person who has accepted any conditional remission of punishment if he knowingly violates any condition on which such remission was granted. The punishment for that offence is the punishment to which he was originally sentenced and if he has already suffered part of that sentence, then so much of the sentence as he had not already suffered. In other words which the Code of Criminal Procedure envisages arrest of a person who violates the conditions of remission and remand straightaway to jail S. 227 of the Indian Penal Code envisages for the same act of violation of prosecution and the punishment if the prosecution succeeds is the same as the consequence contemplated under S. 432(3), namely remanding of the person concerned for the rest of his term. In one case the person is subjected to an executive handling resulting in his being sent to jail and in the other he has a trial in a Criminal Court and he is sent to jail for identical period, but only if he is found guilty. In one case there is a fair trial in a court and in the other case there is not even an executive trial. Whether the provisions of S. 432(3) can operate in such circumstances is a question for serious deliberation. It cannot be that a person is subject to prosecution under S. 227 of the Indian Penal Code and simultaneously action is taken against him under S. 432(3). That would make no sense. If it is not cumulative but alternative then to choose between action under the Code of Criminal Procedure and executive acts would lead to an arbitrary choice which may bring result in violation of Article 14 of the Constitution. It is difficult to reconcile these provisions. That process is none too easy. Even so we would have attempted it had we been compelled to do so on the facts and circumstances of the case. But that is not called for in view of our decision on the other point. We leave the matter here. Our discussion here is intended to alert those concerned to the need for attention to these provisions. On the part of the State Government it is necessary that the Kerala Prison Rules must receive immediate treatment lest in cases arising hereafter where S. 432 is invoked charge of arbitrariness is raised.

The consequence is that the petitioner is to be released forthwith. It is regrettable that he has been in detention for more than one year which detention was not called for. We direct the Inspector General of Prisons to examine similar cases-We find that atleast two cases are covered by the same order of 3-2-1982, but whether there are any more cases we do not know-and forthwith report such cases to the Government. The Government shall thereon pass orders in regard to such prisoners also so that they also will be released from their illegal detention in jail.