
(2002) 03 PAT CK 0097
In the Patna High Court
Case No : Cr.W.J.C. No. 342 of 2001

Pankaj Kumar Choudhary @ Pankaj Kumar Pani	APPELLANT
Vs	
State of Bihar and Others	RESPONDENT

Date of Decision : 21-03-2002

Acts Referred:

Citation : (2002) 03 PAT CK 0097

Final Decision : Dismissed

Judgement

Chandramauli Kr. Pd., J.—Petitioner was put on trial for offence under Sections 302 and 307 of the Indian Penal Code and Section 27 of the Arms Act. The Sessions Judge, Vaishali by judgment dated 13.8.1991 passed in Sessions Trial No. 331/1988 held him guilty of the offence under Sections 302 and 307 of the Indian Penal Code and Section 27 of the Arms Act and sentenced him to undergo rigorous imprisonment for life for offence u/s 302 of the Indian Penal Code and three years each for offence u/s 307 of the Indian Penal Code and Section 27 of the Arms Act. Aggrieved by the same Petitioner preferred Criminal Appeal No. 332 of 1991 and a Division Bench of this Court by judgment dated 23rd April, 1992 dismissed the appeal. Special Leave to Appeal against the judgment of conviction and sentence failed before the Supreme Court.

2. The Petitioner earlier filed a writ application, which was registered as Cr.W.J.C. No. 234/1999 for his premature release. A learned Single Judge of this Court by order dated 17.8.1999 declined to issue any direction for the Petitioner's premature release but gave him liberty to make representation in accordance with law. The Petitioner thereafter filed Special Leave to Appeal (Crl.) No. 4108/1999 before the Supreme Court and by order dated 5.1.2000 the Supreme Court dismissed the Special Leave to Appeal with the following observations:

We have no doubt that the jail authorities will forward the case of the Petitioner to the Government for considering the case of premature release well in time. With this observation, this SLP is dismissed.

3. In the aforesaid SLP Petitioner filed a miscellaneous application which was registered as Cr. Misc. No. 3034/2001 inter alia praying for his premature release under Rule 529 of Bihar Jail Manual. The said application came up for consideration before the Supreme Court on 8.5.2001 and the Supreme Court dismissed the said application with the following observation:

We do not find any reason to entertain this petition, hence dismiss the same. However, the dismissal will not preclude the Petitioner from approaching the High Court.

4. Alleging the Petitioner's case for premature release has not been considered, Petitioner has preferred this application for a direction to the Respondents to consider his case for premature release under Rule 529 of the Jail Manual. It is the stand of the Petitioner that he had remained in jail for more than 11 years and six months and in case remission granted to him is taken into account, he has served the sentence for a period of more than 15 years. In the counter Affidavit filed on behalf of Respondent No. 4, this assertion of the Petitioner has not been denied and the stand of the Respondents is that the Petitioner having not remained in jail custody for actual period of 14 years, he shall not be entitled for premature release. It is their further stand that in view of Section 433A of the Code of Criminal Procedure, a convict for life has to necessarily remain in jail custody for actual period of 14 years and only thereafter his case can be considered for premature release.

5. Rule 529(ii) of the Bihar Jail Manual reads as follows:

529. The sentence of long-term prisoners including those sentenced to transportation for life, or for a definite term, can also be revised by Government at the recommendation of the Board of Visitors and the following orders have been issued by the Government on the subject:

(i) X X X X

(ii) The Board of Visitors shall consider only such cases as are placed before it by the Superintendent of the Jail, and the case of no prisoner shall be sent up by the Superintendent unless he has served half the period of his sentence in the case of a non-habitual prisoner and two-thirds of it in the case of a habitual prisoner. This period will include the remission which the prisoner has earned, including the remissions granted in celebration of public events. But the cases of prisoners sentenced to transportation for life shall be placed by the Superintendent before the Board after they have served 11 years including remission earned-provided their crime was not of a calculated and deliberate nature and was not carried out with great brutality and their conduct in jail has been almost uniformly good.

6. Mr. Basudeo Prasad relying on the aforesaid provision of Bihar Jail Manual contends that the Petitioner having served 11 years of sentence excluding remission, his case is required to be considered by the Board, which in turn, is required to send the case for consideration of the government for Petitioner's

premature release. Mr. S.D. Yadav, Government Advocate, appearing on behalf of Respondents, however, submits that in view of restriction put by Section 433A of the Code of Criminal Procedure as the Petitioner has been sentenced for imprisonment for life; he is not fit to be released from prison unless he had served at least 14 years of imprisonment.

7. The rival submissions necessitate examination of the provisions of the Code of Criminal Procedure, the provision of the Jail Manual and the decision of the State Government in this regard, but before I do so it is apt to refer to the judgment of Constitution Bench of the Supreme Court in the case of Maru Ram and Others Vs. Union of India (UOI) and Others, considering the effect of Section 433A vis-a-vis premature release of the convicts. In the said case the Supreme Court held as follows:

72. We conclude by formulating our findings (1) We repulse all the thrusts on the vires of Section 433A. May be, penological the prolonged term prescribed by the Section is supererogation. If we had our druthers we would have negated the need for a fourteen-year gestation for reformation. But ours is to construe, not construct, to decode, not to make a code.

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

(3) We uphold all remissions and short-sentencing passed under Articles 72 and 161 of the Constitution but release will follow in life sentence cases, only on Government making an order en masse or individually in that behalf.

(4) We hold that Sections 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.

(5) We negate the plea that Section 433A contravenes Article 20(1) of the Constitution.

(6) We follow Gopal Vinayak Godse Vs. The State of Maharashtra and Others, to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government.

(7) We declare that Section 433A, in both its limbs (i.e., both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14 years" actual imprisonment will not operate against those whose cases were decided by the trial Court before the 18th December, 1978 when Section 433A came into force. All "lifers" whose conviction by the Court of first instance was entered prior to that date are entitled to consideration by government for release on the strength of earned remissions although a release can take place only if Government makes an order

to that effect. To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the Court of first instance was before Section 433A was brought into effect.

(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or the Governor on their own. The advice of the appropriate government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or malafide. Only in these rare cases will the Court examine the exercise.

(10) Although the remission rules or short-sentencing provisions *proprio vigore* may not apply as against Section 433A, they will override Section 433A if the Government, Central or State, guides itself by the self-same rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking—a desirable step, in our view—the present remission and release schemes may usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the government if in some intractably savage delinquents. Section 433A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme.

8. Relying heavily on the observation made in sub paragraph 10 of the judgment, Mr. Basudeo Prasad contends that Rule 529 will govern the field and Petitioner's case for premature release is fit to be granted. Mr. Yadav, however, submits that in view of the decision of the State Government in the Department of Jail as contained in its memo No. 1474 dated 24.2.1984 prisoners who have been sentenced to life imprisonment can be released; only if such prisoners have suffered actual imprisonment for a period of 14 years and 20 years, including remission hence Petitioner's case is not fit to be considered under Rule 529 of the Rules.

9. Having appreciated the rival submissions I do not find any substance, in the submission of Mr. Prasad. From the judgment of Supreme Court in the case of Maru Ram (*supra*) it is evident that remission rule of short-sentencing provisions shall not apply, as against Section 433A of the Code of Criminal Procedure. The observation of the Supreme Court that until fresh rules are made the present remission and release schemes is to be taken as guidelines is recommendatory in

nature and in the words of Supreme Court itself "it is for the Government Central/ State to decide whether and why current Remission Rules should not survive until replaced by a more wholesome scheme."

10. As observed earlier the State Government has taken a decision to consider the case of life convict for premature release only when he has undergone 14 years of actual imprisonment and 20 years including remission. In view of the aforesaid decision of the State Government Petitioner has no right to be considered for premature release under Rule 529 of the Rules.

11. Mr. Basudeo Prasad then submits that admittedly Petitioner has undergone imprisonment for a period of 14 years including remission and as such his case deserves to be considered for premature release under Chapter XXI of the Bihar Jail Manual. In this connection Mr. Prasad has drawn my attention to the note appended to Rule 710 of the Rules, which reads as follows:

Note:-"The case of all life convicts and of all prisoners sentenced to more than 14 years imprisonment or transportation or to transportation and imprisonment for terms exceeding in the aggregate 14 years shall, when the term of imprisonment undergone together with any remission earned under the rules amounts to 14 years, be submitted for the orders of the State Government (in accordance with the instructions contained in the Home Department Resolution No. 159-67 (Jails), dated the 6th September, 1905)."

12. Before I advert to this submission, it is apt to answer an ancillary submission of Mr. Prasad. He emphasised that note referred to above is part of Rule 710 of Bihar Jail Manual; hence this forms part of the statute and therefore Respondents are under an obligation to consider the case of the Petitioner for premature release under this rule. Mr. Prasad does not seem to be correct on his assumption that note is part of the statute. In the Bihar Jail Manual (1999 Edn.) published by Malhotra Brothers, the publishers in reference to the note has stated as follows:

These notes should not be regarded as part of the statutory rules, they have merely been inserted for convenience of reference and with the object of assisting officers to interpret the rules.

13. The State Government in its letter referred to above has taken a decision, which reads as follows:

14. In view of the aforesaid, I am of the opinion that the case of the Petitioner for premature release is not fit to be considered as undisputed he has not served the actual sentence for a period of 14 years and the total period spent by him in jail including the remission is not 20 years.

15. As stated earlier the stand of Respondents is that the Petitioner has not suffered actual imprisonment for 14 years, hence his case for premature release is not fit to be considered. To overcome this Mr. Prasad submits that period of remission is to be counted for calculating the sentence. It is common ground that

in case the period of remission is not counted, Petitioner had not undergone 14 years imprisonment and in case it is counted he has crossed this barrier of 14 years.

16. Note referred to above provides that the case of all life convicts shall be submitted for orders of the State Government when the term of imprisonment undergone together with any remission earned under the rules amounts to 14 years. In the case of *Bhaglrath v. Delhi Administration* 1985 S.C. 1050 a Constitution Bench of Supreme Court has observed as follows:

The order passed by this Court in *Sukhlal Hansda* related to the cases of 24 prisoners who were sentenced to life imprisonment. Most of those prisoners had undergone imprisonment for a period which, after taking account of the remissions earned by them, exceeded fourteen years. It was held by this Court that, for the purpose of considering whether the cases of those prisoners should be examined for premature release under the relevant provisions of West Bengal Jail Manual, there was no reason why the period of imprisonment undergone by them as undertrial prisoners should not be taken into account. The Court directed that the cases of the prisoners should be considered by the State Government, both for the purpose of setting off the period of detention undergone by them as undertrial prisoners and for taking into account the remissions earned by them. The order passed by the Court does not discuss the point which arises before us though, the observations made therein are consistent more with the view which we have taken than with the view taken in *Kartar Singh and Others Vs. State of Haryana*,

17. In view of what has been provided in the note and the decision of the Supreme Court referred to above Mr. Prasad contends that the remissions earned by the Petitioner is fit to be counted for calculating the period of imprisonment.

18. It is relevant to state here that the State Government in Department of Jail by its memo No. 1474, dated 24.2.1984 in specific term, has taken a decision that the life convict, convicted after 18.12.1978 shall not be released from the prison unless and until he has undergone period of imprisonment for 14 years and the total period of imprisonment and remission is 20 years. It seems that the aforesaid decision has been taken by the State Government in view of the insertion of Section 433A of the Code of Criminal Procedure. Section 433A was inserted in the Code of Criminal Procedure by Central Act 45/1978 and came into force on 18.12.1978. In view of the clear and unambiguous decision of the State Government, not to release the person unless he had undergone imprisonment of 14 years and 20 years including the remissions, I am of the opinion that the case of the Petitioner is not fit to be considered for premature release.

19. Petitioner is litigating for premature release since 1999. He preferred a writ application before this Court for such a purpose, which was registered as Cr.W.J.C. No. 234/1999 and by order dated 17.8.1999 the said writ petition was dismissed. Thereafter Petitioner preferred Special Leave to Appeal (Crl.) 4108 of

1999 before the Supreme Court and the Supreme Court dismissed the SLP with a direction to the government for considering the case of premature release well in time.

20. Mr. Prasad submits that in view of the observation of the Supreme Court, the State Government is under an obligation to consider the case for premature release well in time. He submits that this Court should issue a mandamus directing the government to consider the case for premature release. He further submits that the State Government having failed to carry out the direction of the Supreme Court, this is a fit case in which this Court should issue mandamus directing for release of the Petitioner forthwith. He submits that such a course was adopted by this Court in the case of *Badri Mahto and Ors. v. Shri N.K. Chowdhary* 1989 PUR 593:

12. On the facts placed before us, however, it cannot be said that the opposite party has wilfully disobeyed the order of this Court and or by not following the direction of this Court he has committed such wrong that we should have sternly dealt with. At the same time, however, we have to take notice of the failure of the State Government in appointing the Board and or the Board in meeting at Schedule by the rule and consider the case of the Petitioners. Since time limit fixed by this Court and even the rules have not been observed by the Board or the Govt. of the State as observed by this Court, the Petitioners' claim has to be allowed. In *Cr.W.J.C. No. 78/85(R)* this Court clearly meant that, in case, the Petitioners' claim were not considered in accordance with Rule 529, they would be deemed to have been allowed. Although no mandamus was issued in express words, as a consequence of the failure of the authorities concerned in acting in accordance with Rule 529 this Court has, in its judgment, clearly spelled out a mandamus.

13. In our view it is a fit case in which the mandamus should issue *ex debito justitiae*. As a result of our discussion above, we hereby direct that the opposite party shall release the Petitioners forthwith. Let a writ in the nature of mandamus accordingly issue. Rule of contempt, however, is discharged.

21. I do not find any substance in this submission of Mr. Prasad. As observed earlier the Supreme Court by its order dated 5.1.2000 passed in Special Leave to Appeal (Crl.) 1408/1999, directed the government for considering the case for premature release well in time. The direction of the Supreme Court to consider the case for premature release, would obviously mean consideration in accordance with law. The Supreme Court did not indicate rule of the executive decision under which the case of the Petitioner deserved to be considered. Thereafter *Cr. Misc. No. 3094/ 2001* was filed contending that Petitioner deserves to be released prematurely in view of Rule 529 of Bihar Jail Manual. The said application was dismissed observing that dismissal will not preclude the Petitioner from approaching the High Court.

22. As I have not found any merit in the case of the Petitioner for release either

under Rule 529 or the note referred to above, no mandamus can be issued for premature release of the Petitioner.

23. In the result, I do not find any merit in this application. The application stands dismissed.