

(1998) 03 OHC CK 0023
In the Orissa High Court
Case No : O.J.S. No. 11630 of 1997

Rabi Prakash Awasthi

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-03-1998

Acts Referred:

Constitution of India, 1950 — Article 161, 20(1), 72
Criminal Procedure Code, 1973 (CrPC) — Section 306, 401, 401(1), 401(2), 401(3)
Orissa Jail Manual Rules — Rule 518, 518(1), 518(2), 708, 708A
Penal Code, 1860 (IPC) — Section 302, 304, 307, 326, 54
Prisons Act, 1894 — Section 59(5)
Representation of the People Act, 1951 — Section 7

Citation : (1999) 87 CLT 222 : (1998) CriLJ 3268

Hon'ble Judges : S.C. Datta, J;A. Pasayat, J

Bench : Division Bench

Advocate : G.P. Dutta, M.R. Nayak and A.A. Khan, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A. Pasayat, J.—Petitioner, a life convict detained in Balasore District Jail has challenged the action of the opposite parties in not accepting his prayer for premature release in terms of Section 433 of the Code of Criminal Procedure, 1973 (in short, the "Code"). Petitioner was convicted for an offence punishable u/s 302 of Indian Penal Code, 1860 (in short "IPC") by the learned Sessions Judge, Sambalpur in S.T. Case No. 70 of 1977 and was taken to jail custody on 1-9-1978. By judgment dated 23-1-1979 learned Sessions Judge found the accused guilty and sentenced him to undergo imprisonment for life. Order of conviction and sentence passed by learned trial Judge was confirmed by this Court in appeal. On completion of fourteen years" of imprisonment, a reference was made to the State Government as required under Rule 518(1) of Orissa Jail Manual (in short, "Manual") for consideration of the question whether petitioner was to be released. The State Government was of the view that it was not

desirable to release the petitioner, Petitioner takes a plea that he has already been inside jail for fourteen years without remission. He was allowed to go on parole on several occasions. On supposition, conjectures and surmises the State Government has refused to direct his release. Therefore, he has prayed for a direction to the State Government to consider the matter.

2. In the counter-affidavit filed by the State of Orissa in Law Department, it has been indicated that petitioner, a life convict (No. 8019/A) has on erroneous premises sought for release from custody on completion of fourteen years' imprisonment. Petitioner's case was referred to I.G. of Prisons under Rule 518(1) and (2) of Manual to the State Government for consideration of premature release. After receipt of the proposal from I.G. of Prisons, Superintendent of District Jail, Balasore, S.P. and Collector, Jharsuguda were required to give their opinion. The S.P. and Collector declined to recommend premature release of the petitioner on the ground that petitioner is a terror in the locality and the local residents are mortally afraid of him, relations of the petitioner are still inimical to him. Therefore, premature release of petitioner will be detrimental to the peace of the locality and it will also not be safe in the interest of petitioner to be released as hostility still subsists. The State Government considered the entire matter in its proper perspective and rejected the proposal on 18-3-1997.

3. Petitioner has given instance of eight persons to contend that they were similarly situated. This stand has been refuted by State Government on the ground that originally case of those persons for premature release was considered by the State and their request for release on completion of fourteen years of substantive sentence was rejected. Subsequently when they completed twenty years of imprisonment, their case was again considered in terms of Rule 708-A of the Manual. At that stage, Government on consideration of long tenure of custody has directed release. Stand of petitioner that he was released on parole has been disputed. Accusation which led to the trial and conviction are that he brutally murdered his family members by firing and stabbing. While considering the question whether premature release would be desirable and that of petitioner in the background of retaliatory possibilities, safety of local residents is also taken into consideration.

4. Life without liberty is "lasting" but not "living", as liberty is the life line of every human being. It is, therefore, not a matter of surprise that liberty is considered one of the most cherished and precious possession of every human being. No one likes fatters on his personal liberty.

5. Section 432 of the Code corresponds to and reproduces almost word for word Section 401 and Sub-section (3) of Section 402 of the 1898 Code. Sub-sections (1) to (4) reproduces word for word Sub-sections (1) to (4) of Section 401 of the old Code. Sub-section (5) reproduces word for word Sub-section (6) of the old Section. Sub-section (6) similarly reproduces Sub-section (4-A) of the same section. Sub-section (5) of old Section 401 had been omitted earlier in 1950.

Subsection (7) corresponds to Sub-section (3) of Section 402 of the 1898 Code. The main paragraph and Clause (a) reproduce the old provision word for word without any change. Clause (b) is slightly different, but without any change of substance. That clause reads :

(b) in other cases, the State Government.

Article 72 of the Constitution of India confers upon the President 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. The power so conferred is without prejudice to the similar power conferred on Court martial or the Governor of a State. Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433A or by any Prison Rules. But the President or the Governor, as the case may be, must act on the advice of the Council of Ministers.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself. It does not amount to an acquittal unless the Court otherwise directs. Pardon should be distinguished from "amnesty" which is defined as "general pardon of political prisoners; an act of oblivion." As understood in common parlance, the word "amnesty" is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned.

Reprieve means a stay of execution of sentence, a postponement of capital sentence on a pregnant woman. Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction. It is some thing like a release on probation of good conduct u/s 360. Remission is reduction of the amount of a sentence without changing its character. In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the Court, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it. The sanctioning authority exercising power to grant furlough (i.e. the Inspector General of Prisons) is not required to refer the case (whether or not to grant furlough) to the appropriate Government when it exercises powers under the provisions of Bombay Furlough and Parole Rules, 1959. Commutation is a change of a sentence to a lighter sentence of a different kind.

6. This section empowers the appropriate Government to suspend or remit sentences. The expression "appropriate Government" means the Central

Government in cases where the sentence or order relates to a matter to which the executive power of the Union extends, and the State Government in other cases. The release of the prisoners condemned to death in exercise of powers conferred under the section and Article 161 of the Constitution does not amount to interference with the due and proper course of justice as the power of the High Court to pronounce upon the validity, propriety and correctness of the conviction and sentence remains unaffected. In *State Vs. Kawas Manekshaw Nanavati*, it has been held that similar powers under Article 161 of the Constitution can be exercised before, during or after trial. The power exercised under this section is largely an executive power vested in the appropriate Government and by reducing the sentence, the authority concerned does not thereby modify the judicial sentence. The fact that the sentence was remitted by the appropriate Government or that on account of certain remissions which he earned under the Jail rules or under some order of general amnesty the person was released earlier, does not affect the measure of the disqualification of the person sentenced u/s 7(b) of the Representation of the People Act, 1951. This section confines the power of the Government to the suspension of the execution of the sentence or the remission of the whole or any part of the punishment. The conviction under which the sentence is imposed remains unaffected. The section gives no power to the Government to revise the judgment of the Court. It only provides with the power of remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces the punishment in part or in whole. The word "remit" as used in Section 432 is not a term of art. Some of the meanings of the word "remit" are "to pardon, to refrain from inflicting, to give up." There is therefore no obstacle in the way of the Governor in remitting the sentence of death. A remission of sentence does not mean acquittal and as aggrieved party has every right to vindicate himself or herself. Section 433 corresponds to Sub-sections (1) and (2) of Section 402 of the 1898 Code, Sub-section (3) of that section having been transferred to Section 432, as Sub-section (7). The law is in substance the same, but the section has been redrafted, and Sub-section (2) of the old section even dropped. The old Section 402 reads :

402. Power to commute punishment. (1) The appropriate Government may, without the consent of the person sentenced, commute any of the following sentences for any other mentioned after it:

death, imprisonment for life, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) Nothing in this section shall affect the provisions of Section 54 or Section 55 of the Indian Penal Code.

Section 428 contemplates a conviction by the Court and it operates at the time of the pronouncement of the sentence by the Court, whereas Section 433 deals with commutation by the State authority. Consequences that follow from the

provisions of Section 433 do not affect Section 428. Sections 432 and 433 appear under heading "suspension, remission and commutation of sentences." u/s 432(1) there is power in the appropriate Government in the case of any person, who has been sentenced to punishment for an offence, to suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced without conditions or upon any condition which the person sentenced accepts. Under sub-section (2) it is provided that whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists. Section 433 of the Code provides for a power of the State Government to commute the sentence and Clause (b) thereof provides that the appropriate Government may without the consent of the person sentenced commute a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine. It may be pointed out that this provision is similar to the provision in Section 55 of IPC. The power to commute a sentence of death is independent of Section 433A. The restriction u/s 433A comes into operation only after the power u/s 433 is exercised.

7. "Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie." This sovereign power to grant a pardon has been recognised in our Constitution in Articles 72 and 161 and also in Sections 432 and 433 of the Code. These provisions relate to the grant of pardon after sentence has been imposed and the tender of pardon to an accomplice under certain conditions as contemplated by Section 306 is a variation of this very power. The grant of pardon, whether it is under Article 161 or Article 72 of the Constitution or under Sections 306, 432 and 433 of the Code is the exercise of sovereign power.

The legal position is this : Before Amending Act XXVI of 1955 a sentence of transportation for life could be undergone by a prisoner by way of rigorous imprisonment for life in a designated prison in India. After the said Act, such a convict shall be dealt with in the same manner as one sentenced to rigorous imprisonment for the same term. Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the IPC or the Code, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison.

8. Section 433A is the vital provision which reads as follows :

433A. Restriction on powers of remission or commutation in certain cases. Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of

death imposed on a person has been commuted u/s 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

The said provision is applicable to two categories of convicts (a) those who could have been punished with the sentence of death, but were not, and (b) those whose sentence has been converted into imprisonment for life u/s 433. It was observed in *Maru Ram and Others Vs. Union of India (UOI) and Others*, that Section 433A does not violate Article 20(1) of the Constitution. It is only prospective in operation, and does not affect the constitutional power of the President under Article 72 or that of the Governor under Article 161 of the Constitution.

Section 433A overrides any special or local law and itself declares that if any specific provision contrary to the special or local law is made in the Court, it will prevail over the former. Therefore, remission rules and like provisions stand excluded so far as persons governed by Section 433A are concerned. For the purpose of calculating fourteen years' imprisonment, remission under Jail Manual cannot be taken into account. For persons governed by Section 433A actual imprisonment in jail for fourteen years is mandatory.

9. The object of Section 433A of the Code is that those governed by it shall not be released unless they have served a sentence of at least fourteen years imprisonment. The provision does not govern all life convicts. It also does not apply to those convicted and sentenced to life imprisonment before its commencement and also to those convicted and sentenced to life imprisonment for offence not punishable with death, such as Sections 304, 307 and 326, IPC etc. Those convicted and sentenced to life imprisonment after the commencement of Section 433A of the Code for offence for which the sentence of death could have also been imposed alone are governed by Section 433A of the Code. The effect of the provision on these that are governed by it is that they must undergo imprisonment for a minimum period of fourteen years, being eligible for such remissions as may be granted to them by the Government.

10. If the appellant has really served fourteen years of imprisonment, he shall be entitled to be considered for grant of benefit u/s 433A of the Code, as Section 302, IPC carries a death sentence also. Section 433 of the Code deals with the power to commute sentence. In *Naib Singh Vs. State of Punjab and Others*, it was observed that in the absence of an order u/s 55, IPC or Section 433(b) of the Code, a convict cannot be released forthwith even after expiry of fourteen years. It is to be noted that in Section 57, IPC in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years. Where a person has been sentenced to imprisonment for life, the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of said rules and do not acquire significance until the sentence is remitted u/s 432, in which case the remission would be

subject to Section 433A of the Code, or constitutional power exercised under Article 72 or Article 161 of the Constitution. A convict who has been sentenced to imprisonment for life has to complete fourteen years of actual incarceration; otherwise he cannot invoke Section 432, and Section 433 of the Code. (See Ashok Kumar alias Golu Vs. Union of India and others,

11. A person in jail sentenced to undergo imprisonment for a long time usually loses track of time. More often than not, he is not aware of his constitutional and/or legal protections and rights. State has a duty to come to his assistance in such matters. It would be appropriate if the authorities of the jail intimate to the State Government the details in all cases where Section 433A has application so that the question of commutation can be considered by it in proper perspective. The Home Department of the State shall issue necessary directions in this regard.

The above aspects have been highlighted by one of us (Pasayat, J.) in Ramesh Kumar Samantray v. State (Criminal Appeal No. 136 of 1986, disposed of on 24-12-1997) (Reported in (1998) 1 OLR 244).

12. There are two stages at which there is consideration of question whether there can be a premature release. Rules 518 and 708 of the Manual are relevant for the purpose. They read as follows :

518(1) Every case in which a convict is sentenced to rigorous imprisonment has undergone in a jail or jails a period of detention amounting together with ordinary and special remission earned to fourteen years shall be submitted through the Inspector-General of Prisons as per note to Rule 708 of Orissa Jail Manual for the orders of the State Government not less than five and not more than six months before the expiry of the period.

(2) Every case in which a convict sentenced to life imprisonment has undergone in a jail or jails a period of detention amounting together with ordinary and special remission earned to twenty years shall be submitted to the Inspector-General of Prisons as per Rule 708-A (Orissa Jail Manual) for the orders of State Govt. not less than five and not more than six months before the expiry of the period.

(3) No case referred to in Rule 709 of the Orissa Jail Manual in which a convict sentenced to death penalty later on committed to life imprisonment shall be to the State Government unless specially called for by the Inspector-General of Prisons for the order of Government.

Note:- The term "remission earned" used in this rule should include remissions granted to prisoners under the rules of the Jail Manual as also remissions awarded under special rules made for special occasions such as special Crown remissions.

708. In these rules -

(a) Prisoner" includes a person committed to prison in default of furnishing

security to keep the peace or be of good behaviour;

(b) to (d) xx xx xx xx

(e) "sentence" means a sentence finally fixed on appeal, revision or otherwise, and includes an aggregate of more sentences than one and order of committed to prison in default of furnishing security to keep the peace or be of good behaviour;

(f) "life convict" means a prisoner sentenced to imprisonment for life.

(Note :- The case of all prisoners sentenced to more than fourteen years or for terms exceeding in the aggregate fourteen years shall when the term of imprisonment undergone together with any remission earned under the rules amounts to fourteen years shall be submitted for the orders of the State Govt.

Explanation :- The term remission earned under the rules such in this note should include remission granted to prisoners under the rules of the Orissa Jail Manual as also remissions awarded under special rules made for special occasions and should also include the set of period envisages u/s 428, Cr. P.C.)

Chapter XIII of the Manual, deals with "Release of Prisoners", Chapter XXI deals with "Remission". Rule 518 consists of two parts. Sub-rule (1) deals with procedure to be adopted when a convict sentenced to rigorous imprisonment has undergone in a jail or jails a period of detention amounting together with ordinary and special remission earned to fourteen years. Every such case has to be submitted through the Inspector-General of Prisons as per note to Rule 708 for orders of the State Government not less than five and not more than six months before the expiry of the period. Sub-rule (2) deals with cases of convicts who has undergone a period of twenty years with ordinary and special remission. In exercise of the powers conferred by Section 59, Sub-section (5) of the Prisons Act, 1894, the rules for shortening of sentences by grant of remissions have been made and are contained in Chapter XXI. The question of release of life convict is required to be referred to the State Government after twenty years of imprisonment including remission earned, in terms of Rule 708-A.

13. Considered in the light of analysis made in the legal position as made above, reasons which weighed with State Government to refuse premature release cannot be said to be unreasonable or perverse to warrant interference by this Court,

The writ application fails and is dismissed.

S.C. Datta, J.

14. I agree.