

(2009) 01 KAR CK 0022
In the Karnataka High Court
Case No : Criminal Appeal No. 1761 of 2006

Smt. Nagarathna

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-01-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 120 B, 201, 302, 34

Citation : (2009) CriLJ 2612 : (2009) 2 KarLJ 564 : (2010) 6 RCR(Criminal) 324

Hon'ble Judges : S.R. Bannurmath, J;A.N. Venugopala Gowda, J

Bench : Division Bench

Advocate : Shekhar Naik, for the Appellant; S.N. Pavin, State Public Prosecutor, C.V. Nagesh and Hasmath Pasha, Amicus Curiaes, for the Respondent

Judgement

1. This Court has received an unusual request from a female convict-Smt. Nagarathna, whose conviction and sentence of imprisonment for life along with other punishments, for the offences punishable under Sections 302, 120-B, 201 read with Section 34 of the Indian Penal Code, 1860, is pending consideration before this Court in this appeal.

2. The request of the convict/appellant is to permit her to withdraw the appeal unconditionally. Last week a similar request was made by another female Smt. Mamatha, who is appellant 2 (along with her husband appellant 1) in another independent Criminal Appeal No. 453 of 2008. In that case also, the convict/appellant had made a similar prayer to withdraw the appeal only so far as she is concerned.

3. Considering this prayer of Smt. Mamatha as strange especially the emphatic words in the application sent through the jail to the registry of this Court, that she is voluntarily seeking the withdrawal of her appeal and there is no pressure or force from anybody to do so, we directed the learned State Public Prosecutor to make enquiry in this regard with the jail authorities and the appellant/convict Smt. Mamatha. We were informed that, not only Smt. Mamatha, but also all other female life convicts have decided of making similar applications to this

Court wherein their respective criminal appeals are pending consideration. Finding this unusual move, in order to satisfy ourselves as to what is going on, we directed the jail authorities to produce the convict Smt. Mamatha before this Court. On appearance and enquiry with her, it was noted that she is bent upon withdrawing the appeal without giving any reason. Though we made it clear to her that, the consequence of withdrawal of her appeal would be resulting in confirmation of her conviction and sentence of life imprisonment along with the other sentences and it may also likely to affect the appeal of her husband, who is a co-accused also, but she was practically not in a mood to listen to either her Advocate on record or to us and went on insisting that irrespective of the consequences, her appeal should be permitted to be withdrawn. Left with no alternative, we permitted her to withdraw the appeal, so far as her appeal was concerned.

4. Now similar request has been made by another female life convict in the present case. Suspecting the reason for such withdrawal, possibly as threat or some extraneous promises made to these female life convicts, we directed the learned State Public Prosecutor to make enquiry in the jails as to the possible reasons for such repeated requests of withdrawal of criminal appeals by the female life convicts and now we learnt that, the Government of Karnataka has framed rules called as Code of Criminal Procedure (Directions for Suspension of Sentences) Rules, 2007 (hereinafter referred to as "the Rules 2007") and because of the Rules, the life convicts have been given an impression that, all male life convicts on completion of 7/14 years of imprisonment and all female convicts, who have completed 5 years of imprisonment, will be automatically released from the jail after the expiry of the said period of 14 years and 5 years respectively. We are informed that the life convicts especially who have challenged the judgment of conviction and sentence by way of appeals before this Court, have been informed by some NGO's and co-inmates that unless their appeals are withdrawn by them, their cases for remission under the Rules 2007 will not be considered. As such, the applications of present nature are being filed.

5. Incidentally it is also to be mentioned that on 13-1-2009 news report has appeared in almost all newspapers which is stated to be on the basis of statement of the Hon"ble Minister for prisons to the effect that the State Government is recommending release of as many as 375 life convicts including 12 female convicts across the State as a goodwill gesture on the occasion of the Republic day. In this news report, it is also mentioned that, the life convicts who have completed serving seven years (male) and five years (female) of their term and who have a record of good conduct will be recommended for the release. In this regard, it is stated by the Hon"ble Minister that, detailed rules have been framed to shortlist the prisoners for the release.

6. In this regard, when we enquired with the learned State Public Prosecutor and the Secretary for the Home Department, we were informed that except the Rules 2007, no other rules are framed in respect of remission of sentences of the

prisoners in Karnataka.

7. On perusal of these Rules 2007, framed in exercise of power u/s 432(5) of the Criminal Procedure Code, 1973 and noting the fact that the general power of remission u/s 432 of the Cr. P.C. is controlled by the special provision u/s 433A of the Criminal Procedure Code and prima facie some of the provisions in the Rules appeared to us as illegal/incorrect, we posted the matter to hear in this regard.

8. As this was a question of general importance, apart from the learned State Public Prosecutor and Advocate appearing for the appellant, we also requested Sri C.V. Nagesh and Sri Hashmath Pasha, learned Senior Advocates, who mostly appear for the accused in larger number of criminal appeals, to assist the Court as the Amicus Curiae and enlighten us in this regard.

9. It was submitted by the learned Counsel for the appellant that, the power of remission by the Government u/s 432 of the Criminal Procedure Code is an executive power and as such, outside the scope of jurisdiction of this Court for considering the rules framed thereunder. It is also submitted that, as the life convicts have a right of remission under the Criminal Procedure Code as well as under the Constitution of India, the Rules framed by the State are just and proper and need no interference. It was also submitted that, by bare reading of Section 432 of the Cr. P.C., and various pronouncements of the Apex Court in this regard, it is clear that the convicts have a right of suspension of sentence and remission, which cannot be interfered with by the Courts.

10. On the other hand, the learned Amicus Curiae and the learned State Public Prosecutor contended that, the present Rules 2007 framed by the Government are not in conformity with the provisions of the Cr. P.C. and the law declared by the Apex Court in *Maru Ram and Ors. v. Union of India* and Ors. AIR 1981 SC 2147 : (1981) SCC 107 and later pronouncements. However, it was contended that, though the State in exercise of power u/s 432(5) of the Cr. P.C., to straightaway release life convicts, as such power is vested only with the President of India and the Governor of the State under Article 72 and Article 161 of the Constitution of India respectively.

11. In order to appreciate the rival contentions, it is necessary for us to understand the scope and jurisdiction under Sections 432, 433 and 433A of the Criminal Procedure Code and for this purpose, we have to look into the object, scope and wordings of these provisions.

12. Section 432 of the Cr. P.C. reads thus:

432. Power to suspend or remit sentences.-(1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) 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.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour 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.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and:-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means:-

(a) in cases where the sentence is for an offence against, or the order referred to in Sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases the Government of the State within which the offender is sentenced or the said order is passed.

By bare reading of this provision, it appears that, this section confers power on the executive authority to suspend, remit or commute the punishment

(sentence) of the convicts unconditionally or with conditions and at the same time, the conviction remains unaffected.

Sub-section (2) provides that whenever an application is made by a convict in this regard, the appropriate Government may obtain opinion of the Court.

Sub-section (3) indicates that in case where a sentence is suspended or remitted on certain conditions and if in the opinion of the appropriate Government, the said conditions are violated or unfulfilled, such suspension or remittance, the same can be revoked and the convict has to undergo unexpired portion of the sentence.

Sub-section (5) empowers the appropriate Government to frame Rules as to the conditions on which petition for suspension/remission of sentence should be presented and dealt with by the authorities.

Sub-section (6) is intended to make clear that the power to remit the sentence can be exercised in the case of orders of penal nature.

433. Power to commute sentence.-The appropriate Government may, without the consent of the person sentenced commute.--

(a) a sentence of death, for any other punishment provided by the Indian Penal Code, 1860 (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

433-A. 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 punishment provided by laws 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.

13. Section 433 confers powers similar to Sections 54 and 55-A of the Indian Penal Code.

14. Section 433-A imposes restrictions on clemency powers of the Government mandating that, notwithstanding anything contained in Section 432 or Section 433, the life convict prisoner shall not be released from prison unless he has served at least 14 years of imprisonment.

15. This provision has been the subject-matter before the Hon"ble Supreme Court in a number of cases.

16. The constitutional validity of this section was considered by the Constitutional Bench in the case of Maru Ram. It was made clear in that landmark pronouncement that the provision is justifiable and valid law.

17. It was also laid down that "imposition of at least a 14 years term u/s 433A for a murderer cannot be considered to be an arbitrary, unusually cruel and unconstitutional as violative of Article 14. In the current state of things and ethos of society a very long term in prison for a murderer cannot be castigated as so outrageous as to be utterly arbitrary and violative of rational classification between lifers and lifers and as so blatantly barbarous as to be irrational enough to be struck down as ultra vires. Even the submission that no penal alibi justifies a prisoner being kept walled off from the good Earth if, by his conduct, attainments and proven normalisation, he has become fit to be a free citizen, cannot spell unconstitutionality".

18. It was also observed that "sentencing is a judicial function but the execution of the sentence, after the Court's pronouncement, is ordinarily a matter for the executive under the Procedure Code. Higher the power, the more cautious would be its exercise. This is particularly so because, Section 433A has been passed by the Parliament on being sponsored by the Central Government itself. It is, therefore, manifest that while exercising the powers under Articles 72 and 161 of the Constitution, neither the President, who acts on the advice of the Council of Ministers, nor the State Government is likely to overlook the object, spirit and philosophy of Section 433A so as to create a conflict between the legislative intent and the executive power".

(emphasis supplied)

19. Cautioning the misuse of power of remission, the Hon'ble Supreme Court observed thus:

push this logic a little further and the absurdity will be obvious. No constitutional power can be vulgarised by personal vanity of men in authority. Likewise if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself, the power of remission under Article 72/161 may ordinarily be exercised and a refusal may be wrong headed. If on the other hand, a brutal murderer, bloodthirsty in his massacre, has been sentenced by a Court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to limit his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a political high-up. The Court, if it finds frequent misuse of this power may have to investigate the discrimination.

(emphasis supplied)

In the case of Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal, the Apex Court observed thus:

We are also of the view that even the appropriate Government may not, as a matter of routine course, indulged in exercise of such power at its sweet will, pleasure, whim or fancy. As observed earlier, the power conferred upon the appropriate Government u/s 433 of the Cr. P.C., have to be exercised in accordance with rules and established principles reasonably and rationally, keeping in view the reasons germane and relevant for the purpose of law under which the conviction and sentence has been imposed, commiserative facts necessitating the commutation and the interests of the society and public interest to exercise of any power vested by the statute in a public authority is to be always viewed as in trust, coupled with a duty to exercise the same in larger public and societal interest too. When the Legislature concerned has chosen to mandate for the imposition of minimum sentence in a given situation, the responsibility of the appropriate Government becomes all the more greater and power u/s 433 of the Cr. P.C., may have to be exercised with great circumspection. Otherwise, the legislative will become mere dead-letter at the whim of the executive.

(emphasis supplied)

As observed by the Apex Court in the case of *Epuru Sudhakar and Another Vs. Govt. of A.P. and Others*, :

Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public consideration alone. The President and the Governor are the sole Judges of the sufficiency of facts and of the appropriating of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the constitution itself. Therefore, the principle of Exclusive Cognizance would not apply when and if the decision impugned is in derogation of a Constitutional provision.

(emphasis supplied)

20. On perusal of these pronouncements, it is clear that no doubt sentencing is a judicial function but the execution of the sentence is ordinarily a matter for the executives, but this power has to be exercised cautiously. No doubt it is the prerogative of the concerned Government to give remission to a convicted prisoner, but this prerogative cannot be indiscriminately used, especially by allowing the prisoners remission under some celebrations of the party in power, as was tried recently by the Karnataka State while celebrating the golden jubilee of the birth of Karnataka State (Suvarna Karnataka Celebrations). While exercising this power, as per the law laid down by the Apex Court, the State is not only required to keep in mind the public interest and interests of the society as well as interest and feelings of the victim or family of the victim.

21. As observed by the Apex Court in *Epuru Sudhakar's* case "the controlling factor in determining whether the exercise of prerogative power is subject to the judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Rule of law is the basis for evaluation of all decisions. The supreme quality of the Rule of law is fairness and legal certainty. The principle of legality occupies a central place in the Rule of law. Every prerogative has to be the subject to the Rule of law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of law and it would amount to setting a dangerous precedent. The power of the executive clemency is not only for the benefit of the convict, but while exercising such a power, the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future".

22. In this regard it is to be noted that the problem of penology is not one which admits an easy solution. It is to be noted that the effect of such punishment is to be judged not from a purely ethical point of view, but from an angle of vision, which is practical and pragmatic. Time and again the word "crime" has been described as an act of warfare against the community or society. The object of imposing deterrent sentences is three fold: (1) to protect the community/society against callous criminals for a long time; (2) to administer as clearly as possible to others tempted to follow them into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow; and (3) to deter criminals who are forced to undergo long-term imprisonment from the point of view of reformatory form of punishment.

23. As noted by the learned Author Sir Leon Radzinowicz in - *The Growth of Crime* "prolonged and indefinite detention is justified not only in the name of prevention but cure. The offender has been regarded in one sense as a patient to be discharged only when a response to the treatment and it can be regarded as safe".

24. It is to be kept in mind that, the four objects which punishment of an offender by the State is intended to achieve are deterrence, prevention, retribution and reformation. However, in recent years an opinion has been strongly expressed in favour of reformation being the dominant object of punishment but then an opposite opinion has not been lacking in expression. Champions of the former view, vehemently contend that, punishment must have as its target the crime and not the criminal. Others however, have been equally vocal in bringing into focus the mischief flowing from what the criminal has done to its victim and those near and dear to him and have insisted on greater attention being paid to victimology and therefore to the retributive aspect of punishment. We are aware that legal battle in this regard is going on between the champions of the accused and those who are also concerned about the

victims of the crime. We are not expressing any opinion in this regard, except quoting the words of Sir Leon Radzinowicz in his book "The Growth of Crime" -- "Long imprisonment could be regarded as the neat response to all three requirements; it would put the miscreants behind bars for a long time; it would demonstrate that the game was not worth the candle for others. Maximum penalties, upper limits to the punishment, a Judge may impose for various kinds of crimes, are essential to any system which upholds the rule of law. Objections arise only when these penalties are illogical, inconsistent, at odds with people's sense of justice".

25. It is also to be mentioned that, the life imprisonment prescribed under the Indian Penal Code is to be 14 years or 20 years, which has been set at rest by the landmark pronouncement of the Apex Court in the case of *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka*, . In the said decision, it is made clear that, the life imprisonment means till the end of life. Incidentally in that case, the Hon'ble Supreme Court also considered the question of computation and remission, etc., of sentences and observed thus:

It is thus to be seen that both in Karnataka and Bihar remission is granted to life convicts by deemed conversion of life imprisonment into a fixed term of 20 years. The deemed conversion of life imprisonment into one for fixed term by executive orders issued by the State Governments apparently flies in the face of a long line of decisions by this Court and we are afraid no provision of law was brought to our notice to sanction such a course. It is thus to be seen that life convicts are granted remission and released from prison on completing the 14 years term without any sound legal basis. This Court can also take judicial notice of the fact that remission is allowed to life convicts most mechanically without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society.

26. Keeping in view all these principles and pronouncements in our considerate view, the executive clemency power has to be exercised on public considerations alone, and it is to be weighed whether public welfare will be better served by inflicting less than what the judgment has fixed rather than political exigency.

27. It is also to be noted that the only power of the executive to grant remission flows from Article 72 and Article 161 of the Constitution of India. In our view Section 432(5) only empowers the Government to frame rules in respect of suspension of sentences and the condition on which the petitions can be filed by convict for such suspension and does not give jurisdiction to the Government to frame the rules for remission of sentences as is now done under the Rules 2007.

28. If one looks into the aims and objects of granting remission as explained by the Hon'ble Supreme Court in the aforesaid pronouncements, it appears to us that en masse release or remission of life convicts is totally impermissible.

29. As already noted even while exercising the constitutional power under

Articles 72 and 161 of the Constitution of India and the executive is required to consider the individual cases only and as such, the decision of the Karnataka Government as declared by the Hon'ble Minister for Department of Prisons as appears from the press report releasing en masse 375 life convicts in the State is without sanction of law. Further, while granting such remission not only the interests of the individual accused but also of the society and the victims of the crime is to be kept in mind.

30. Keeping in mind these principles, when we peruse the Rules -Code of Criminal Procedure (Directions for Suspension of Sentences) Rules, 2007, we find that, the part of condition at Rule 2(i)".... or on the completion of imprisonment of a period prescribed by the State Government from time to time" is totally illegal and contrary to the spirit of Section 433A of the Cr. P.C.

31. Similarly, the condition in Rule 2(ii) that "male prisoners sentenced to more than one year and above, who have attained the age of 65 years .." is again contrary to spirit of Section 433-A of the Cr. P.C, but is very vague in the sense the words "sentence to more than one year and above" can include life imprisonment also. As such, this condition is also illegal one.

32. The next condition Rule 2(iii) prescribing the limit of five years for women offenders sentenced to life imprisonment is, in our view, gender discriminatory. It is to be noted that Section 433-A of the Cr. P.C, refers to all the life convicts irrespective of whether male or female. As such, the present period under the Rule, prescribing lower limit of 5 years for female offenders vis-a-vis, 14 years for male offenders is also gender discriminatory.

33. In the light of our aforesaid conclusion, we find that, the Code of Criminal Procedure (Directions for Suspension of Sentences) Rules 2007 is illegal and as such, liable to be quashed in its entirety. We order accordingly.

34. So far as the present prayer of the appellant seeking permission to withdraw the appeal is concerned, as we have already noted, it appears to us as having been made out of misconception and confusion created by the Rules 2007 as well as wrong propaganda given by the concern NGO or fellow prisoners.

35. However for finding out the real cause for such withdrawal, we deem it proper to give an opportunity to the appellant to reconsider her request especially in the light of quashing of the Rules 2007. Hence, we direct that the accused be produced before this Court under body warrant on 19-1-2009.