IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 6769 OF 2021

Mritunjay Ghosh s/o Gobind Ghosh
Age 55, Occu : Business, R/at Flat No.301,
3rd Floor, Navghar Road, Bhayander (E),
Thane – 401 105. … Petitioner

Versus

1. The State of Maharashtra
(Through D.N.Nagar Police Station)

2. Hon'ble Home Minister Maharashtra,
Madam Cama Road, Hutatma Rajguru Chowk,
Nariman Point, Mumbai – 400 032.

3. Addl. Directorate General of Police (Prisons)
Old Central Building, 2nd Floor, Pune – 411 001.

4. Prison Deputy Inspector General (Headquarters),
2nd Floor, Old Administrative Central Building,
Pune – 411 001.

5. Deputy Inspector General of Prisons,
West Division, Yerawada, Pune – 411 006.

6. Jail Superintendent, Kalamba Central Jail,
Near C Ward, Kalamba, Kolhapur.

7. The Police Inspector of Kolhapur
Central Jail, Kalamba Jail, Quarters, Kalamba,
Kolhapur, Maharashtra 416 007.

8. Mr. Laltu Ghosh,
Age 39 years, C/3999, Kalamba Central Jail,
Kalamba, Kolhapur, Maharashtra 416 007. … Respondents

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Mr. Gaurav Bhawnani instructed by Mr. Saurabh Nikalje for the Petitioner.
Mr. H.J. Dedhia, AGP for the State.
Mr. Pranav Badheka, Amicus Curiae, present.

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CORAM : S.J. KATHAWALLA &
MILIND N. JADHAV, JJ.

DATED : DECEMBER 30, 2021
(VACATION COURT)

JUDGMENT : (PER S.J.KATHAWALLAL J. & MILIND N. JADHAV, J.)

1. The above Writ Petition, *inter-alia*, challenges the Government Order dated 18.08.2016, bearing Ref. No. RLP/1416-Pr No 532/2016/ Turang-3, passed by the Respondent No.2, Under Secretary, Home Department, State of Maharashtra, Mantralaya, Mumbai – 400 032 (the 'Impugned Order'). The said Impugned Order dated 18.08.2016 is passed on the basis of the recommendation of the Advisory Committee set up under the Maharashtra Prison Rules, 1972, which recommended the release of Respondent No. 8 Laltu Ashok Ghosh under Category 4(e) as per the Guidelines dated 15.03.2010. The period of imprisonment undergone by the Respondent No.8 was completed on 30.12.2021.

2. The Petitioner has prayed that in the event that the Respondent No.8 is released by this Court, then just and necessary conditions be imposed by this Court on the Respondent No.8, to ensure the safety of the Petitioner and his family.

Sentence Imposed upon Conviction:

3. The Respondent No. 8 (Laltu Ashok Ghosh) and his co-accused

(Prashant Majhi) were convicted by the Additional Sessions Judge, Greater Mumbai, on 23.11.2006, for offences under Sections 302, 394 and 449 r/w 34 of I.P.C., and under Section 302 r/w 34 IPC. The said conviction and the sentences set out hereinbelow, were recorded against the Respondent No.8 and the co-accused for the murder of the Petitioner's wife and minor son in or about 2001. They were both sentenced to suffer imprisonment for life and pay a fine of Rs.5,000/- (Rupees Five Thousand) each, in default to suffer further R.I. for six months. They were further convicted under Section 394 r/w. 34 I.P.C. and both the Respondent No. 8 and the co-accused were sentenced to suffer R.I. for 10 years each and pay a fine of Rs.10,000/- (Rupees Ten Thousand) each, in default suffer further R.I. for one year each. Both the Respondent No. 8 and the co-accused were also convicted under Section 449 r/w 34 I.P.C., and sentenced to suffer R.I. for 7 years each, and to pay a fine of Rs. 5,000/- (Rupees Five Thousand) each, in default suffer R.I. for six months each.

4. **Submissions of the Petitioner's Counsel :**

i) While convicting the Respondent No. 8, the Learned Additional Sessions Judge at point no. 3, in the Conviction Order dated 23.11.2006, has categorically recorded that the Petitioner alongwith the co-accused are entitled to set-off under Section 428 Cr.P.C., for the period undergone by them in custody as regards sentence of imprisonment passed under Sections 394 and 449 r/w. 34 I.P.C. It was

therefore argued that by implication, set-off under Section 428 Cr.P.C. had not been granted by the Trial Court for the period undergone in custody for offences under Section 302 r/w 34 I.P.C., and thus the Respondent No.8 is not entitled to the benefit under Section 428 Cr.P.C., vis-à-vis his conviction and imprisonment under Section 302 r/w 34 of I.P.C.

ii) The Petitioner's Counsel further argued that even the Appellate Court in its Order dated 29.07.2013 has confirmed the Conviction Order dated 23.11.2006 and has not interfered with the sentences imposed by the Trial Court. The Appellate Court has exhaustively discussed the evidence and thereafter dismissed the Appeal vide its Order dated 29.07.2013.

iii) In this backdrop, it was submitted that the said Orders of the Trial Court and the Appellate Court had attained finality and the benefit in the form of set off under Sec. 428 Cr.P.C. cannot be made available to the Respondent No.8 for the period undergone by him in the custody as regards sentence of imprisonment passed under Section 302 read with Section 34 IPC.

iv) The Petitioner's Counsel in addition to the above, relied upon the Judgment of the Apex Court in the case of **Suraj Bhan vs. Omprakash and Anr.**[1], paragraph (7) of which reads thus:-

1 (1976) 1 SCC 886

> "7. It is also clear from Section 428, Criminal Procedure Code itself that even though the conviction was prior to the enforcement of the Code of Criminal Procedure, benefit of Section 428 would be available to such a conviction. Indeed, Section 428 does not contemplate any challenge to a conviction or a sentence. It confers a benefit on a convict reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as an under trial prisoner. The procedure to invoke Section 428, Criminal Procedure Code, could be a miscellaneous application by the accused to the court at any time while the sentence runs for passing an appropriate order for reducing the term of imprisonment which is the mandate of the section."

v) In light of the above Judgment, it was urged that the Advisory Committee could not have taken up the matter of Respondent No.8 for his release under Category 4(e) as per the Guidelines dated 15.03.2010, and the Under Secretary could not have passed the Impugned Order dated 18.08.2016, as the power was only vested in the Court and no other.

vi) Finally, the Petitioner's Counsel urged this Court to keep in mind the heinous nature of the offence committed by the Respondent No. 8, of murdering the Petitioner's wife Lipika, aged 27 years and son Pranay, aged 4 years, on 24.12.2001 in a cold blooded manner. After committing this heinous offence of the double murder, the Respondent No.8 further threatened the Petitioner, for which the Petitioner lodged an N.C. with D.N. Nagar Police Station on 27.01.2014. Thus, it was submitted

that the above facts disentitle the Respondent No. 8 for early release.

vii) The Petitioner's Counsel also relied on the Judgment of the Apex Court in the matter of **Kartar Singh vs. State of Haryana**[2], in which it was held that the benefit of set off under Section 428 Cr.P.C. is not to be given to a '*life convict*'. The Petitioner's Counsel submitted that since in the present matter, the Respondent No.8 has been convicted for life under Section 302 r/w 34 of I.P.C., he shall also not be entitled to the benefit of set off under Section 428 Cr.P.C., and even otherwise, the benefit under Section 428 Cr.P.C. should not be given to Respondent No.8.

Submissions of the Learned Public Prosecutor:

5. The Learned Public Prosecutor has placed on record a Report dated 29.12.2021 submitted by the Superintendent of Kolhapur Central Prison in respect of Respondent No.8 alongwith the calculation and the basis for categorizing Respondent No.8 under Category 4(e) of the Guidelines dated 15.03.2010. The Report (Nomination List) at Point No.15, sub-para (2) gives the benefit of 4 years, 10 months and 29 days for the time spent by the Respondent No.8 in judicial custody during trial, in calculating the total of 26 years, which is the period of imprisonment to be undergone by the Respondent No. 8, including remissions, under Category 4(e) of the

2 AIR 1982 SC 1437

Guidelines dated 15.03.2010. It was contended by the Learned Public Prosecutor that no interference is called for to the said categorization and hence the Petition must be dismissed.

6. Since the said Criminal Writ Petition involved an important question of law, this Court deemed it necessary to appoint Learned Counsel, Shri Pranav Badheka, as '*amicus curiae*', to assist the Court with respect to the issues raised in this Criminal Writ Petition.

7. **Submissions of Shri Pranav Badheka :**

Mr. Pranav Badheka appointed as Amicus Curiae by this Court submitted as follows :

(i) That the argument advanced on behalf of the Petitioner that the Advisory Committee could not have taken up the matter of Respondent No.8 for his release under Category 4(e) of the Guidelines dated 15th March, 2010 and the Under Secretary could not have passed the Impugned Order dated 18th August, 2016, as the power was only vested in the Court and no other, cannot be accepted in view of the decision of the Division Bench of this Court in Criminal Writ Petition No.328 of 2015 which was filed by the present Respondent No.8 and the co-accused seeking their

premature release under Section 433(A) of Code of Criminal Procedure, wherein it was held that the Petitioner has been rightly placed under Category 4(e).

(ii) That it has also become clear from the Order of this Court in Criminal Writ Petition No.328 of 2015 that the categorization and applicability of the Guidelines has been upheld by this Court, which Order was not challenged any further and therefore, the arguments of the Petitioner with respect to categorization of Respondent No.8 under Category 4(e) and the applicability of the Guidelines of 2010, also cannot be accepted. Infact, even if the 1992 Guidelines are taken into account, the period of imprisonment undergone by the Respondent No.8, including remission, would also be 26 years.

(iii) That the view taken in the case of *Kartar Singh (supra)*, that the person who is convicted to life cannot get the benefit under Section 428 of Cr.P.C., has been overruled by the decision of the Supreme Court in the case of **Bhagirath v/s. Delhi Administration**[3].

(iv) That the contention of the Petitioner's Counsel that the benefit of Section 428 Cr.P.C., would not be available to Respondent No.8 since it is categorically stated in the Conviction Order dated 23rd November, 2006 that the Respondent No.8 and his co-accused were entitled to set off for the period undergone

3 (1985) 2 SCC 580

by them in custody with respect to the sentence of imprisonment passed only under Section 394 and 499 read with 34 IPC, and the conviction of the Respondent No.8 under Section 302 read with 34 IPC being specifically excluded, is clearly contrary to the Judgment of the Supreme Court in the case of Bhagirath (supra). Reliance was placed by him in the case of **Rajaram Kashinath Charoskar Vs. State of Maharashtra**[4].

(v) That the Judgment in the case of *Rajaram Kashinath Charoskar (Supra)* also clearly held that the power to grant set-off while calculating total period of sentence is an executive power and not a judicial power.

(vi) That despite the observations of the Constitution Bench in the case of **Maruram v. Union of India**[5], one cannot be heard to say that there can be no judicial intervention in cases of set-off, remission, commuting or otherwise abbreviating sentence. The Courts have wide powers to interfere in a case where the executive whilst exercising its power acted in a malafide, high handed or arbitrary manner.

(vii) That the contention of the Petitioner that the subsequent Guidelines of 2010 will not be applicable and the 1992 Guidelines would prevail, is without merit. In support of this contention, the Learned Amicus Curiae relied upon a decision of the Apex Court in the case of **State of Haryana vs. Jagdish**[6].

(viii) That as regards the argument of the Petitioner's Counsel on *Suraj*

4 2008 ALL MR (Cri) 3407,
5 (1981) 1 SCC 107
6 2010 Cri.L.J. 2398

Bhan's case (supra), a bare reading of Section 428 Cr.P.C. makes it clear that it nowhere requires the accused to move the court for availing the benefit under Section 428 Cr.P.C. In support of this contention, the Learned Amicus Curiae relied on the decision of the Supreme Court in the case of *Maruram (Supra).*

(ix) That the apprehension and anxiety of the Petitioner qua his safety and security seems to be unfounded. However, if the Petitioner is threatened by Respondent No.8, or apprehends danger to his life at the hands of Respondent No.8 after his release, he can be granted liberty to forthwith approach the concerned police station for necessary action, or may even petition the Court for appropriate action.

FINDINGS :

8. We have considered the submissions advanced by the Learned Advocate for the Petitioner, the learned Public Prosecutor and also the submissions advanced by the Learned Amicus Curiae. We have also considered the case law cited by the Learned Advocates for the Petitioner and the Learned Amicus Curiae.

9. The issue of placing Respondent No.8 under Category 4(e) is not *res-integra*, as the Respondent No.8 (Laltu Ashok Ghosh) and the co-accused had filed Criminal Writ Petition No.328 of 2015, by which they had sought their premature release as envisaged under Section 433(A) Cr.P.C., and the Division Bench of this Court interalia observed as under:-

> "4. We have carefully gone through the judgment in this case of the Sessions Court as well as the judgment dated 29th July, 2013 passed by this

> Court in Criminal Appeal No.582 of 2007 and Criminal Appeal No.310 of 2012 preferred by the petitioners against their conviction and sentence in Sessions Case no.278 of 2002. These two judgments as well as other records clearly show that it is a case of murder committed in the course of robbery. In this view of the matter, the petitioners have been rightly placed under category 4(e). A convict placed in category 4(e) is released on completing 26 years of imprisonment with remission, provided the convict has completed 14 years of actual imprisonment. The petitioners as of 31st July, 2016 have completed actual imprisonment of about 14 years and 7 months and with remission they have completed about 17 years of imprisonment. As the petitioners have been placed in category 4(e), their probable date of release is in April, 2019. In view of the order dated 18th August, 2016, the petitioners be released on completing period of 26 years with remission."

It is therefore, clear from the above order that categorization and applicability of the Guidelines etc., has been upheld by this Court vide its Order in Criminal Writ Petition No.328 of 2015, which Order was not challenged in the Supreme Court either by the Respondent No. 8 nor by the Petitioner at any point of time and therefore the argument of the Petitioner with respect to the categorization of Respondent No. 8 under 4(e) and the applicability of the Guidelines of 2010, cannot now be countenanced. Even otherwise, the categorization and applicability of the Guidelines of 2010 would not come in the way of Respondent No.8, as even in the earlier Guidelines of 11.05.1992, the Respondent No.8 would have been placed in Category 5(a). The relevant portion of the Guidelines of 11.05.1992 reads thus:

"5. MURDERS BY PROFESSIONAL CRIMINALS

a) Murders committed by dacoits and robbers in the act of committing dacoities and robberies - 26 years"

Therefore, even if the 1992 Guidelines are taken into account, the period of imprisonment to be undergone by the Respondent No. 8, including remission, would still be 26 years.

10. The contentions advanced on behalf of the Petitioner that in the case of Kartar Singh (Supra), the Supreme Court has taken a view that a person who is convicted to life cannot get the benefit under Section 428 Cr.P.C., is advanced without noticing the Judgment passed by the Supreme Court in the case of Bhagirath v/s. Delhi Administration (supra), which over rules the view earlier taken. Paragraphs 12 and 13 of this Judgment are relevant and reproduced hereunder :

> "12. The two cases before us were referred to a larger Bench because of the doubt entertained as regards the correctness of the decision in Kartar Singh, especially because of the apparently conflicting view taken by another Bench of this Court in Sukhlal Hansda v. State of W.B. Both of those decisions were rendered by a three-Judge Bench. In Kartar Singh, persons who were sentenced to life imprisonment challenged an order passed by the Government of Haryana, denying to them the benefit of the period of under trial detention under Section 428 of the Code. It was held by this Court that the Penal Code and the Criminal Procedure Code make a clear distinction between 'imprisonment for life' and 'imprisonment for a term' and, in fact, the two expressions are used in contradistinction with each other in one and the same section, the former meaning imprisonment for the remainder of the natural life of the convict and the latter meaning imprisonment for a definite or fixed period. The Court proceeded to hold that an order of remission

> passed by the appropriate authority merely affects the execution of the sentence passed by the Court, without interfering with the sentence passed or recorded by the Court. Therefore, Section 428 which opens with the words "where an accused person has, on conviction, been sentenced to imprisonment for a term", would come into play only in cases where 'imprisonment for a term" is awarded on conviction by a court and not where the sentence imposed upon an accused becomes a sentence for a term by reason of the remission granted by the appropriate authority. Finally, according to the Court, "the question is not whether the beneficent provision should be extended to life convicts on an a priori reasoning or equitable consideration but whether on true construction, the section comprises life convicts within its purview". The Court found support to its view in the Objects and Reasons for introducing Section 428 in the Code, as set out in the Report of the Joint Committee.
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> 13. We have considered with great care the reasoning upon which the decision in Kartar Singh proceeds. With respect, we are unable to agree with the decision……"

11. Therefore, the contention of the Petitioner's Counsel that the benefit of Section 428 Cr.P.C., would not be available to Respondent No.8, as the Conviction Order dated 23rd November, 2006, has categorically stated that the Respondent No.8 and his co-accused were entitled to set off only for the period undergone by them in custody with respect to the sentence of imprisonment passed under Sections 394 and 499 r/w 34 IPC, and Section 302 r/w 34 I.P.C. being specifically excluded thereby denying the benefit of set off under Section 428 Cr.P.C to the Respondent No.8 with respect to his sentence under Section 302 r/w 34 of I.P.C, is erroneous. This

contention is not only clearly contrary to the Judgment of the Supreme Court in the case of *Bhagirath V/s. Delhi Administration* (supra) but is also contrary to the decision of the Bombay High Court in the case of *Rajaram Kashinath Charoskar* (supra), paragraphs 17, 21 to 24 of which are relevant and reproduced hereunder :

> "17. The aforesaid discussion of the relevant aspects of the matter pertaining to grant of commutation and/or set off will show that power to commute a sentence as also to grant set off while calculating the total period of sentence is an executive power and not a judicial power as such. This power vests exclusively with the Executive Government and not with the Judiciary. In other words, it is not open for the judiciary to either grant or not to grant the set off as also either to commute or not to commute a sentence."

> "21. The aforesaid discussion of the relevant legal aspects of the matter thus shows that neither the judgment delivered by the Sessions Judge nor the one delivered by this Court in the appeal, can be read to mean that the petitioner cannot be granted set off to which he may otherwise be entitled to under the said Code. It was not for the judiciary to direct grant or otherwise of such a set off to the petitioner at that stage. It is exclusively within the domain of the Executive Government to take such a decision. Obviously, therefore, it is open for the Executive Government in terms of the aforesaid provisions of law and in the light of its policy decisions reflected by relevant Government Resolutions and/or Circulars to decide the issue as to whether the petitioner is entitled to set off or not. In taking such a decision the aforesaid observations and/or order of the Sessions Judge or for that matter of this Court cannot operate as a hurdle much less prohibition.

> 22. We, therefore, answer the aforesaid issue by holding that the petition is entitled to claim commutation of his sentence as also set off, if otherwise found entitled in law, in spite of specific orders of the Sessions

Judge, which is confirmed in appeal by this Court, directing to the contrary.

23. In this petition what is impugned by the petitioner is the decision of the Executive Government not to grant such a set off to the petitioner under section 428 of the Code only on the ground that the Sessions Judge had issued an order to the contrary which is confirmed in appeal by this Court. Thus, before us, what is questioned is the executive action of the State Government in refusing to grant set off to the petitioner under section 428 of the said Code. **We, therefore, hold, in the light of the aforesaid legal aspects of the matter, that the set off u/s 428 of the Code could not have been denied to the petitioner on the ground that the Sessions Judge has ordered accordingly, which order is confirmed by this Court in appeal and that in spite of such orders it is open for the State Government to grant such a set off to the petitioner.** We may hasten to add that we have already held hereinabove that the petitioner is entitled to enjoy such a set off.

24. Another way of looking at the issue under consideration is that an occasion to try, entertain and decide the claim of a convict for set off under section 428 of the Code will arise only when the imprisonment for life awarded to such a convict is to be commuted. Such an occasion obviously cannot arise when such a convict is being convicted and sentenced either by Sessions Judge or when sustainability of such conviction and sentence is being examined by the High Court in an appeal. In other words, an occasion to operate provisions of section 428 r/w section 433-A of the Code arises only after the convict is convicted and not at the time when the convict is being convicted or being sentenced by a Court.

We may draw support in this regard from the observations made in paragraph 11 of the judgment delivered by the Supreme Court in the case of **Bhagirath** (supra), which reads thus –

> "This extract is taken from Bhagirath Vs. Delhi Admn., (1985) 2 SCC 580, at page 586:
>
> 11. ..... The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life"
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> Therefore, in our view for this additional reason as well, this aspect of the matter could neither have been considered by the Sessions Judge, nor by the Division Bench of this Court, while considering the question as to whether the petitioner be convicted or nor and if to be convicted, what sentence be awarded to him. For this additional reason also we hold that the statutory benefit to be granted to the petitioner under section 428 r/w section 433-A of the Code, cannot be taken away, simply because it was so ordered by the Sessions Judge, which order appears (as actually it is not) to have been confirmed in appeal unintentionally by the Division Bench of this Court.
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> (Emphasis supplied)"

12. The above Judgment, especially the portion emphasized by us, clearly answers the issue raised by the Petitioner that the Conviction Order dated 23.11.2006 excludes the benefit of set off under Section 428 Cr.P.C. to the Respondent No.8 for the conviction and sentence imposed upon him under Section 302 r/w S.34 IPC., and that the same has not been interfered with by the Appellate Court in its Order dated

29.07.2013. Moreover, and pertinently in paragraph (4) of the aforesaid Judgment of *Rajaram* Kashinath Charoskar the operative portion of the conviction order dated 20.10.1993 has been reproduced, in which sub-para (3), is of some relevance and reads thus:-

> "3. The accused is under trial prisoner but as he is sentenced for life imprisonment, no set off is given u/s.428 of Code of Criminal Procedure."

Despite the aforesaid conviction order dated 20.10.1993 being upheld by the Division Bench in appeal vide its judgment and order dated 19.08.1996, the above observations and findings were recorded. In fact the Learned Division Bench categorically laid down that the set off under Section 428 of the Code could not have been denied to the petitioner on the ground that the Sessions Judge has ordered accordingly, which order was confirmed by this Court in appeal **and that in spite of such orders** it is open for the State Government to grant such a set off to the petitioner. Pertinently, the Judgment has in fact drawn support from the said decision of the Hon'ble Supreme Court in the case of *Bhagirath v/s. Delhi Administration (supra).*

13. The Judgment in the case of *Rajaram Kashinath Charoskar (supra)* also clearly holds that the power to grant 'set off' while calculating the total period of sentence, is an executive power and not a judicial power. Further, the power vests exclusively with the Executive Government and not with the Judiciary.

14. Paragraphs 21 to 26 of the Judgment of the Constitution Bench in the case of *Maruram* (supra), are relevant and reproduced hereunder :

> "21. The learned Solicitor-General reinforced the conclusion by pointing out that the whole exercise of Section 433-A, as the notes on clauses revealed, was aimed at excluding the impact of Prison Remissions which led to unduly early release of graver 'lifers'. Parliament knew the 'vice', had before it the State remission systems and sought to nullify their effect in a certain class of cases by use of mandatory language. To read down Section 433-A to give overriding effect to the Remission Rules of the State would render the purposeful exercise a ludicrous futility. If 'Laws suffer from the disease of Language', courts must cure the patient, not kill him. We have no hesitation to hold that notwithstanding the 'notwithstanding...' in Section 433-A, the Remission Rules and like provisions stand excluded so far as 'lifers' punished for capital offences are concerned.
>
> 22. The learned Solicitor-General explained why the draftsman was content with mentioning only Section 432 in the non-obstante clause. The scheme of Section 432, read with the court's pronouncement in Godse case, furnishes the clue. We will briefly indicate the argument and later expatiate on the implications of Godse case as it has an important bearing on our decision.
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> 23. Sentencing is a judicial function but the execution of the sentence, after the courts pronouncement, is ordinarily a matter for the executive under the Procedure Code, going by Entry 2 in List III of the Seventh Schedule. Keeping aside the constitutional powers under Articles 72 and 161 which are 'untouchable' and 'unapproachable' for any legislature, let us examine the law of sentencing, remission and release. Once a sentence has been imposed, the only way to terminate it before the stipulated term is by action under Sections 432/433 or Articles 72/161. And if the latter power

under the Constitution is not invoked, the only source of salvation is the play of power under Sections 432 and 433(a) so far as a 'lifer' is concerned. No release by reduction or remission of sentence is possible under the corpus juris as it stands, in any other way. The legislative power of the State under Entry 4 of List II, even if it be stretched to snapping point, can deal only with Prisons and Prisoners, never with truncation of judicial sentences. Remissions by way of reward or otherwise cannot cut down the sentence as such and cannot, let it be unmistakably understood, grant Final exit passport for the prisoner except by government action under Section 432(1). The topic of Prisons and Prisoners does not cover release by way of reduction of the sentence itself. That belongs to criminal procedure in Entry 2 of List III although when the sentence is for a fixed term and remission plus the period undergone equal that term the prisoner may win his freedom. Any amount of remission to result in manumission requires action under Section 432(1), read with the Remission Rules. That is why Parliament, tracing the single source of remission of sentence to Section 432, blocked it by the non-obstante clause. No remission, however long, can set the prisoner free at the instance of the State, before the judicial sentence has run out, save by action under the constitutional power or under Section 432. So read, the inference is inevitable, even if the contrary argument be ingenious, that Section 433-A achieves what it wants – arrest the release of certain classes of 'lifers' before a certain period, by blocking Section 432. Articles 72 and 161 are, of course, excluded from this discussion as being beyond any legislative power to curb or confine.

24. We are loathe to loading this judgment with citations but limit it to two leading authorities in this part of the case. Two fundamental principles in sentencing jurisprudence have to be grasped in the context of the Indian corpus juris. The first is that sentencing is a judicial function and whatever may be done in the matter of executing that sentence in the shape of remitting, commuting or otherwise abbreviating, the executive cannot alter the sentence itself. In Robha case, a Constitution Bench of this Court

illumined this branch of law. What is the jural consequence of a remission of sentence?

In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that is does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability, to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional Court would have of reducing the sentence passed by the trial Court and substituting in its place the reduced sentence adjudged by the appellate or revisional Court. This distinction is well brought out in the following passage from Weater's CONSTITUTIONAL LAW on the effect of reprieves and pardons vis-à-vis the judgment passed by the court imposing punishment, at p. 176, para 134:

> A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. The judicial power and the executive power over sentences are readily distinguishable', observed Justice Sutherland, 'To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment.

Though, therefore, the effect of an order of remission is to wipe out that part

of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched.

The relevance of this justice distinction is that remission cannot detract from the quantum or quality of sentence or its direct and side-effects except to the extent of entitling the prisoner to premature freedom if the deduction following upon the remission has that arithmetic effect.

25. Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at that point where th subtraction results in zero. Here, we are concerned with the imprisonment and so we come upon another concept bearing on the nature of the sentence which has been highlighted in Godse case[7]. Where the sentence is indeterminate and of uncertain duration, the result of substraction from an uncertain quantity is till an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of Godse sought his release through a Writ Petition under Article 32 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Articles 72 or

7 (1961) 3 SCR 440

161 of the Constitution. Godse is authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life". The legal position has been set out in the pretext of remissions in life sentence cases thus :

"Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Penal Code, 1860 or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is found in law to serve the life term in prison. The rules framed under the Prisons Act enable such a prisoner to earn remissions – ordinary, special and State – and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions, the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appropriate Government to remit the sentence under Section 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We therefore, hold that the Petitioner has not yet acquired any right to release."

26. In Godse case, Subba Rao J., also drew the conceptual lines of "remission", "sentence" and "life sentence". "Remission" limited in time, helps computation but does not ipso jure operate as release of the prisoner. But when the sentence awarded by the Judge is for a fixed term the effect of remissions may be to scale down the term to be endured and reduce it to nil, while leaving the factum and quantum of the sentence intact. That is the

> ratio of Rabha[8]. Here, again, if the sentence is to run until life lasts, remissions, quantified in time, canot reach a point of serio. This is the . ratio of Godse. The inevitable conclusion is that since in Section 433-A we deal only with life sentence, remissions lead nowhere and cannot entitle a prisoner to release. In this view, the remission rules do not militate against Section 433-A and the forensic fate of Godse (who was later released by the State) who had stockpiled huge remissions without acquiring a right to release, must overtake all the petitioners until 14 years of actual jail life is suffered and further an order of release is made either under Section 432 or Articles 72/161 of the Constitution."

15. As correctly clarified by the Learned Amicus Curiae, despite the above observations in the case of *Rajaram Kashinath Charoskar (Supra)*, it does not mean that in no case, can there be judicial intervention in cases of set off, remission, commuting or otherwise abbreviating sentence. In fact, the courts have wide power to interfere if it finds the action of the Executive, who while exercising its power, has acted in a malafide, high handed or arbitrary manner. Hence, any executive decision is always subject to judicial review in certain extraordinary cases, as well established in the following judgments:-

(i) The Apex Court had the occasion to consider the nature of review by a court, when the administrative action is challenged before it. The nature of the challenge and the principles thereof were considered in the Judgment of **Om Kumar v. Union of India**[9], wherein the court noticed that the challenge to the action could be

8 AIR 1961 SC 334
9 (2001) 2 SCC 386

either on grounds of discrimination or on grounds of arbitrariness. The Supreme Court held that a challenge to the administrative action on the ground of discrimination is tested on the touchstone of proportionality, as a primary review. Here the courts deal with the balancing act of the administrator as a primary reviewing authority to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. However if the challenge is on grounds of arbitrariness, i.e. as to whether the action of the administrative authority is rational or reasonable, the courts are then confined to a secondary role and have to apply the Wednesbury Principle. In such a role, the courts have confined themselves to see whether the administrator discharged his primary role or not.

(ii) In **Fertilizer Corporation Kamgar Union (Registered) Sindri v. Union of India**[10], the Supreme Court has held (at page 584):

> "35……..We certainly agree that judicial interference with the administration cannot be meticulous in a montesquien system of separation of powers. The court cannot usurp or abdicate and the parameters of judicial review must be clearly defined and never exceeded. If the directorate of a Government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor take the board of directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of

10 (1981)1 SCC 568

procedure set for it by rules of public administration."

(iii) Even in case of Maruram, in paragraph (23), it is stated that "sentencing is a judicial function but the execution of the sentence, after the courts pronouncement, is ordinarily a matter for the executive under the Procedure Code …….".

16. The above guidelines need to be borne in mind by the Court, when any judicial intervention is sought for, and it thus cannot be said that no judicial intervention in executive decisions, is possible in any case.

17. In the case of **State of Haryana vs. Jagdish**[11], the Supreme Court, while interalia dealing with a case of remission of sentence of a life convict considered whether the respondent prisoner had a right to get his case considered under the policy dated 04.02.1993 or the policy dated 13.08.2008, observed in paragraph 43 of the Judgment as follows:

> "The State has to exercise its powers of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose, in our opinion, it should relate to a policy which, in the instant- case, was in favour of the respondent. **In case a liberal policy prevails on the date of consideration of the case of a "lifer" for pre-mature release, he should be given benefit**

11 2010 Cri. Law Journal 2398

thereof." (Emphasis supplied)

18. The above being the dictate of the Supreme Court, the Petitioner cannot raise a grievance that the case of the Respondent No. 8 ought to have been considered under the 1992 Guidelines and not the 2010 Guidelines.

19. However, in the present case this argument of the Petitioner loses its meaning, since under both the 1992 Guidelines and the 2010 Guidelines, the period of imprisonment to be undergone including remissions, subject to a minimum of 14 years actual imprisonment including set off period, by the Respondent No. 8, is the same viz. 26 years.

20. As regards the argument of the Petitioner's Counsel on *Suraj Bhan's* case *(supra)*, as submitted by Shri Pranav Badheka, a bare reading of S. 428 Cr.P.C. makes it clear that it nowhere requires the accused to move a court for availing the benefit under S. 428 Cr.P.C. Even otherwise, paragraph (7) should be read to mean that an application under Section 428 CrPC **'could be' a miscellaneous application** by the accused to the court at any time……. Thus, the observation therein cannot be suggested to mean that applications for set off should only be made to the court alone. In fact in light of the decision in the case of *Maruram* and *Bhagirath (supra)*, this contention of the Counsel for the Petitioner does not hold any substance and runs counter to what has been held therein.

21. Lastly, with regard to the Respondent No.8 allegedly threatening the Petitioner in 2014, and the Petitioner's consequent concern with respect to his safety and security, particularly in view of the drastic nature of the crime committed by the Respondent No. 8, certain safeguards are required to be provided to the Petitioner. Shri Pranav Badheka submitted that in this regard, only an N.C. of 2014 has been lodged with the D.N. Nagar Police Station on 27.01.2014. The same after a period of more than six years, is stale and since there have been no further such instances alleged by the Petitioner against Respondent No. 8, the apprehension and anxiety of the Petitioner seems to be unfounded. Moreover, the Respondent has already suffered actual incarceration for a period of 20 years and 5 days.

22. However, despite the above submissions, this Court cannot be insensitive to the mental trauma suffered by the Petitioner upon losing two of his very dear ones in a brutal act by the Respondent No. 8 and his co-accused, and thereafter being allegedly threatened by Respondent No. 8, for which the Petitioner again had to lodge an NC, as mentioned above. Therefore if the Petitioner in future is threatened by Respondent No. 8, or if he apprehends danger to his life at the hands of Respondent No. 8, he shall have the liberty to forthwith approach the concerned police-station for necessary action upon his complaint, or may even petition a court for appropriate action, depending on the facts at the relevant time.

23. For all the reasons stated above, the Writ Petition is dismissed.

(MILIND N. JADHAV, J.) **(S.J. KATHAWALLA, J.)**