The Indian Law Reports

Before : I. S. Tiwana & J. L. Gupta, JJ.

JALANDHAR SINGH,—*Petitioner.*

versus

STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Criminal Writ Petition No. 55 *of* 1990

September 4, 1991

Constitution of India 1950—*Arts.* 72 *and* 161—*Code of Criminal Procedure* (*II of* 1974)—*Executive instructions of Punjab Government dated December* 12, 1985—*S.* 43-*A*—*Power to pardon or order premature release—Heinousness of crime is not a factor extraneous to grant of pardon or pre-mature release—The same can be taken into consideration by the President and the Governor while passing orders under Articles* 72 *and* 161 *respectively.*

Mithu Singh v. *State of Punjab* 1989(1) *Recent Criminal Reports* (238), *Dalbir Singh* v. *State of Haryana and another* : (1989) (2) *All India Criminal Law Reports* (290), *and Sehaj Ram* v. *State of Haryana and another* : (1990) (2) *Chandigarh Criminal Cases* 99).

(over-ruled)

Held, that while exercising power under Articles 72 and 161 of the Constitution of India, the facts and circumstances of each case can be taken into consideration. The heinousness of the crime and the 'intractable savagery' of the delinquent are factors which have been considered to be relevant for the exercise of power under the said articles. Even otherwise, whatever is relevant for the Court while awarding punishment can by no process of law or logic become irrelevant or extraneous for the Government while considering the question of pre-mature release.

(Para 9)

Held, that we are unable to accept the contention that the question of pre-mature release has to be considered only on the grounds mentioned in the letter dated December 12, 1985 or that the heinousness of crime is specifically excluded under the said letter. Exercise of mercy jurisdiction involves a permutation and combination of a large number of factors. No executive authority can visualise all permutations and combinations and lay down guidelines of universal application. It can only think of some and incorporate them by way of guidelines. No such compilation can be exhaustive in its scope. In any event the letter of December 12, 1985 to which repeated reference has been made by the learned counsel does not in any way exclude the gravity of the offence as one of the factors relevant for the decision of the mercy petition.

(Para 11)

Held, that factors like grave or sudden provocation and absence of motive and premeditation are relevant for determining the heinousness of the crime. These have been specifically included in the letter of December 12, 1985. Whatever was implicit in this letter has later on been clarified by the Government by its letter of July 8, 1991, a copy of which was produced before us during the hearing. The convicts have been classified under different heads. Heinousness of the crime is specifically made relevant. In view of the instructions the contention based on instructions has primarily become academic.

(Para 12)

Held, that all convicts cannot be classified as one homogeneous class. They can be classified on the basis of different considerations. Heinousness or gravity of the offence committed by a convict can be one of the basis for classification.

(Para 13)

Held, that the provisions of the Jail Manual are merely guidelines which can be taken into consideration by the Governor while passing orders under Article 161 of the Constitution. These do not preclude the Governor from taking into consideration factors like heinousness of the crime.

(Para 13)

Held, that the heinousness of the crime is not extraneous to the grant of pardon or pre-mature release. We are also of the view that the decisions of this Court in Mithu Singhs' case (1989) (1) Recent Criminal Reports (238) Dalbir Singh's case (1989) (2) All India Criminal Law Reporters (290) and Sehaj Ram's case (1990) (2), Chandigarh Criminal Cases (99), suggesting that heinousness is irrelevant, do not lay down correct law.

(Para 14)

Petition Under Articles 226/227 *of the Constitution of India praying that the entire record concerning the case of the detenu may kindly be summoned and after the perusal of the same, this Hon'ble Court may be pleased to issue* :—

(*i*) *a writ in the nature of habeas corpus holding that the convict is entitled to be released prematurely and that the impugned inaction in denying premature release is violative of Articles* 14, 19, 21 *of the Constitution of India;*

(*ii*) *any other writ, order or direction which in the circumstances of this case, this Hon'ble Court may deem fit and proper be also passed;*

IT IS FURTHER PRAYED :

(*i*) *during the pendency of the present writ petition, detenu be allowed to be released on bail;*

(*ii*) *filing of certified copies of annexures P/1 to P/6 be dispensed with;*

(*iii*) *filing of an affidavit be dispensed with as the petitioner is confined in jail.*

V. K. Jindal, Advocate, *for the petitioner.*

O. P. Goyal, Addl. A.G. Pb., *for the Respondent.*

JUDGMENT

Jawahar Lal Gupta, J.

(1) Is heinousness of crime wholly extraneous to the grant of pardon or pre-mature release ? A learned Single Judge in *Mithu Singh* v. *State of Punjab* (1), has taken the view that "the heinousness or gravity of the offence is no legal ground to discriminate the case of one accused with the cases of other accused....." This view appears to have been reiterated in later decisions *viz., Dalbir Singh* v. *State of Haryana and another* (2) and in *Sehaj Ram* v. *State of Haryana and another* (3). Sekhon, J. has expressed reservation about the view taken in *Mithu Singh's case.* On a reference this matter has come up before us.

(2) Mr. Vijay Jindal, learned counsel for the petitioner has whemently contended that heinousness or gravity of the offence is a matter which is considered by the Court while awarding punishment. It is not relevant to the question of pre-mature release of the convict. He has further contended that the State Government having issued instructions,—*vide* letter dated December 12, 1985 (Annexure P. 2), the mercy petitions had to be examined only in accordance with the instructions. Heinousness of the offence is not one of the factors mentioned in the letter and cannot thus be taken into consideration. On the other hand, Mr. O. P. Goyal, learned Additional Advocate General appearing on behalf of the respondents has contended that the Constitution confers very wide powers on the Executive Head of the State and no impediments can be placed thereon. He further contends that the various factors mentioned in the instructions issued by the Government from time to time are only illustrative and not exhaustive of the grounds which can be taken into consideration while deciding the case for pre-mature release.

(3) A word about the necessity and nature of the 'power to pardon'. It has been recognised since the hoary past. In the words of Chief Justice Marshal "this power had been exercised from time immemorial by the Executive of that nation whose language is our

(1) 1989 (1) R.C.R. 238.

(2) 1989 (2) All India Criminal Law Reports 290.

(3) 1990 (2) Chandigarh Criminal Cases 99.

language, and to whose judicial institutions ours bare a close resembance....." In the words of Chief Justice Taft in *Philip Grossman's case* (69 L.ED. 527) :—

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the Executive for special cases, To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; *but whoever is to make it useful must have full discretion to exercise it.* Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it." (Emphasis supplied).

(4) As in America, so under our own Constitution, the power of clemency has been conferred by the Constitution on the President of India and the Governors of States. The relevant provisions occur in Articles 72 and 161 of the Constitution. The scope of these provisions has been considered by various Courts. The provisions fell for pointed consideration in *Nanawati's case* before a Full Bench of the Bombay High Court and later on before the Apex Court in AIR 1961 S.C. 112 in the year 1978 when the Parliament enacted and added Section 433-A of the Code of Criminal Procedure. the Supreme Court considered the matter in *Maru Ram's case.* After a review of the case law, a Constitution Bench in the words of Krishna Iyer, J. observed as under :—

> "*Para* 59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are co-extensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from

being identical, and, obviously, the Constitutional power is 'untouchable' and unapproachable and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433 (a) is within the legislative powers of Parliament."

"*Para* 60. Even so, we must remember the Constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a we-bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid Articles."

(5) Recently another Constitution Bench of the Apex Court in *Kehar Singh* v. *Union* of *India* (4), *inter alia* observed as under :—

"Learned counsel for the petitioners next urged that in order to prevent an arbitrary exercise of power under Article 72 this Court should drawn up a set of guidelines for regulating the exercise of the power. It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude."

(6) The power is thus of the widest amplitude. Its exercise cannot be cabined or cribbed by "any precise, clearly defined and sufficiently channelised guidelines." In spite of the widest amplitude of the power, Mr. Jindal contends that the President and the Governor are precluded from taking into consideration the heinousness of the crime. Relying on the view in *Mithu Singh's* case, the learned counsel submits that all life convicts from one class and they cannot be treated differently on the basis of the heinousness or

(4) A.I.R. 1989 S.C. 653.

the gravity of the crime. Both on the basis of principle and precedent, we find no rationable behind the contention. While considering the constitutional validity of Section 433-A of the Code of Criminal Procedure and the scope of Articles 72 and 161 of the Constitution of India in *Maru Ram's case,* the Apex Court laid down certain principles. In paragraph 72 (10) it was observed as under :—

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

(7) The underlined portion in our view is a clear indication that in case of "intractably savage delinquents" the yard-stick for the grant of mercy could be different from that in other cases. Soon thereafter in the case commonly known as *Billa Ranga's case* (*Kuljeet Singh alias Ranga* v. *Union of India and other* (5). Chief Justice Chandrachud observed that :—

> "the death of the Chopra children was caused by the petitioner and his companion Billa after a savage planning which bears a professional stamp. The murder was most certainly not committed on the spur of the moment as a result of some irresistible impulse while can be said to have overtaken the accused at the crucial moment. In other words, there was a planned motivation behind the crime though the accused had no personal motive to commit the murder of these two children."

(5) A.I.R. 1981 S.C. 1572.

Further it was observed as under :—

> "The survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security. They are professional murderers and deserve no sympathy even in terms of the evolving standards of decency of a maturing society."

(8) After dismissal of Appeal by the Supreme Court and the mercy petition by the President, a petition under Article 32 was moved before the Supreme Court. It was contended that the power conferred by Article 72 of the Constitution was a power coupled with duty which had to be exercised fairly and reasonably. In *Kuljeet Singh alias Ranga* v. *Lt. Governor, Delhi and another* (6), Rule Nisi was issued. The execution of death penalty in all cases was stayed. However, finally the case was disposed of with the following observations reported in A.I.R. 1982 S.C. 774 :—

> "But the question as to whether the case is appropriate for the exercise of the power conferred by Article 72 *depends upon the facts and circumstances of each particular case. The necessity or the justification for exercising that power has therefore to be judged from case to case.* In fact, we do not see what useful purpose will be achieved by the petitioner by ensuring the imposition of any severe, judicially evolved constraints on the wholesome power of the President to use it as the justice of a case may require. After all, the power conferred by Article 72 can be used only for the purpose of reducing the sentence, not for enhancing it. We need not, however, go into that question elaborately because in so far as this case is concerned, we are quite clear *that not even the most liberal use of his mercy jurisdiction could have persuaded the President to interfere with the sentence of death imposed upon the petitioner, in view particularly of the considerations mentioned by us in our judgment in Kuljeet Singh alias Ranga* v. *Union of India.* We may recall what we said in that judgment that "the death of the Chopra children was caused by the petitioner and his companion Billa after a savage planning which bears a professional stamps", that the "survival of an orderly society demands the extinction

(6) A.I.R. 1981 S.C. 2239.

of the life of persons like Ranga and Billa who are a menace to social order and security", and that "they are professional murderers and deserve no sympathy even in terms of the evolving standards of decency of a mature society."

2. The petition is accordingly dismissed."

(9) A perusal of the above would show that while exercising power under Articles 72 and 161 of the Constitution of India, the facts and circumstances of each case can be taken into consideration. The heinuousness of the crime which had been perpetrated by Billa and Ranga had persuaded the Supreme Court to hold that even the most liberalise of mercy jurisdiction could not have persuaded the President to interfere with the sentence of death. Apparently the heinousness of crime and the 'intractable savagery' of the delinquent are factors which have been considered to be relevant for the exercise of power under Articles 72 and 161 of the Constitution. Even otherwise, whatever is relevant for the Court while awarding punishment can by no process of law or logic become irrelevant or extraneous for the Government while considering the question of pre-mature release.

(10) While exercising powers under Articles 72 and 161 of the Constitution, the appropriate authority is competent to examine the record of the criminal case. It is also competent to take into consideration such evidence as may have come into its possession besides the evidence on the file of the Court. Nothing considered in this regard can be dubbed as extraneous. Just as in the case of *Billa and Ranga,* the gravity of the offence persuaded the Court to hold that the President could not have awarded a punishment less than death sentence, the executive authority can in all cases examine various factors including the heinousness or gravity of the offence to decide as to whether or not pre-mature release of a convict is desirable. The conflict between individual's freedom and social order has to be reasonably balanced on a comprehensive consideration of all relevant factors. Heinousness or gravity of the offence are not irrelevant to that consideration.

(11) We are also unable to accept the contention that the question of pre-mature release has to be considered only on the grounds mentioned in the letter dated December 12, 1985 or that the heinousness of crime is specifically excluded under the said letter. Exercise of mercy jurisdiction involves a permutation and combination of a large number of factors. No executive authority can visualise all permutations and combinations and lay down guidelines of universal application. It can only think of some and incorporate them by way of

guidelines. No such compilation can be exhaustive in its scope. In any event the letter of December 12, 1985 to which repeated reference has been made by the learned counsel does not in any way exclude the gravity of the offence as one of the factors relevant for the decision of the mercy petition. In this letter, it is *inter alia* mentioned as under :—

> "The aspect of young/adolescent age, sex, mental deficiency, grave or sudden provocation and absence of motive and pre-meditation should also be the factors while scrutinising the copies of the judgment in mercy petition cases."

(12) Factors like grave or sudden provocation and absence of motive and premeditation are relevant for determining the heinousness of the crime. These have been specifically included in the letter of December 12, 1985. Whatever was implicit in this letter has later on been clarified by the Government by its letter of July 8, 1991, a copy of which was produced before us during the hearing. The convicts have been classified under different heads. Heinousness of the crime is specifically made relevant. In view of these instructions, the contention based on instructions has primarily become academic. However, in view of the fact that even in the letter of December 12, 1985, the heinousness of the crime has not been excluded, the question need not be examined any further.

(13) We are also of the view that all convicts cannot be classified as one homogeneous class. They can be classified on the basis of different considerations. Heinousness or gravity of the offence committed by a convict can be one of the basis for classification. Billa and Ranga can in a given situation be treated as a class apart from an ordinary convict, who may have committed murder in an entirely different situation. While it may not be open to the executive to make the classification on the basis of wholly arbitrary or extreneous criteria, we entertain no doubt that in principle the classification can be founded on the gravity of the offence. Mr. Jindal has referred to the various provisions of the Punjab Jail Manual to contend that the convicts have been classified by a uniform criteria and their further classification on the basis of the supposed heinousness of the crime would be unfair and inequitable. In our view the provisions of the Jail Manual are merely guidelines which can be taken into consideration by the Governor while passing orders under Article 161 of the Constitution. These do not preclude the Governor from taking into consideration factors like heinousness of the crime.

(14) In view of the above, we answer the question posed at the threshold in the negative and hold that the heinousness of the crime is not extraneous to the grant of pardon or pre-mature release. We are also of the view that the decision of this Court in *Mithu Singh's case* (9), *Dalbir Singh's case* (10), and in *Sehaj Ram's case* (11), suggesting that heinousness is irrelevant, do not lay down correct law. The case will now go back to the learned Single Judge for decision on merits.

R.N.R.

Before : Amarjeet Chaudhary, J.

JANTA PROPERTIES (REGD.),—*Petitioner.*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ Petition No. 10024 *of* 1990

May 10, 1991.

Punjab Regulation of Colonies Act, 1975—Ss. 2, 4(1), 17—Licence issued to private coloniser under the 1975 Act for the development of colony—Licence issued by Director Housing and Urban Development, Punjab being competent authority—During work in progress Municipal Committee issuing notice to general public, warning purchaser that the colony had not been sanctioned by Town and Country Planning Department and was being developed in violation of the Punjab Scheduled Roads and Controlled Areas (Restriction of Unregulated Development) Act 1963—Held, notice is liable to be quashed—No violation of licence alleged—Authority of the Director is supreme in according such approval and no other authority has any right to put any hurdle in the works.

Held, that once the licence was granted by the competent authority, no interference either by the Municipal Committee or by the Country and Town Planning Department, Chandigarh was called for Even it is an admitted case of the Chief Town Planner, Chandigarh, that no approval in the matter was required as the licence is granted by the competent authority if the provisions contained in the Act are fulfilled by the licence holder and it can be cancelled only in case any provisions of the Act is contravened by the colonizer or he fails to comply with any of the terms and conditions on which the licence is issued. In the present case, the respondents have not been able to show that the colonizer has violated any of the provisions of the Act or he has failed to comply with any of the terms

(9) 1989 (1) R.C.R. 238.

(10) 1989 (2) All India Criminal Law Reporters 290.

(11) 1990 (2) Chandigarh Criminal Cases 99.