

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No.53 of 2019

Arising out of PS. Case No.-193 Year-1988 Thana- ARWAL District- Jehanabad

Chandra Kant Kumar, son of Shri Tribhuwan Sharma, resident of Village-
Ahiyapur Chotaki, P.S.- Arwal, District- Arwal, Bihar

... .. Petitioner/s

Versus

1. The State of Bihar, through The Chief Secretary, Government of Bihar, Old Secretariate, Patna, Biha
2. The Principal Secretary, Department of Home, Government of Bihar, Patna
3. The State Sentence Remission Board, through its Chairman, Government of Bihar, Patna
4. The Law Secretary cum Legal remembrance, Department of Law, Government of Bihar, Patna
5. The Director General of Police, Government of Bihar, Patna
6. The Director, Probation Services, Government of Bihar, Patna
7. The Inspector General, Prison, and Jail Reforms, Government of Bihar, Patna
8. The Additional Director General of Police, Criminal Investigation Department, Government of Bihar, Patna
9. The Superintendent, Gaya Central Jail, Gaya, Bihar

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Kamal Nayan Choubey, Sr. Advocate Mr. Binod Kumar Jha, Advocate Mr. Bhairaw Nand Sharma, Advocate
For the Respondent/s	:	Mr. Prabhu Narayan Sharma, A.C. to A.G.

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 22-01-2019

Heard Shri Kamal Nayan Choubey, learned Senior
Counsel along with Shri Bhairaw Nand Sharma, learned counsel
for the petitioner and Shri Prabhu Narayan Sharma, Assistant
Counsel to Advocate General for the State of Bihar.

2. This is a petition more in the nature of the



correction of record by way of a *certiorari* than by way of a Habeas Corpus petition for release.

3. The petitioner is the son of the convicted detenu Tribhuwan Sharma who has prayed that the Remission Board (Respondent No. 3) has been incessantly repeating the same reason again and again for rejection of the request for award of remission to the detenu on grounds that have already been rejected by the High Court vide judgment dated 20th of June, 2017 in Cr.W.J.C. No. 748 of 2017.

4. Learned counsel submits that a complete non-application of mind is reflected in the decision making process and, therefore, the manner in which the Remission Board has proceeded confirms that it has failed to take notice of the observations made by this Court as well as the facts pleaded by the detenu in support of his contention for release. It is urged that the issue of discriminating the detenu was at the fore that has completely been overlooked and ignored by the Remission Board that has resulted in once again the filing of this writ petition seeking liberty.

5. Learned counsel has urged that the petitioner's father was convicted in a case vide judgment dated 21st July, 2003 and the sentence of life imprisonment was awarded to him



on 4th August, 2003 against which an appeal was preferred before the Apex Court that was dismissed on 2nd April, 2004, the said judgment whereof is reported in **(2004) 2 BLJR 930 [Madan Singh Vs. State of Bihar]** along with the connected appeal of the detenu].

6. The question of remission was raised by the detenu before the State Government and in the absence of any consideration thereof the present petitioner filed Cr.W.J.C. No. 334 of 2017. During the pendency of the said petition the Remission Board rejected the prayer of premature release as a result whereof the petition was withdrawn on 5th of May, 2017 with liberty to challenge the order of the Remission Board.

7. The petitioner thereupon instituted Cr.W.J.C. No. 748 of 2017, the judgment whereof is relevant for the purpose of the present controversy. A Division Bench of this Court vide judgment dated 20th June, 2017 examined the contentions including the issue of applicability of the policy as notified by the State Government in the notification dated 10th December, 2002. The said notification refers to ineligibility for premature release for certain category of convicts and the same is gainfully reproduced hereinunder for ready reference:-

“Home (Special) Department
NOTIFICATION



The 10th December, 2002

(iv) Ineligibility for premature release

The following category of convicted prisoners undergoing life sentence may not be considered eligible for premature release-

- (a) **Prisoners convicted of the heinous offences such as rape, dacoity, terrorist crimes etc.**
- (b) Prisoners who have been convicted for organised murders in a premeditated manner and in an organised manner.
- (c) Professional murderers who have been found guilty of murder by hiring.
- (d) Convicted prisoners, who commit murder while involving in smuggling operations or who are guilty of murder of public servants on duty.”

8. One of the issues raised before the Court was about the applicability of the said notification as according to the petitioner the Remission Board itself had not been constituted and, therefore, the said policy would not be applicable in order to refuse premature release to the convict. The Court, however, did not proceed to deliberate upon the same inasmuch it found that the petition was bound to succeed on the ground of allegations of discrimination which did not



find consideration by the Remission Board. It was pleaded by the petitioner that two persons, namely, one Ajay Kumar Choudhary who had been convicted in a case of rape had been extended the benefit of remission and the second Shri Deena Yadav who had been convicted in a case of multiple murder on 5th June, 2003 in Sessions Trial No. 25 of 2002/206 of 1989 had been granted the benefit of premature release. According to the petitioner, these two categories of convicts who had committed the offence of rape and multiple murder respectively were released prematurely whereas the claim of the father of the petitioner was rejected without adverting to the said facts. This resulted in hostile discrimination in the decision making process of the Remission Board. The said argument was accepted and Cr.W.J.C. No. 748 of 2017 was allowed vide judgment dated 20th June, 2017. The relevant part of the judgment is extracted hereinunder:-

“So far the first question is concerned, learned counsel for the State has not been able to convince this Court as to under what circumstances such distinction could have been made between the father of the petitioner whose case has been considered at serial no. 19 as well as one of Ajay Kumar Choudhary whose case has been considered at serial no. 24 of Annexure-4. It appears from



column 2 that date of his conviction is also 04.08.2003, i.e. after publication of said notification dated 10.12.2002 (Annexure-A), whereas at the same time petitioner's case has been rejected on the ground of the said notification. That apart, the petitioner has clearly stated in paragraph 1 of the writ petition that the said notification remained inoperation and was implemented in the year 2007 itself, however, the State authority has not brought any document to show that such notification was made operational immediately and the question would be whether the policy which was made in the year 2003 but was never implemented till the year 2007, can be considered for the case of the convict who was convicted in the year 2003?

However, in view of the fact that the father of the petitioner's case has to succeed on the first issue itself, this Court would restrain itself from deciding the second issue for the present as this is a clear case of discrimination as the same Board in the same meeting has considered the 2002 notification for the purpose of rejection of the case of the father of the petitioner but has allowed the case of convict for rape and murder at serial no. 24 of Annexure-4. That apart, learned counsel for the petitioner also points out that a convict who was sentenced with capital punishment vide judgment dated 05.06.2003 in Sessions Trial No. 25 of 2002/206 of 1989 in the case of heinous crime of



murder but later on in appeal the sentence was converted to life imprisonment in Cr.App. No. 289 of 2003 and analogous matters, was prematurely released vide the decision taken in the meeting dated 11.09.2012 of the Remission Board (Annexure-14 series to the supplementary affidavit.) In such a situation, in our opinion, the order passed by the Remission Board with respect to the father of the petitioner is not at all sustainable on the ground of unreasonableness and being discriminatory.

As a result, this writ petition succeeds. The impugned order as contained in Annexure-4, so far it concerns the father of the petitioner, is quashed and set aside.”

9. The matter was directed to be reconsidered again by the Remission Board in the light of the observations made therein.

10. The Board again repeated its performance by reiterating its earlier stand without adverting to the aforesaid issue of discrimination. The petitioner again approached this Court by filing Cr.W.J.C. No. 2130 of 2017 where the State gave an undertaking through a counter affidavit filed that the premature release of the convict would be considered afresh. The judgment dated 22nd November, 2017 passed in Cr. W.J.C.



No. 2130 of 2017 is extracted hereinunder:-

“Heard parties.

Petitioner is aggrieved by the decision of the Bihar State Sentence Remission Board so far as it concerned with respect to his father who is serving life sentence in view of his conviction under Section 302 of the IPC and other provisions of Tada Act in the year 2003 in connection with Arwal P.S. Case No. 193 of 1998 registered on 04.08.2003.

The question involved in this case would be as to whether the policy of the State vide notification no. 3106 dated 10.12.2002 would be applicable in the case of the petitioner's father as it is contended that the policy, though published in the Official Gazette of the State of Bihar in year 2002 was not implemented till the year 2007 when first time Bihar State Sentence Remission Board was constituted. Thus it is urged, that in practical sense there was no implementation of the concerned policy of the State.

However, in view of the statement made in paragraph No. 13 of the counter affidavit filed on behalf of respondent Nos. 2,3,7 and 9 today making a categorical statement that in view of the issues involved in this matter the proposal for fresh consideration of petitioner's father premature release would be put up before the Remission Board in its next meeting so that the same once



again be considered by the Remission Board in accordance with law in the light of various decisions of this Court, this writ application stands disposed of with a direction to the authorities once again to put up the matter of the petitioner's father for fresh consideration by the Remission Board in its next meeting which would take a decision in accordance with law without being prejudiced by its earlier decision."

11. It is in the said background and the undertaking given to reconsider the matter that the writ petition came to be disposed of.

12. Unfortunately, there was delay in the decision making process.

On 3rd May, 2018 a decision appears to have been taken by the Remission Board to file a Special Leave Petition against the order dated 16.09.2017 in Cr.W.J.C. No. 1503 of 2017. This, however, does not appear to be relating to the person presently involved but the claim of the petitioner's father was rejected, and he again filed Cr.W.J.C. No. 1100 of 2018 where an affidavit was filed by the Inspector General of Police (Prison) that the case of the petitioner would be considered by the Board on its own merit in its next meeting. The order dated 29th June, 2018 passed in Cr.W.J.C. No. 1100 of 2018 is extracted hereinunder:-



“Heard learned counsel for the petitioner and learned Advocate General.

Affidavit has been filed on behalf of the I.G. Prison, Bihar that in the facts and circumstances of the case, the petitioner’s case would be considered by the Board on its own merit and in accordance with law in its next meeting.

On such affidavit having been given, this writ application stands disposed of with such direction to consider the case of the petitioner in the next meeting of the Board in accordance with law which is likely to be held, as per the affidavit filed today, in the next month.”

13. It is thereafter that the impugned decision has been taken by the Remission Board on 01.08.2018, whereby the claim of the petitioner’s father has been rejected once again on the very same grounds of the policy dated 28th December, 2002.

14. Shri Choubey, learned senior counsel contends that this chronology of events and the facts narrated hereinabove leave no room for doubt that this is a clear case where the Remission Board has repeatedly been passing orders mechanically without taking into consideration the issues raised by the petitioner, particularly the two specific instances of premature release of Ajay Kumar Choudhary and Deena Yadav.

15. Responding to the aforesaid submissions learned counsel for the State has urged that the policy of 2002



was clearly applicable in the case of the concerned convict inasmuch as since his conviction is of the year 2003 the policy was very much in existence and it is the same policy which will have to be taken into consideration for the purpose of grant of premature release. It is in this background that the policy makes the convict ineligible for premature release as he was involved in a case of terrorist activity. The fact of the involvement of the convict has already ended up in the judgment of the Apex Court and which is not in dispute but the issue raised is that if the Remission Board has proceeded to consider the claim of other convicts involved in heinous offences then in that event the Remission Board will have to record reasons in the light of the aforesaid facts.

16. Learned counsel for the State has urged that so far as the case of Ajay Kumar Choudhary is concerned, his conviction was of the year 1997 and, therefore, the 2002 policy was not applicable and he was released taking into consideration his individual conduct and the policy of 1984 prevalent at the time of his conviction. The submission, therefore, is that the same cannot be a ground for parity in the present case where the conviction is of the year 2003 which is after the promulgation of the new policy declared vide notification dated 28th December,



2002.

17. This argument of the learned counsel for the State is not borne out either from the impugned decision dated 01.08.2018 or even from the counter affidavit which has been placed on record. It is settled principle of law that in proceedings, particularly in the writ jurisdiction, an affidavit cannot supplement the reasons for the passing of the order and which law has been settled way back in the case of **Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi & Ors, reported in AIR 1978 SC 851**. Thus, the impugned order has to either sustain itself or otherwise on the basis of the reasons contained therein and not on the basis of any oral submissions advanced. The reason is very simple that the facts which are now being stated to be the basis for passing of the order through oral submissions do not find any consideration or application of mind by the decision making body. Thus, the decision making process itself stands vitiated by non-application of mind.

18. We would have proceeded to impose heavy cost on the State of Bihar keeping in view the fact that the petitioner has had to approach this Court time and again for the consideration of the case of his father on the basis of the



material produced but in view of the nature of the offence alleged and the period which has been spent in incarceration, we at this stage refrain from doing so with a clear direction to the State of Bihar and the Remission Board in particular that it would this time consider each and every fact which is necessary for complying with the judgment of this Court dated 20th June, 2017 which has become final between the parties. There is nothing on record to indicate that the judgment of the High Court in Cr.W.J.C. No. 748 of 2017 has been subjected to any further appeal before the Apex Court. Consequently, the Remission Board cannot avoid the observations made therein or even otherwise the facts which have been made the basis for the claim of remission on behalf of the convict by the petitioner, particularly the second instance where the date of conviction is stated to be 5th of June, 2003. The conviction in the said case, therefore, appears to have been pronounced after the promulgation of the policy dated 28th December, 2002 in respect of a heinous offence of multiple murders. It is strange as to how these facts have escaped the notice of the Remission Board and as to why the aforesaid facts have not been taken into consideration for the purpose of either accepting or rejecting the claim of the convict in the present case.



19. Consequently, for all the reasons aforesaid, we find the impugned order dated 1st of August, 2018 passed by the Remission Board to be unsustainable in law. The petition is allowed, the order dated 1st of August, 2018 is quashed and the Remission Board is directed to pass an appropriate order within three months of the date of production of certified copy of the order before it in the light of what has been indicated hereinabove as well as any other material that may be necessary for such consideration.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

P.K.P./-Jagdish

AFR/NAFR	
CAV DATE	
Uploading Date	24.01.2019
Transmission Date	

