

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 17248 of 2021

**Sri Gopal Sarkar
Vs.
The State of West Bengal and others**

For the petitioner	:	Mr. Sudipto Maitra, Mr. Vijay Verma, Mr. Dwaipayan Biswas
For the State	:	Mr. Amitesh Banerjee, Ms. Ipsita Banerjee
Hearing concluded on	:	25.08.2022
Judgment on	:	30.08.2022

Sabyasachi Bhattacharyya, J:-

1. The petitioner is a lifer, in jail custody for more than twenty-three years. Kamal and Nepal Sarkar, the petitioner's brothers, made several efforts to obtain remission of the petitioner after he had served a considerable part of his sentence (more than fourteen years). Upon the State Sentence Review Board (SSRB) having rejected the petitioner's request for premature release on February 3, 2020, a writ petition, being WPA 3571 of 2020, was moved before this court, which was dismissed vide Judgment and Order dated February 19, 2021, thereby upholding the report of the SSRB.

2. Being thus aggrieved, the petitioner preferred an appeal bearing MAT No. 252 of 2021. It was disposed of by a Division Bench on April 9, 2021 by granting liberty to the petitioner to make an appropriate application for remission of sentence before the competent authority, who was directed by the Division Bench to duly process that application following due procedure in terms of Section 432 of the Code of Criminal Procedure (Cr.P.C) and have a final decision taken through the competent authority.
3. The SSRB, in its sixty-fifth meeting held on July 14, 2021, considered the cases of 322 life convicts for premature release under Section 432 of the Cr.P.C. However, the petitioner Gopal Sarkar, along with some others, was not recommended by the SSRB for premature release in its report. Such report was accepted by the State Government by an Order of the Principal Secretary to the Government of West Bengal dated September 9, 2021, against which the present writ petition has been preferred.
4. Learned counsel contends that the power to suspend or remit sentences is provided in Section 432 of the Cr.P.C. Moreover, the Division Bench, when remanding the matter back, had specifically directed that the provisions of Section 432 have to be taken into account. However, the decision impugned in the present writ petition was taken *de hors* the said provisions.
5. Section 432(2) provides that whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was held 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.

6. It is submitted that a judicial scrutiny is contemplated in the said provision for sufficient reasons. Otherwise, it is submitted, the Government may arbitrarily remit sentences of convicts who have otherwise been held guilty of serious offences by courts of law.
7. In the present case, however, it is submitted that the said sanction of court was never taken.
8. Learned counsel for the petitioner, by placing reliance on *Dharam Pal and others Vs. State of Uttar Pradesh and others*, reported at (2014) 1 SCC (Cri) 131 = [(2013) 9 SCC 798], submits that in the said judgment, the Supreme Court directed the petitioner to be released since they had completed fourteen years of imprisonment. The Superintendent of the concerned jail was to release the prisoners forthwith.
9. Hence, there is no bar to the Court directly releasing the petitioner.
10. Next placing reliance on *Kansi Ram Vs. State of U.P.*, reported at 1990 (Supp) SCC 134, learned counsel submits that the Supreme Court held in the said case that the petitioner was in actual detention for more than eighteen years; however, the State Government did not consider his case for release on the grounds that there was no source of means of living and that he may commit a crime after release. The Government was also of the opinion that he may revert into crime and abscond.
11. Those grounds, it was observed by the Supreme Court, betrayed a complete lack of application of mind on the part of the competent authority.

Ordinarily, the Supreme Court observed, it would have directed the competent authority to reconsider his case afresh, but having regard to the facts and circumstances of the case, inasmuch as he has actually remained in jail for more than eighteen years, it was directed that the respondent was to release the prisoner from detention within two weeks from said date.

12. Learned counsel next cites *Ram Chander Vs. State of Chhattisgarh and another*, reported at 2022 SCC OnLine SC 500. In the said judgment, the Supreme Court discussed judicial review of the power of remission in the context of Section 432 of the Cr.P.C. The Supreme Court held that, while a discretion vests with the Government to suspend or remit the sentence, the executive power cannot be exercised arbitrarily. The prerogative of the executive is subject to the rule of law and fairness in State action embodied in Article 14 of the Constitution. Other judgments of the Supreme Court were considered in the said judgment and the said principle was reiterated. Although it was held that the court can review the decision of the Government to determine whether it was arbitrary, it cannot usurp the power of the Government and grant remission itself. It was further observed that where the exercise was found to be arbitrary, the authorities may be directed to consider the case of the convict afresh. Although the court is not to supplant the prerogative exercised by the competent authority, since grant of premature release is not a matter of privilege but is the power coupled with duty conferred on the appropriate Government in terms of Sections 432 and 433 of Cr.P.C., the petitioner is entitled to the relief of having directions issued to consider his representation expeditiously on its own merits. While commenting on the value of the opinion of the presiding

judge, the Supreme Court held specifically that the procedure under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the presiding officer can always be regulated and settled by High Court concerned and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the appropriate Government.

13. Learned counsel for the petitioner next relies upon *Satish @ Sabbe Vs. The State of Uttar Pradesh*, reported at 2021 (1) Supreme 294. It was held therein that no convict can claim remission as a matter of right. Once a law has been made by the appropriate legislature, it is not open for the executive authorities to surreptitiously subvert its mandate. The Supreme Court reiterated that any assessment regarding predilection to commit crime upon release must be based on antecedents as well as conduct of prisoner while in jail and not merely on his age or apprehensions of the victims and witnesses.
14. Lastly, learned counsel relies on *Zahid Hussein and others Vs. State of W.B. and another*, reported at 2001 SCC (Cri) 631. The Supreme Court laid down therein that the conduct of the prisoners while in jail is an important factor to be considered as to whether they have lost their potentiality in committing crime due to long period of detention. The views of the witnesses who are examined during trial and the people of the locality cannot determine whether the petitioners would be a danger to the locality, if released prematurely. This has to be considered keeping in view the conduct of the prisoners during the period they were undergoing sentence. Age alone, it was held, cannot be a factor while considering whether the

petitioners still have potentiality of committing crime or not, as it will depend on change in mental attitude during incarceration. While coming to the conclusion of the possibility of regrouping for anti-social activities, the Review Board did not take into account that the life convicts are in jail for more than eighteen years and the Board did not consider whether there would be any fruitful purpose of confining the convicts any more and also the socio-economic condition of their families.

15. It is submitted that the said vital considerations were omitted in the present case.
16. Learned counsel appearing for the State controverts the submissions of the petitioner and places reliance on the judgment on *Dharam Pal and others Vs. State of Uttar Pradesh and others* [(2013) 9 SCC 798].
17. In the said case, the Supreme Court directed the Superintendent of the concerned jail to release the prisoners forthwith, who were undergoing life imprisonment. However, the Supreme Court did not directly pass an order of releasing the convicts.
18. It is submitted that the National Human Rights Commission (NHRC) took a resolution on October 20, 1999, the proceedings of which are relied on by counsel. In the said guidelines, the constitution of a State Sentence Review Board (SSRB) was contemplated. The composition of the State Board would be as follows:
 1. Minister-in-Charge, Jail Department/Principal Secretary, Home; Principal Secretary-in-Charge of Jail Affairs/ Law & Order - Chairman
 2. Judicial Secretary/Legal Remembrancer - Member

3. A District & Session Judge nominated by the High Court - Member
4. Chief Probation Officer - Member
5. A senior police officer nominated by the DG of Police not below the rank of IG of Police - Member
6. Inspector General of Prisoners - Member-Secretary

The coram is to be at least four persons, including the Chairman.

- 19.** In Clause 6.3 thereof, the Commission observed that while considering the case of premature release of a particular prisoner the Board shall keep in view the general principles of amnesty/remission of the sentence as laid down by the State Government or by courts as also the earlier precedents in the matter. The paramount consideration before the Board was to be welfare of the prisoner and the society at large. More specifically, the Board shall not ordinarily declare a premature release of prisoner merely on the ground that the police has not recommended his release on certain far-fetched and hypothetical premises. The Board shall take into account the circumstances in which the offence was committed by the prisoner and whether he has the propensity and is likely to commit similar or other offence again.
- 20.** Learned counsel for the State next relies on a report of compliance filed by the State. It was indicated in the said report that the SSRB based its recommendations on various reports obtained from the correctional home where the inmate is housed, the local police and the Chief Probation and After-care Officer. The composition of the Board has also been stated in the report.

- 21.** Hence, it is submitted, the respondent-authorities acted within the purview of the guidelines of the NHRC and the documents obtained in connection with the petitioner. Highlighting the fact that the petitioner had been convicted for heinous offences, including kidnapping and murder of a fourteen-year-old boy, it is argued that this Court ought not, under Article 226 of the Constitution of India, to substitute or supplant its own decision for the exercise by the SSRB and the State in due compliance with law and procedure as well as taking into account all relevant certificates.
- 22.** Moreover, it is argued that further compliance of Section 432(2), Cr.P.C. was not required in the present case. Although the Division Bench had directed to take into account the provisions of Section 432 of the Cr.P.C., further reference to a court was redundant, since such exercise had already been completed at the first instance when the matter had come up before this Court. It is submitted that neither the NHRC guidelines nor the law envisages a further reference to court in the second round of litigation, after it passed through such sanction on the first occasion.
- 23.** Upon hearing learned counsel appearing for the parties, a salient feature which catches the eye is that the petitioner, who is in his late fifties, has been in custody for more than 23 years. Out of the said period, for about eight years, he was on bail (March 26, 1998 to September 10, 2006), till his sentence was affirmed. During the entire period, the petitioner's records stand unblemished. About thirty local residents filed joint petition indicating their view that they had no objection if the petitioner was rehabilitated in normal life upon remission.

- 24.** The reference in the police report, on which the SSRB relied, was to the opinion of “disinterested persons in the neighbourhood”. Such indeterminate, vague body of ‘disinterested’ persons could not be a sufficient stimulus for taking the serious decision of refusing remission to the petitioner, despite the authorities having recommended his name for remission.
- 25.** That apart, the two brothers of the petitioner, namely Nepal and Kamal, affirmed affidavits on several occasions to say that they are willing to take responsibility of the petitioner upon remission. It is to be noted that the affidavit in support of the present writ petition has been affirmed by the wife of one of such brothers. Hence, the ground cited in the refusal of remission to the petitioner, that the petitioner does not have the potential to earn livelihood and does not have anyone to go back to, apart from one brother who has been visiting him, is perverse on the face of it. That apart, it cannot be expected that the convict, even after incarceration for almost a quarter of a century, would be proficient in some vocation. Adverse inference drawn against the convict on such ground would be entirely counter-productive to the concept of remission and negate the reformatory purpose of punishment.
- 26.** Modern society has been increasingly laying stress on reformation and not retribution. Such purpose would be totally frustrated if remissions are refused even after so many years of custody to prisoners having no criminal antecedents otherwise. In the event of such refusals, the hyper-technical approach of the authorities would invalidate the justification of the

ornamental moniker “correctional home”, which is the present jargon in vogue for jail, and relegate it to mere hypocrisy on the part of civil society.

- 27.** Surprisingly, the report of the Probation-cum-After-care Officer dated September 9, 2021, which has been annexed to the present writ petition, was never considered. The report of the Superintendent of the Dum Dum Correctional Home dated January 23, 2021, which was sent to the respondent-authorities, clearly reflects the impeccable records of the petitioner. It is clearly evident from the same that the petitioner had all along shown good and respectful attitude to the administration as well as his co-inmates. Not only that, the petitioner, according to the said report, also undertook nursing activities and looked after mentally unsound prisoners.
- 28.** Such acts of the petitioner clearly speak out loud in favour of his remission.
- 29.** That apart, the petitioner has had no criminal antecedent otherwise than the present conviction.
- 30.** Such documents and factors were utterly overlooked in refusing the petitioner’s remission.
- 31.** During his entire jail tenure of 23 years, the petitioner was never castigated even by a single adverse report by the jail authorities. Apart from the eight years while he was on bail, the petitioner had obtained five paroles for a total of 42 days during the pandemic period. During this entire period when the petitioner roamed free, he does not have even a single incident reported against his from any quarter of society.
- 32.** The respondents have merely cited the age of the petitioner (who is now about 57 years old) to hold on to the conjecture that he had the potential to

regroup and to threaten the witnesses of the case in which he was convicted.

- 33.** However, age itself would not be a valid consideration, as also held by the Supreme Court in several cited judgments as discussed above.
- 34.** In the event the petitioner's physical and mental soundness are construed against him for the purpose of remission, the entire purpose behind the concept of "correctional homes" would be frustrated. In fact, a remission would be wasted on a person of unsound mind and/or body, apart from the perspective of human sympathy, in the sense that such person might not be able to contribute effectively to the society.
- 35.** Hence, such opinion of the police authorities is ridiculous, in the absence of even a single adverse report or other factor supporting such allegation. The entire apprehension against the petitioner is based on thin air, as opposed to the joint petition filed by the residents of the locality for his release.
- 36.** In the present case, it is also to be noted, the SSRB was not composed of the exact officers contemplated in the guidelines of the NHRC, which is cited by the State itself. Whereas a District and Session Judge nominated by the High Court is absent, no reference was even made to a court within the contemplation of Section 432(2) of the Cr.P.C., although the Division Bench, while remanding the matter, specifically directed Section 432 to be considered in its entirety and not sans sub-section (2) thereof.
- 37.** Thus, upon a complete appreciation of the evidence glaring from the record, it is seen that both the SSRB and the respondents committed a patent perversity in refusing remission to the writ petitioner.

38. After the direction of the Division Bench, the observations of the Single Judge in respect of the petitioner became academic and merged into the Division Bench judgment.
39. Hence, the direction of the Division Bench prevails, mandating the respondent-Authorities to consider Section 432 in its proper perspective while reconsidering remission.
40. The yardsticks provided therein and in the landmark judgments of the Supreme Court, as cited by the petitioner and indicated above, clearly vitiate the exercise of the respondents' power in refusing the remission of the petitioner.
41. There is no hard and fast rule, even as per the Supreme Court judgments, that the matter has to be referred back to the authorities in every case.
42. The opinion of the Supreme Court in *Ram Chander* (supra) to that effect, was not in the context of a prior exercise having been indicated in Section 432 and, more importantly, there was no direction by any Division Bench of the High Court in the said case for the respondents to reconsider the entire prayer of remission in the context of Section 432 of the Cr.P.C. The moment Section 432 is directed to be complied with, it is implicit in the order of the Division Bench that the respondent had to comply with the said provision in its entirety, including sub-section (2) thereof. Having not done so, the impugned refusal of remission cannot be sustained in law.
43. In any event, since the above discussion shows that there are overwhelming materials-on-record unerringly indicating towards remission of the petitioner, there is no justifiable cause to violate the petitioner's right of equality as enshrined in Article 14 of the Constitution of India in

discriminating against the petitioner to refuse such remission. Since the respondents, including the SSRB (which was not validly constituted as per the NHRC guidelines), shirked their responsibility to adhere to the law and relevant criteria, further remand would unnecessarily rob the petitioner of his personal liberty for a further inordinate period, for which this Court cannot be pardoned by its own judicial conscience.

44. Keeping on balance of interest of society and the personal liberty of the petitioner, as well as taking into consideration all the materials admittedly on record, I am, thus, of the opinion that the petitioner ought to be granted remission immediately.
45. Accordingly, WPA No.17248 of 2021 is allowed, thereby setting aside the decision of the respondents to refuse the remission to the petitioner, namely, Gopal Sarkar. The respondents are directed to immediately release the said Gopal Sarkar from custody, in view of the remission so granted by this Court.
46. The order be communicated by the Office at the earliest to the Superintendent of the Dum Dum Correctional Home in order to implement the early release of the petitioner.
47. There will be no order as to costs.
48. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)