IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1149 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE K.R.VYAS and
MR.JUSTICE M.S.PARIKH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DIPAKKUMAR BHANUPRASAD UPADHYAY

Versus

STATE OF GUJARAT

Appearance:
MR NAVIN K PAHWA for Petitioner
MR PRASHANT DESAI, PUBLIC PROSECUTOR
with Mr. A.J. Desai, Addl. Public Prosecutor
for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE K.R.VYAS and
MR.JUSTICE M.S.PARIKH
Date of decision: 28/11/97

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The petitioner who is undergoing the sentence of imprisonment for life for the offence under Section 302 of the IPC, for which he was convicted and sentenced on 5th April, 1996 in Sessions Case No. 49 of 1985 by the learned Sessions Judge, Panchmahal at Godhra, has presented this petition, seeking benefit of the order of His Excellency the Governor of Gujarat dated 14th August, 1997, under which remission to the extent indicated therein, was granted to the prisoners convicted for life imprisonment under Section 302 IPC, falling in the categories mentioned in the said order.

2. When this petition came up for hearing before one of us (Mr.Justice M.S.Parikh), as it appeared that the question, whether the periods of furlough and parole enjoyed by a prisoner can be counted for working out the period of 10 years' imprisonment specified in the said remission order, was of public importance affecting a sizable number of prisoners, the matter was directed to be placed before Hon'ble the Chief Justice for passing necessary order for placing it before a larger bench, and accordingly, this Full Bench has been constituted to consider the question involved in this petition.

3. There is no dispute about the fact that the petitioner was convicted and sentenced for the offence under Section 302 IPC on 5th April, 1986. It is also not disputed that if the furlough and parol periods enjoyed by the petitioner are not computed as imprisonment undergone, he would not complete 10 years of imprisonment as on 14th August, 1997. Though the case of the petitioner was that both furlough and parole periods should be considered as imprisonment while computing the period of imprisonment undergone by the petitioner, at the hearing, the learned Counsel for the petitioner submitted that even if only furlough period were to be so computed, the petitioner would have completed 10 years of imprisonment as on 14th August, 1997 and therefore, become entitled to the grant of remission under the order dated 14th August, 1997 made by the Governor under Article 161 of the Constitution of India.

4. The order dated 14th August, 1997 at Annexure "A" made by order and in the name of the Governor of Gujarat, which has been issued by the Government of Gujarat in its Home Department, provides that on the occasion of the 50th Anniversary of the Independence of India and in pursuance of Article 161 of the Constitution of India, the Governor of Gujarat granted remission in sentence to the extent set out therein, to prisoners undergoing life

imprisonment following conviction under Section 302 of the Indian Penal Code by the Courts of Criminal Jurisdiction and were confined in the jails of the State. The remission granted under this order was made effective from 15th August, 1997. The categories of prisoners eligible for such release were: (a) those who had undergone actual imprisonment of 10 years with set-off to be entitled to full remission of the remaining period; (b) those who had not completed 10 years of actual imprisonment with set-off - to be entitled to remission in sentence to the extent of two years. It was further provided that if the balance of sentence left to be undergone after conferring benefit as at category (a) was less than or equal to 15 days, such balance shall be given as a special remission and such prisoner shall be set at liberty on completion of actual ten years of imprisonment. As per the condition of release, if any prisoner so released commits any cognizable offence involving grave injury to person or property, he would be liable to be apprehended and confined to serve out the unexpired portion of his sentence, so remitted.

5. The petitioner has claimed benefit of category (a) under which prisoners who had undergone actual imprisonment of 10 years with set-off as on 14.8.1997 were to be granted full remission of the remaining period of imprisonment. This category refers to such class of prisoners who have undergone actual imprisonment of 10 years with set-off. In context of this provision, it was contended on behalf of the petitioner that the concept of imprisonment is a wide concept and even when a person is released on parole or furlough, he should be treated as if he is under imprisonment, because of the restraints which are imposed at the time of such release and because of the empowerment of the authority to immediately put him back in the prison. The petitioner's counsel relying upon the meaning of word "imprisonment" given in Black's Law Dictionary, submitted that the word "imprison" would not only mean "to put in a prison or in a place of confinement", but it also would mean "to confine a person, or restrain his liberty in any way". It was submitted that as per the definition of the word "imprisonment" in Black's Law Dictionary, if there is restraint of a person's personal liberty, or coercion is exercised upon a person to prevent the free exercise of his powers of locomotion, that would be sufficient to constitute imprisonment. From The Dictionary of English Law `London Sweet & Maxwell Limited' (1959 edition), it was pointed out by the learned Counsel that the restraint of a person's liberty under the custody of another, would constitute imprisonment. On the basis of these

definitions and emphasising the aspect of restraint on liberty, it was submitted by the learned Counsel that even when the convict undergoing life imprisonment is released on furlough or parole, his liberty would still be restrained and he would not be free to go away anywhere he likes. In most of the cases, he is required to report to the nearest Police Station and his whereabouts are to be kept informed to the Jail and the Police authorities. It was therefore submitted that the liberty of movement of such person is severely restricted and he continues to remain under imprisonment even while furlough or parole. In support of this contention, reliance was placed on certain observations made by the Supreme Court in the case of Maru Ram Vs. Union of India, reported in AIR 1980 S.C 2147, in which, while considering the provisions of Section 433A of the Criminal Procedure Code, the Supreme Court observed in paragraph 71 of its judgement that The U.P. Prisoners' Release on Probation Act, 1938, described as a welcome measure would survive Section 433A of the Code of Criminal Procedure for two reasons firstly, Government may resort to the statutory scheme, not qua law but as guidelines and secondly, and more importantly, the expression `prison' and `imprisonment' must receive a wider connotation and include any place notified as such for detention purposes. It was held that `stone walls and iron bars do not a prison make'; nor are `stone walls and ironbars' a sine qua non to make a jail. It was further held that any life under the control of the State, whether within the high-walled world or not, may be a prison if the law regards it as such. It was also pointed out relying on paragraph 72 (10) of the judgement that the Supreme Court had observed that it would be fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking, the existing remission and release schemes may usefully be taken as guidelines under Articles 72 and 161 of the Constitution and orders for release be passed. It was submitted on behalf of the petitioner that the order made under Article 161 granting remissions should be construed in light of these observations of the Supreme Court and therefore, for the purpose of category (a), 10 years of imprisonment with set-off should be computed as on the relevant date of 14th August, 1997, by including the furlough and parole periods i.e. by treating these periods as imprisonment undergone.

6. The concept of imprisonment is not a fluid concept and it gets it's colour and meaning from the

provisions contained in the Code of Criminal Procedure. Chapter XXXII of the Code of Criminal Procedure, 1973 provides for execution, suspension, remission and commutation of sentences. Provisions of Section 417 to 424 have a bearing on the question of imprisonment, while the provisions in Section 423 to 435 are general provisions regarding execution of sentences. Under Section 417, the State Government is empowered to appoint place of imprisonment and accordingly, it may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined. Section 418 provides for execution of sentence of imprisonment. It inter-alia provides that where the accused is sentenced to imprisonment for life or to imprisonment for a term in cases other than those privided for by Section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant. Sub-section (2) of Section 418 provides that where the accused is not present in Court when he is sentenced to such imprisonment, the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined; and in such case, the sentence shall commence on the date of his arrest. Under Section 419, every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined. It is therefore, clear that as per the concept of imprisonment as it is understood in context of the offences for which such punishment is imposed, physical confinement of the person in jail or other appointed place is the mode for executing such sentence of imprisonment. When the person is present before the Court at the time when sentence of imprisonment is imposed, he is required to be forwarded with the warrant to the jail and when he is not present, warrant of his arrest is to be issued and the sentence of imprisonment in such a case would commence from the date of his arrest. Under Section 46 of the Criminal Procedure Code, the manner in which a person is to be arrested is laid down and it is provided that in making an arrest, the Police Officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action. Therefore, the sentence of imprisonment can be executed only by arresting the person and confining him to the place appointed for imprisonment. It is also significant to note that under

Section 430 of the Code, it is only when a sentence has been fully executed that the officer executing it shall return the warrant with an endorsement under his hand certifying the manner in which the sentence has been executed.

7. It is thus, abundantly clear that the concept of imprisonment under the Code is a well defined and well understood concept and it only means that a person can be said to be undergoing imprisonment when on imposition of sentence of imprisonment he is confined to the custody of the officer in the jail or other place that may be appointed by the State in this regard. We may also note that under Section 3(1) of the Prisons Act, 1894, word `prison' is defined so as to mean any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners and inter-alia includes, all lands and buildings appurtenant thereto.

8. Under Section 32 of the Prisoners Act, 1900 also, the State Government is empowered to appoint places for confinement of persons under sentence of imprisonment for life within the State in which person under imprisonment for life shall be lodged. As held by the Supreme Court in Naib Singh V. State of Punjab - AIR 1983 S.C 855, the expression confinement occurring in the marginal note of the Section means the prisoners' detention in the place for the purpose of executing or carrying out their sentence.

9. It will be noted from the provisons of the Prisons Act, that keeping the convict undergoing imprisonment in custody is of utmost importance and even movement of such convict from one prison to other prison is regulated. Under Section 55 of the Prisons Act, a prisoner, when being taken to or from any prison in which he may be lawfully confined, or whenever he is working outside or is otherwise beyond the limits of any prison in or under the lawful custody or control of a prison-officer belonging to such prison, shall be deemed to be in prison and shall be subject to all the same incidents as if he were actually in prison.

10. It would therefore, appear from the various provisions of the Code of Criminal Procedure and the Prisons Act that when a sentence of imprisonment is imposed on a person, he can be said to be undergoing imprisonment only when he is in custody and confinement for that purpose. It would therefore, be difficult for

us to accept the contention of the learned Counsel that the word `imprisonment' is of such a wide amplitude so as to include even a person who though not in actual confinement or custody has been released subject to some conditions impairing his absolutely free movement. To treat a person released as undergoing actual imprisonment would be doing violence to the very concept of imprisonment.

11. Obviously therefore, the legislature found it necessary to provide for suspension, remission and commutation of sentences in appropriate cases. The provisions of Section 432 of the Code empower the Government to suspend the execution of sentence of punishment for an offence or remit the whole or a part of punishment to which a person is sentenced. Under sub-section (2) of Section 432, an application made to the appropriate Government for suspension or remission of sentence is required to be dealt with in the manner provided therein. Under sub-section (5) the appropriate Government may give directions by general rules or special orders as to the suspension of sentences and the conditions on which petition should be presented and dealt with. Under this provision, the general directions that can be given, are confined only to suspension of sentences and not remissions.

12. Section 433-A of the Code provides that, notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment. On its plain reading, it is clear that this provision imposes a restriction on the power of the State Government in remitting the punishment of persons who fall in one of the two categories enveloped in this provision. A person who is convicted and sentenced to imprisonment for life for the offence under Section 302 IPC is a person who is convicted for an offence for which death is one of the punishments provided by Section 302 IPC. Therefore, in such cases, unless such person has served atleast fourteen years of imprisonment, he cannot be released from prison.

13. It is a settled legal position that a sentence of imprisonment for life is not a sentence which would expire automatically after the expiry of 20 years

including remissions. The sentence would enure till the life time of the prisoner as it is not possible to fix the period of his remaining natural life. A sentence of imprisonment for life cannot be automatically treated as one for a definite period in absence of any provision to that effect in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. There is no rule conferring an indefeasible right on a prisoner sentenced to imprisonment for life to an unconditional release on the expiry of a particular term including remissions. The Rules under the Prisons Act do not substitute a lesser sentence for a sentence of imprisonment for life. Whatever be their releases on furlough or parol, the life convicts still have to undergo imprisonment for the remainder of their life. The Supreme Court reaffirmed the ratio of Gopal Godse V. State of Maharashtra - (AIR 1961 S.C 600), in Maru Ram's case (supra), holding that imprisonment for life lasts until the last breath and whatever the length of remission earned, the prisoner can claim release only if the remaining sentence is remitted by the Government. In Ashok Kumar's case (supra) the Supreme Court after referring to the ratio of Godse's case (supra) and Maru Ram's case (supra) held that where a person has been sentenced to imprisonment for life, the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and do not acquire significance until the sentence is remitted under Sec. 432 of the Code, in which case the remission would be subject to limitation of Section 433A of the Code, unless ofcourse power is exercised under Article 72 or 161 of the Constitution. The State Government has however, a discretion under Section 432 of the Code to remit the remaining part of the sentence and order release of the convicted prisoner, subject to the embargo on its right imposed under Section 433A of the Code. Such an embargo does not exist when Governor exercises power under Article 161 of the Constitution, and the limits of remission that the Governor sets in his order would not be subject to any judicial review and it would not be open for us to give an elastic meaning to the expression `imprisonment' occurring therein more particularly when the meaning is made specific by describing it as `actual' imprisonment.

14. The decision in Maru Ram's case (supra) and the decision of the Punjab and Haryana High Court in Writ Petition No. 180/83 decided on 23rd May, 1983 in Rajinder Singh Vs. State of Punjab and anr. and of the Delhi High Court in Sher Singh Vs. Delhi Administration in Criminal Writ No. 143/85 decided on 19th Aug. 1985, on which reliance was placed, cannot therefore assist the

petitioner.

15. The learned Counsel referred to the provisions of Section 433A of the Code mainly with a view to gain some support from the decision of the Supreme Court in Maru Ram's case (supra), in which it was observed that this provision does not obligate continuous fourteen years in jail and so parole is permissible. We are however, not concerned in this case about the question whether parole is permissible or not in such cases. There are furlough and parole rules as per which the temporary release of prisoners is governed. We are more concerned about the remission order. It is clear from the order which is placed on record that the power of granting remission has been exercised by the Governor under Article 161 of the Constitution of India and therefore, it cannot be pinned down to the provisions of Section 433A of the Code of Criminal Procedure. The clemancy power of the Governor under Article 161 of the Constitution is of a wide amplitude and the embargo which is imposed on the Government's power under Section 433A of the Code by virtue of the non-obstante Act (notwithstanding anything contained in Section 432), cannot be read into Article 161 of the Constitution. No such restriction is imposed on the power of the Governor as can be seen from the said Constitutional provision, which reads as under:-

"Art.161 - Power of Governor to grant pardons, etc. and to suspend, remit or commute sentences in certain cases:--

The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

16. We may note in this context that the Supreme Court in Kehar Singh and anr. Vs. Union of India, reported in AIR 1989 S.C 653, while considering the provisions of Article 72 of the Constitution of India, held that the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is no question involved of asking for the reasons for an order made under Article 72. The Courts are the constitutional instrumentalities to go into the scope of Ar.72 but cannot analyse the exercise of the power under Art. 72 on its merits. It was held that the proceedings before the President is of an executive character and the matter lies entirely within his discretion. This was

reiterated by the Supreme Court in a later decision in the case of Ashok Kumar Vs. Union of India, reported in AIR 1991 S.C 1792, observing in paragraph 13 of the judgement that Articles 72 and 161 confer the clemancy power on the President and the State Governors, respectively and that this Constitutional power over-rides the statutory power contained in Sections 432 and 433 and the limitation of Section 433-A of the Code as well as the power conferred by Sections 54 and 55 of the Indian Penal Code. This opinion was rendered after considering the decision in Maruram's case (supra) in the context of the very argument which was canvassed before us that the existing remission schemes should be treated as guidelines for exercise of powers under Articles 72 and 161 of the Constitution. It will be noted that even while making these observations in paragraph 72 (10) of the judgement in Maruram's case (supra) it was in terms stated that these observations were recommendatory and only meant to avoid a hiatus, but it was for the Government to decide whether and why the current remission rules should not survive until replaced by a more wholesome scheme. Referring to these clarificatory remarks that the observations were only recommendatory, the Supreme Court in Ashok Kumar's case (supra) held that these observations were purely recommendatory in nature and that they did not constitute a ratio decidendi having a binding effect on the Constitution Bench, which decided Kehar Singh's case (supra). It will be noted that in Ashok Kumar's case (supra), on merits the Supreme Court refused premature release of the petitioner since he had not completed fourteen years of incarceration, observing that as such he could not invoke Section 433-A of the Code.

17. We therefore, find ourselves in agreement with the ratio of the decision of a Division Bench of this Court (Coram : R.A.Mehta and S.M.Soni,JJ.) in Special Criminal Application No. 1093 of 1994 decided on 22.8.1994, in which it was held that non-obstante clause in Section 433A of the Code in terms excludes Sec.432 and the whole mandate of the rest of the Section necessarily subjects the operation of Section 433-A to a serious restriction and this embargo directs that commutation in such cases shall not reduce the actual duration of imprisonment below 14 years.

18. In view of the above discussion, it is not possible for us to give any wide meaning to the word `imprisonment', as is sought to be suggested on behalf of the petitioner. The remission order issued under Article

161 of the Constitution grants the benefits to only those who have undergone actual imprisonment of ten years with set-off. The use of word actual leaves no room for any doubt and it clearly signifies that the concerned prisoner should have undergone actual confinement in prison for a period of ten years with set-off. It appears that precisely to prevent the concept of imprisonment from being enlarged beyond physical confinement, that the word "actual" has been used, leaving no scope for any doubt or argument for attributing any enlarged meaning to the concept of imprisonment.

19. In view of the above, we hold that the petitioner who had not completed actual imprisonment of ten years with set-off as on 14.8.1997 was not eligible for the benefit intended for the category of prisoners mentioned at item (a), of the Remission Order so as to become entitle to remission from 15th August, 1997 for the remaining period and that the period enjoyed by him on furlough and/or parole cannot be treated as imprisonment undergone, in view of the specific mention in the remission order that a person should have undergone actual imprisonment of 10 years with set-off.

20. The petition is therefore rejected. Rule is discharged.

---

*/Mohandas