

SHAIK ABDUL AZEEZ

v.

STATE OF KARNATAKA

March 28, 1977

[Y. V. CHANDRACHUD, P. K. GOSWAMI AND P. N. SHINGHAL, JJ.]

Penal Code (Act 45 of 1860), 1860, section 303—Death Sentence for murder by life convict—Whether a person sentenced to imprisonment for life and later released by the Government by remission of sentence u/s. 401 of the Cr. P.C., 1898 (1973 Code, s. 432) continues to “being under sentence of imprisonment for life” for the purpose of s. 303 I. P. C.—Criminal Procedure Code, 1898, sec. 401 (1973 Code, section 432)—Scope of.

Section 303 I.P.C. lays down that “whoever being under sentence of imprisonment for life commits murder shall be punished with death”. The appellant, for the offence of murder committed on December 3, 1959, had been convicted on July 26, 1961, by the High Court of Mysore under s. 302 I.P.C. and sentenced to imprisonment for life in appeal by the State against his acquittal. The State Government, in exercise of its power under s. 402 Cr. P. C. conditionally remitted his sentence on February 8, 1972 and he was, therefore, conditionally released from jail on February 8, 1972. The two conditions of the remission were that during the unexpired period of his sentence conditionally remitted (i) he will not commit any offence punishable by any law in Mysore and (ii) he will not in any way associate with persons known to be of bad character or lead a dissolute or immoral life. Even before the expiry of the first year of his release, the appellant got himself involved on January 27, 1973, in another murder charge. He was convicted under s. 302 read with s. 303 I. P. C. by the Sessions Judge, Kolar on November 7, 1974 and sentenced to death under s. 303 I. P. C. On an appeal to the High Court which was heard along with the reference for confirmation, the sentence of death under s. 302 I. P. C. was confirmed on November 19, 1975. It held that s. 303 I. P. C. was applicable as this was a case of conditional remission under s. 401 Cr P. C. and the second murder was committed during the unexpired portion of the sentence of imprisonment for life. This Court while granting the special leave limited it to the question of applicability of s. 303 I. P. C. and the sentence.

Allowing the appeal partly and modifying the sentence of death to that of life imprisonment, the Court,

HELD : (1) An accused cannot be under a sentence of imprisonment for life at the time of commission of the second murder unless he is actually undergoing such a sentence or there is legally extant judicially a final sentence which he is bound to serve without the requirement of a separate order to breathe life into the sentence which was otherwise dead on account of remission under s. 401 Cr. P.C. [398 H, 399-A]

(2) The earlier sentence of imprisonment for life became final and inexorable so far as the judicial process was concerned. It is only when such a sentence is “operative and executable” that s. 303 I.P.C. is attracted. [395-C]

Dilip Kumar Sharma & Ors. State of Madhya Pradesh [1976] (2) SCR 289, referred to.

(3) Section 303 I.P.C. is applicable only to an accused who on the date of commission of the second offence of murder had earlier committed a murder for which his conviction and sentence of imprisonment for life were beyond judicial controversy and operative. [399-A]

(4) Unlike in the case of s. 75. I.P.C., s. 303 I.P.C. does not contemplate a mere enhanced punishment for a convict with a past criminal history for the same offence. Section 303 I.P.C. creates a most aggregated form of offence when committed by a person under sentence of imprisonment for life to be punished only with death, the maximum penalty under the law. The true effect

A of s. 303, I.P.C. is that if the accused was continuing to be under the sentence of imprisonment for life on the day of the second murder the court cannot come to his rescue by exercising discretionary clemency in favour of the alternative sentence. The only sentence the court has power and is obliged to impose and no other is the sentence of death. [399 B-C]

B (5) A person must be actually and irrevocably the lifer beyond the pale of judicial controversy at the time of commission of the second offence of murder to be vitiated with a penalty of death under s. 303 I.P.C. If the sentence of a convict had already been remitted at the time of commission of the second murder, he would cease to be an actual lifer to come within the lethal clamp of s. 303 I.P.C. [399-C]

(6) For the purpose of s. 303 I.P.C. there can be no warrant for introducing a legal fiction of being deemed to be under a sentence of imprisonment for life. In the instant case the appellant is not liable for conviction under s. 303 I.P.C. [399-D]

C *Sohan Singh v. State* [1965] (1) ILR 181 Punjab 201, over-ruled.

(7) Section 401(3) makes it clear that for the purpose of s. 303 I.P.C., it does not make any difference whether the remission under s. 401 Cr. P.C. is with or without conditions. [396-F]

D *Po Kun v. King* AIR 1939 Rangoon 124; *Sogan Singh v. State* [1965] ILR 181 Punjab 201; *Gulam Mohanmad Wali Mohammad v. Emperor* AIR 1943 Sind 114 and *Sarat Chandra Rabha & Ors. v. Kagendranath & Ors.* [1961](2) SCR 133, referred to.

E (8) Section 401(3) leaves it to the option of the Government to take the penal action and there is no automatic return of the prisoner to the jail on breach of any condition of the remission. It will certainly be open to the Government in a particular case to cancel the remission but it may not. The Government is not under a legal obligation to cancel the remission. It is only when the Government chooses to pass an order of cancellation of the remission of sentence that the convict is arrested and is required to serve the unexpired portion of the sentence. During the interval the accused who is released cannot be said to be under a sentence of imprisonment for life while he is in enjoyment of the freedom on account of remission. That period is not even reckoned under s. 401 Cr. P.C. for the purpose of calculation of the sentence to be served in the eventuality. [397 B-C, E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No 592/1976.

F (Appeal by Special Leave from the Judgment and Order dated 19.11.1975 of the Karnataka High Court in CrI. A. No. 551 of 1974 and Reference Case No. 56/74)

R. B. Datar, for the appellant

Narayan Nettar and R. C. Kaushik, for the respondent.

G The Judgement of the Court was delivered by

GOSWAMI, J. The short question in this appeal by special leave is whether a person sentenced to imprisonment for life and later released by the Government by remission of the sentence under section 401, Criminal Procedure Code, 1898, continues to "being under sentence of imprisonment for life" for the purpose of section 303, Indian Penal Code.

H The appellant had earlier been convicted on July 26, 1961, by the High Court of Mysore under section 302 IPC and sentenced to imprisonment for life in an appeal by the State against his acquittal.

The earlier murder was on December 3, 1959. The State Government in exercise of its power under section 401 Cr. P.C. conditionally remitted his sentence on February 8, 1972. Thus he was conditionally released from jail on February 8, 1972. Tragically enough, on January 27, 1973, the appellant got himself involved in the present murder charge even before the expiry of the first year of his release. He was convicted under section 302 and section 303 IPC by the Sessions Judge, Kolar, on November 7, 1974 and sentenced to death under section 303 IPC. On an appeal to the High Court by the appellant which was heard along with the reference for confirmation, the sentence of death under section 303 IPC was confirmed on November 19, 1976. Hence this appeal by special leave limited to the question of applicability of section 303 IPC and the sentence.

The earlier sentence of imprisonment for life became final and inexorable so far as the judicial process was concerned. It is only when such a sentence is "operative and executable" that section 303 IPC is attracted. (See *Dilip Kumar Sharma & Ors. v. State of Madhya Pradesh*(¹).

The remission of the sentence in this case is by the State of Karnataka in exercise of its statutory power under section 401 Cr. P.C. The power has been exercised, in the instant case, laying down certain conditions which the convict had accepted. The two conditions were that, during the unexpired period of his sentence conditionally remitted, (1) he will not commit any offence punishable by any law in Mysore and (2) he will not in any way associate with persons known to be of bad character or lead a dissolute or evil life.

The portion of the remitted sentence, in this case, was a period of four years and four months after the appellant had undergone over 15½ years' of his sentence including a little over five years' remission earned by him in jail. In the normal course, in absence of the order of remission, the appellant would have been released from jail on June 9, 1976.

Shortly stated, was the appellant under sentence of imprisonment for life on the date of occurrence of the second murder on January 27, 1973? If he was continuing to be under the sentence of imprisonment for life on that day the court cannot come to his rescue by exercising discretionary clemency in favour of the alternative sentence. Then the only sentence the court has power and is obliged to impose, and no other, is the sentence of death. That is the true effect of section 303 IPC. The fact that the accused is of the age of 73 years will be of no consequence once he is found guilty under section 303 IPC. The court will be helpless in such an event.

The Sessions Judge as well as the High Court held that section 303 IPC was applicable as this was a case of conditional remission under section 401 Cr. P.C. and the second murder was committed during the unexpired portion of the sentence of imprisonment for life.

(1) [1976] 2 S.C.R. 289.

A It is the correctness of the above view of the law that falls for consideration before us. That view receives support from the following decisions cited at the bar.

The first decision is from the Rangoon High Court in *Po Kun v. The King*⁽¹⁾. It was held in that case that—

B “if the sentence of transportation for life passed on a person is conditionally remitted by the Government under s. 403 ? Criminal P.C., and the person is released, such person must still be deemed to be under sentence of transportation for life in spite of the fact that he is not actually under sentence or in a penal settlement”.

C The next decision is from the Punjab High Court in *Sohan Singh v. The State*⁽²⁾. It was held in that case that—

“it is not essential for the application of the section (303 IPC) that a person should be actually undergoing the sentence of imprisonment for life when he commits murder”.

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D “.....the effect of a conditional order of remission is not to altogether wipe out or efface the remitted portion of the sentence, but to keep it in abeyance. As soon as there is breach of the conditions of the remission, the remission can be cancelled and the prisoner committed to custody to undergo the unexpired portion of the sentence. In the circumstances the accused should be deemed to be under sentence of imprisonment for life when the present occurrence took place”.

E Our attention was drawn to a decision of the Sind Court in *Ghulam Muhammad Wali Muhammad v. Emperor*⁽³⁾ which was a case of unconditional remission of the sentence under section 401 Cr. P.C. It was held in that decision that since the Provincial Government had remitted the sentence without condition under section 401 Cr. P.C. the accused committing the second murder after the remission would no longer be said to be “under a sentence of transportation for life, that sentence having in effect been served”.

F We are, however, clearly of opinion that for the purpose of section 303 IPC it does not make any difference whether the remission under section 401 Cr. P.C. with or without conditions. This is clear from a perusal of sub-section (3) of section 401 Cr. P.C. which reads as follows :—

G 401(3) “If any condition on which a sentence has been suspended or remitted, is in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission and thereupon the person

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(1) A.I.R. 1939 Rangoon 124.

(2) [1965] I.L.R. 18 (1) Punjab 201.

(3) A.I.R. 1943 Sind 114.

in whose favour the sentence has been suspended or remitted, may, if at large, be arrested by any police officer without warrant and remanded to undergo the unexpired portion of the sentence".

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It is manifest from the above provision that on breach of any condition of the remission there is not an automatic revival of the sentence. It will certainly be open to the Government in a particular case to cancel the remission but it may not. The Government is not under a legal obligation to cancel the remission. It is only when the Government chooses to pass an order of cancellation of the remission of sentence that the convict is arrested and is required to serve the unexpired portion of the sentence. During the interregnum the accused who is released cannot be said to be under a sentence of imprisonment for life. While he is in enjoyment of the freedom on account of remission, that period is not even reckoned under section 401 Cr. P.C. for the purpose of calculation of the sentence to be served in the eventuality.

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Take the present case. Suppose during the unexpired period of this sentence, which would have normally ended on January 9, 1976, the accused made breach of the first condition of the remission giving a slap to a person an offence punishable under section 358 IPC. Clearly there is a breach of one of the conditions laid down, namely, that "he will not commit any offence punishable by any law in Mysore". Can it be conceived that in such a case the Government will immediately cancel the remission and remand him to serve the remaining period of his sentence of imprisonment for life? That is why section 401(3) Cr. P.C. advisedly leaves it to the option of the Government to take the penal action and there is no automatic return of the prisoner to the jail.

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Counsel for the State of Karnataka relies upon the above decisions and also upon the decision of this Court in *Sarat Chandra Rabha and Others v. Khagendranath Nath and Others*⁽¹⁾. In *Sarat Chandra Rabha* case (supra) the question of remission under section 401 Cr. P.C. came up for consideration in the context of a disqualification clause under section 7(b) of the Representation of the People Act, 1951. In that case the appellant's nomination paper was rejected by the Returning Officer for incurring disqualification under section 7(b) of the Representation of the People Act. According to section 7(b) of the Act, a person shall be disqualified for being chosen as a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State if he is convicted by a court in India of any offence and sentenced to imprisonment for not less than two years, unless a period of five years, or such less period as the Election Commission may allow in any particular case, has elapsed since his release. It was admitted in that case that the appellant was convicted under section 4(b) of the Explosive Substances Act, (VI of 1908) and sentenced to three years' rigorous imprisonment on July 10, 1953 and the nomination paper was filed

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(1) [1961] 2 S.C.R. 133.

- A in January 1957 and the election was held in February 1957. Thus the period of five years had not elapsed since his release by the State under section 401 Cr. P.C. on November 14, 1954. This Court held in that case that section 401 Cr. P.C., unlike the grant of a free pardon, cannot wipe out either the conviction or the sentence and affirmed the order of rejection of the nomination paper on the ground of disqualification incurred under section 7(b) of the Representation of the People Act.
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Mr. Nettar for the State emphasises upon the observation of this Court in *Sarat Chandra Rabha* case (supra) that there is no wiping out of the conviction and sentence under section 401 Cr. P.C. in the present case and, therefore, the present appellant's conviction and sentence subsisted on the date of the second murder.

- C In *Sarat Chandra Rabha* case (supra), this Court had to consider the effect of remission vis-a-vis a disqualification clause under an Act which even provides for removal of disqualification by the Election Commission and which was not actually done. There is a complete purging process provided in the Representation of the People Act itself by an efflux of a period of five years from release on expiry of the sentence. Conviction and sentence recorded by a judicial court cannot be wiped out by executive remission under section 401 Cr. P.C. in order to set at naught the penitentiary period provided for in the Act, in absence of removal of the disqualification by the Election Commission under the Act. Those were the considerations which weighed with this Court when it refused to do away with the effect of the judicial conviction and sentence merely on the basis of executive remission. Even if the sentence were run through without remission, the five years' period had to elapse for commencement of new electoral life. The factum of conviction and the sentence is sufficient and it does not matter whether it has been served out wholly or a portion of it has been remitted. The person remains convicted and sentenced for the purpose of the Representation of the People Act notwithstanding the remission. The decision in *Sarat Chandra Rabha* case (supra) does not at all support the submission that even after remission of the sentence the convict therein was under a sentence of imprisonment. No such corollary follows from the above decision of this Court.
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The observations of this Court in *Sarat Chandra Rabha* case (supra) with regard to wiping out of conviction and sentence cannot be pressed too far in a criminal trial where the provisions of the penal section have to be very strictly construed and in case of ambiguity or possibility of two views the benefit of construction must be in favour of the accused.

- G To revert, at the end, to the only question with which we started. Was the appellant under sentence of imprisonment for life during the unexpired period of his imprisonment conditionally remitted under section 401 Cr. P.C.? We are clearly of opinion that an accused cannot be under a sentence of imprisonment for life at the time of commission of the second murder unless he is actually undergoing such a sentence or there is legally extant a judicially final sentence
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which he is bound to serve without the requirement of a separate order to breathe life into the sentence which was otherwise dead on account of remission under section 401 Cr.P.C. Section 303 IPC is applicable only to an accused who, on the date of commission of the second offence of murder, had earlier committed a murder for which his conviction and sentence of imprisonment for life were beyond judicial controversy and were operative.

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Unlike in the case of section 75, Indian Penal Code, section 303 IPC does not contemplate a mere enhanced punishment for a convict with a past criminal history for the same offence. Section 303 IPC creates a most aggravated form of offence when committed by a person under sentence of imprisonment for life to be punished only with death, the maximum penalty under the law. A person must be actually and irrevocably a lifer beyond the pale of judicial controversy at the time of commission of the second offence of murder to be visited with the penalty of death under section 303 IPC. If the sentence of a convict had already been remitted at the time of commission of the second murder he would cease to be an actual lifer to come within the lethal clamp of section 303 IPC. For the purpose of section 303 IPC there can be no warrant for introducing a legal fiction of being deemed to be under a sentence of imprisonment for life. The decision of the Punjab High Court in *Sohan Singh* case (supra); with respect, is not correct. We are also, with respect, unable to agree with the view of the Rangoon High Court in *Po Kun* case (supra).

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We find from the judgement of the trial court as well as that of the High Court that if the appellant were not convicted under section 303 IPC, a sentence of death would not have been imposed on him. For the reasons set out earlier we are clearly of opinion that the appellant is not liable for conviction under section 303 IPC and his sentence of death is, therefore, set aside. The judgment and order of the High Court are set aside to that extent. The appellant, however, stands convicted under section 302 IPC and is sentenced to imprisonment for life. The appeal is partly allowed with the above modification of the sentence.

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S.R.

Appeal allowed in part.