

(2001) 09 AHC CK 0068

Allahabad High Court

Case No: Criminal M.W.P. No. 5039 of 2000

Mirza Mohammad
Husain

APPELLANT

Vs

State of U.P. and
Others

RESPONDENT

Date of Decision: Sept. 27, 2001

Acts Referred:

- Constitution of India, 1950 - Article 14, 161, 226, 72
- Criminal Law (Amendment) Act, 1932 - Section 2, 3
- Criminal Procedure Code, 1973 (CrPC) - Section 235, 313, 428, 432, 433A
- Official Secrets Act, 1923 - Section 10, 3
- Penal Code, 1860 (IPC) - Section 121, 131, 149, 167, 170

Citation: (2001) 3 ACR 2276

Hon'ble Judges: S.K. Jain, J; G.P. Mathur, J

Bench: Division Bench

Advocate: H.N. Sharma and A.B.L. Gaur, for the Appellant; Dheeraj Singh and D.R. Chaudhary, for the Respondent

Final Decision: Allowed

Judgement

G.P. Mathur, J.

This petition under Article 226 of the Constitution has been filed for quashing of the Government orders dated 11.1.2000 and 25.1.2000, by which general directions were issued for premature release of prisoners who had undergone a very small portion of sentence imposed upon them.

2. A gruesome incident took place in the afternoon of 1.2.1989 in village Sakhni within the limits of police station, Jahangirabad in the district of Bulandshahr in which 11 persons were killed and some others including a police constable on duty were injured. The accused restored to indiscriminate firing upon the victims when

they were performing the burial of a lady in the family graveyard. In all 21 accused were put up for trial. The Sessions Judge acquitted 4 and convicted and sentenced 6 accused to death and remaining 11 to imprisonment for life besides some shorter terms of imprisonment for other offences. Appeals were preferred by the accused and also by the State before the High Court which acquitted 2 accused and affirmed the conviction of the remaining 15. Except for one accused, the death sentence of the remaining was altered to imprisonment for life. The accused and also the State preferred appeals to the Supreme Court, which were dismissed on 4.5.1995 with the modification that the sentence of death awarded to one accused was altered to imprisonment for life. The Respondent Nos. 7 to 19 who were convicted in the aforesaid case were undergoing sentences awarded to them and were confined in Central Jail, Agra. A Government order was issued on 11.1.2000 providing for premature release of various categories of prisoners, which was partly modified by another order dated 25.1.2000. The Respondent Nos. 17 to 19 were then released from jail on the basis of the aforesaid Government order. Mirza Mohammad Husain, who is the complainant and had lodged the F.I.R. of the incident has filed the present writ petition for quashing of the Government orders and for a direction to the State of U.P. not to release Respondent Nos. 7 to 17 from jail on their basis.

3. The subject of the Government order is "premature release of prisoners on the occasion of Republic Day 2000". It recites that the Governor of U.P. has granted sanction for premature release of prisoners in the manner indicated in the order. Para 1 of the order provides for premature release of following category of prisoners:

- (i) Prisoners who had undergone 20 years of sentence with remission by 26.1.2000;
- (ii) Male prisoners of 60 years or above, who had been sentenced to imprisonment for life and had undergone 3 years of sentence (without remission) by 26.1.2000;
- (iii) Lady prisoners of 50 years or above who had been sentenced to imprisonment for life and had undergone 3 years of sentence (without remission) by 26.1.2000;
- (iv) Male prisoners of 60 years or above who had been sentenced to a fixed term of imprisonment and undergone 1/3 of the sentence imposed upon them or 2 years whichever is less;
- (v) Lady prisoners of 50 years or above who had been sentenced to a fixed term of imprisonment and had undergone 1/3 of the sentence imposed upon them or 2 years whichever is less.

4. With regard to the prisoners coming within the purview of Clause (1), it was provided that undergoing of 14 years of sentence (without remission) will be mandatory for those whose cases were covered by Section 433A, Cr. P.C. Para 4 of Government order provides that following category of persons will not be eligible premature release:

- (i) those who had been granted bail and were not confined in jail on 26.1.2000;
- (ii) foreigners;
- (iii) convicted by court martials;
- (iv) under-trials/detenues under detention laws;
- (v) convicted under Foreigner's Act or Passport Act;
- (vi) convicted under Sections 3 to 10 of Official Secrets Act, 1967.
- (vii) convicted u/s 2 or 3 of Criminal Law Amendment Act and Sections 121 to 131, I.P.C.
- (viii) convicted under Prevention of Corruption Act or Sections 167, 170, 171, 181, 191 to 197, 210, 216A, 216B and 219, I.P.C.
- (ix) convicted under Immoral Traffic (Prevention) Act;
- (x) convicted for outraging the modesty of a woman.

5. Clauses (ii) and (iii) show that male prisoners of 60 years or above and lady prisoners of 50 years or above having been sentenced to imprisonment for life would be entitled to release after undergoing a sentence of 3 years only. Similarly, prisoners of the aforesaid age group who had been sentenced to any term of imprisonment other than life would be entitled to release after undergoing 2 years imprisonment or 1/3rd of the sentence whichever was less. The Government order is applicable even if the prisoner has been convicted for most serious or heinous offences like Sections 302, 304B, 364, 376, 395, 396, I.P.C. or under the N. D. P. S. Act or other T.A.D.A. The only requirement for getting a premature release for a life convict, if male of 60 years or above and if female of 50 years or above is undergoing of 3 years sentence and if these categories of prisoners have been sentenced to any term of imprisonment other than life sentence, undergoing of 2 years of sentence would be enough.

6. Though in response to the notice served on the Respondents, several counter-affidavits have been filed but the main counter-affidavit is by Sri Bhola Nath Tewari. Chief Secretary of Government of Uttar Pradesh. The stand taken therein is that the Governor of Uttar Pradesh has exercised powers under Article 161 of the Constitution and the Government orders have been issued in exercise of the said power. It is pleaded therein that the Government orders have been issued in the interest of public at large and the power has been exercised considering the old age, ill-health and other factors and circumstances. The opening part of the Government order dated 11.1.2000, also mentions that in exercise of power conferred by Article 161 of the Constitution, the Governor of Uttar Pradesh has given sanction for premature release of the category of prisoners enumerated therein. Thus, according to the State, the Government orders are orders of pardon

by the Governor of U.P. under Article 161 of the Constitution.

7. Learned Counsel for the Petitioner has submitted that Article 161 of the Constitution confers power upon the Governor of a State to grant pardon to "any person" convicted of any offence and, therefore, he can exercise this power in favour of an individual only, on the consideration of the facts on the sole criteria of age cannot be granted. He has further submitted that the impugned Government orders have been issued without any valid criteria and are arbitrary and consequently void. Shri Mahendra Pratap, learned A.G.A. has submitted that while exercising the power of pardon under Article 161 of the Constitution, the Governor can pass general orders which may be for the benefit of a large group of persons. He has also submitted that the criteria of age fixed in the Government orders is a valid criteria for premature release and it cannot be said to be arbitrary or irrational. It has also been urged that the Governor has a Constitutional power to grant pardon which cannot be challenged in a Court. Shri Ravi Kiran Jain who has appeared for private Respondents has supported the contentions of Shri Mahendra Pratap and has urged that the Governor acts on the advice of Council of Ministers and his decision to grant pardon cannot be challenged in Court.

8. Before considering the submissions made, it is necessary to keep in mind the legal effect of a sentence of "imprisonment for life". This has been examined in [Gopal Vinayak Godse Vs. The State of Maharashtra and Others](#), , where the Court said:

There is no provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. Section 57 does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended Section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for a whole of the remaining period of the convicted person's natural life.

9. This view has been reiterated in [Maru Ram and Others Vs. Union of India \(UOI\) and Others](#), [State of Punjab and others Vs. Joginder Singh and others](#), and [Sat Pal alias Sadhu Vs. State of Haryana and Another](#), Therefore, as said in Maru Ram (supra), imprisonment for life is nothing less and nothing else than a imprisonment which lasted till the last breath.

10. Section 432, Cr. P.C. confers power upon appropriate Government to suspend or remit the whole or any part of the punishment to which a person may have been sentenced, Section 433, Cr. P.C. confers power upon the appropriate Government to commute sentence of death to any other punishment provided by the Indian Penal Code and sentence of imprisonment for life to that for imprisonment for a term not

exceeding 14 years. Section 433A, Cr. P.C. which was introduced by an amendment in 1978 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 punishment provided by law, or where a sentence of death imposed on a person has been commuted u/s 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. The reasons why such an amendment was brought and the amending bill was passed by the Parliament will be clear from the recommendation of the joint committee which was as under:

Section 57 of the Code as proposed to be amended had provided that in calculating fractions of terms of punishment, imprisonment for life should be reckoned as equivalent to rigorous imprisonment for twenty years. In this connection, attention of the committee was brought to the aspect that sometimes due to grant of remission even murders sentenced or commuted to life imprisonment were released at the end of 5 to 6 years. The committee feels that such a convict should not be released unless he has served at least fourteen years of imprisonment.

So legislative intent is that a person sentenced to imprisonment for life should not be released unless he has served fourteen years.

11. The overall aim of the people or a good Government is to maximise the happiness of the entire society. Crime is a reduction in happiness. Punishment is considered as one of measures for dealing with the crime. Since the Government orders drastically reduce the punishment imposed by Courts on convicts and virtually set them on naught, it will not be out of place to briefly advert to the theory and purpose of punishment. This has been stated in a very concise form in 21A American Jurisprudence (2d) Note 576 in following words:

The term "punishment" may be defined as may pain, penalty, suffering or confinement inflicted on a person by authority of law and the judgment or sentence of a Court for some crime or offence committed by him

It is said that the purpose of imposing penalties is not expiation or atonement of the offence committed, but prevention of future offences of the same kind, the reformation of the wayward and the protection of the society.

12. Section 15 of Salmond on Jurisprudence (Twelfth Edition by P. J. Fitzgerald), deals with topic. The purpose of Criminal Justice Punishment. It will be useful to quote the views of the learned author:

We can look of punishment from two different aspects. We can regard it as a method of protecting society by reducing the occurrence of criminal behaviour, or else we can consider it as an end in itself. Punishment can protect society by deterring potential offenders, by preventing the actual offender from committing further offences and by reforming and turning him into a law abiding citizen.

... If criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual and moral training, prisons must be turned into dwelling houses far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn. Further difficulty arises with the incorrigible offender. Some men appear to be beyond the reach of any correctional influences and yet they cannot just be abandoned as totally unfit for punitive treatment of some sort. The protection of society demands at least a measure of disablement to restrain such persons from further harmful activity.

It is needful, then, in view of modern theories and tendencies, to insist on the importance of the deterrent element in criminal justice. The reformatory element must not be overlooked, but neither must it be allowed to assume undue prominence. How much prominence it may be allowed is a question of time, place and circumstance.

13. In Jurisprudence by R. M. W. Dias (Fifth Edition--First Indian Reprint 1994) in Chapter VI dealing with Control of Liberty, the author has expressed his views in following words on pages 120 and 121:

Enforceability of a law depends on the observance by the officials concerned of other laws giving effect to the penalty. Once they are discouraged because of lack of interest in upholding laws, the practical foundation of law - enforcement as a whole is eroded ... It is important to remember that those loyal to standards and laws should not be betrayed. Removal of laws as a concession to dissidents is more likely to bring about the loss of their confidence and faith. The easing of laws and penalties on anti-social conduct may conceivably result in less freedom and safety for the law abiding. As Dietze puts it: "Just as the despotic variant of democracy all too often has jeopardised human rights, its permissive variant threatens these rights by exposing citizens to the crimes of their fellow-men. Mere condemnation of such behaviour and words of sympathy with victims are never enough without firm action giving practical effect to such sentiments. The more law-abiding people lose confidence in the law and those in authority to protect them, the more will they be driven to the alternative of taking matters into their own hands, the perils of which unthinkable and are nearer than some literal minded philanthropists seem inclined to allow.

14. In [Maru Ram and Others Vs. Union of India \(UOI\) and Others](#), the Constitution Bench, after referring to several earlier decisions, observed in para 51 that deterrence as one valid punitive component has been accepted in [Sunil Batra Vs. Delhi Administration and Others etc.](#), and so a measure of minimum incarceration of 14 years of the gravest class of crimes like murder cannot be considered shocking having regard to the escalation of horrendous crime in the country. What was valid in 1980 when this question was thrashed out and decided in Maru Ram has become more relevant two decades later when the country is witnessing manifold increase in serious crime and terrorist activity using most sophisticated weapons and devices

with the aid of modern means of transport and communication.

15. Punishing an accused may afford the victim or his family a measure of lawful vengeance, which conceivably could diffuse a potentially retaliatory scenario in which the victim and his family seek to take justice into their own hands. General deterrence is not aimed at the accused or the criminal. Rather the sentence is meant "to send a message" to others. The accused is made an example of what will happen to other persons to commit that crime. A sentence may often be justified solely as an expression of society's outrage at heinous anti-social behaviour. In his statement to Royal Commission on Capital Punishment, Lord Denning said: The ultimate justification of any punishment is not that it is a deterrent, but that is the emphatic denunciation by community of a crime. (See Punishment and Responsibility by H.L.A. Hart-Oxford University Press). Eminent jurists are, however, unanimous that the chief value of punishment consists in its deterring or preventing crime and protection of society. Therefore, it is wholly wrong to undermine the value or impact of punishment which is absolutely essential for protection of law abiding people and the society.

16. According to the State, the Government orders have been issued by the Governor in exercise of power conferred by Article 161 of the Constitution. Article 161 says that the Governor of a State shall have the power to grant pardon, 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. The power conferred on the Governor under Article 161 to grant pardon is similar to that possessed by the President under Article 72 of the Constitution with difference that latter can also exercise that power in all cases where the punishment or sentence is by a court martial and also where the sentence is a sentence of death. A pardon is said by Lord Coke to be a work of mercy, whereby the King, either before attainder, sentence, or conviction or after forgive any crime, offence, punishment, execution, right, title, debt or due temporal or ecclesiastical. In common parlance, a pardon is forgiveness, release or remission. In *United States v. George Wilson*, 8 L Ed 640, Chief Justice Marshall defined pardon as an act of grace proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment, the law inflicts for a crime he has committed. It is private though official act of the Executive Magistrate delivered to the individual for whose benefit it is intended.

17. It will be useful to keep in mind the difference between the pardon and other kind of the power conferred on the Governor under Article 161 of the Constitution. Amnesty is defined to be an act of the sovereign power granting oblivion or a general pardon for a past offence and is rarely, if ever, exercised in favour of a single individual, but is usually exerted on behalf of certain classes of persons who are subject to trial but have not yet been convicted. Reprieve from the French word

"reprendre" to take back, is withdrawing of a sentence for an interval of time, whereby the execution is suspended. It is merely the postponement of the execution of sentence for a definite time or to a day certain. It does not and cannot defeat the ultimate execution of the judgment of the Court, but merely delays it temporarily. A commutation of sentence is the change of the punishment to which a person is sentenced to less severe punishment-substitution of lesser for a greater punishment - by authority of law and may be imposed upon a convict without his acceptance and against his consent. Pardon and Amnesty are different characters and have different purposes. Amnesty overlooks offence; Pardon remits punishment, amnesty is generally addressed to classes or even communities and it typically (1) is enacted by the legislation instead of being a purely executive act; (2) is applied generally to unnamed persons, that is, to persons who fulfil certain conditions or a description laid down by the law; and (3) is designed to remove ex post facto the criminality of the acts committed. These characteristics differentiate amnesty from pardon which issues from the head of State rather than the Legislature, impinges upon the penalty rather the conviction, and is granted on an individual basis. (See 59 American Jurisprudence (2d) Notes 3 to 9 and Encyclopedia of Crime and Justice Vol. (1) - Macmillan and Free Press, New, York-Chapter Amnesty and Pardon). This shows that pardon is granted to a named person on an individual basis. Where it is granted in favour of unnamed persons in a general way, it will in reality be amnesty which can only be done by an act of Legislature. Granting a sort of amnesty after conviction would be an abuse of power of pardon.

18. The power of President to grant pardon was extensively debated in the Constituent Assembly before Article 72 was adopted in its present form but the debates do not show that it was ever intended or contemplated that the power would be exercised in a general manner for life convicts as has been done here (See Framing of India's Constitution by Shiva Rao, pages 367-371).

19. The reasons for conferring the power of pardon on the highest constitutional functionary are many but one of important reason is that a Court is bound by rules relating to procedure and admissibility of evidence and there may be cases where it has resulted in miscarriage of justice. This was highlighted in [Kehar Singh and Another Vs. Union of India \(UOI\) and Another](#), where it was said that the fallibility of human judgment being undeniable even in the most trained mind, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority. The object is to give relief from undue harshness or apparent mistake in the operation or enforcement of criminal law.

20. In England, King has absolute power to grant pardon and in fact King coronation oath is that "he will cause justice to be executed in mercy." The grant of pardon by the King in England cannot be challenged in Court. The position of a President or Governor in India is altogether different from that of a King in England. A President

holds an elected office, has a fixed term of five years and can be impeached for violation of the Constitution. A Governor of a State is appointed by the President and holds office during the pleasure of the President and normally his term is five years. Therefore, the position of a Governor being very different from the King in England, the nature of the power exercised by him in granting pardon is also different. Articles 72 and 161 of Constitution of India are somewhat similar to Article II Section 2 of the United States Constitution which confers upon the President the power "to grant reprieves and pardon for offence against United States except in cases of impeachment. "In United States, the grant of pardon by the President has been subject-matter of challenge before the Courts and the decisions of U. S. Supreme Court can be referred to for assistance. In *ex-parte Gross Man* 69 L Ed 527, Chief Justice Taft, who delivered the opinion of the Court, opined as under:

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. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lesson their effectiveness than a wholesale pardon of other offences. If we could conjure up in our minds a President willing to paralyze Courts by pardoning all criminal contempts, why not a President ordering a general jail delivery ... If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a Court of power to enforce its orders in a recalcitrant neighbourhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.

21. In *Biddle v. Peravich* 71 L Ed 1161, the U. S. Supreme Court stated the principles of pardon in following words:

We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. See *Ex parte Grossman* 267 U S 87. Just as the original

punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done ...

So the view of United States Supreme Court is that the main consideration for grant of pardon is public welfare. The exercise of power of pardon in a manner which has the effect of destroying the deterrent effect of judicial punishment would be a complete perversion of the power and if a President acts in such a manner, he is even liable for impeachment.

22. The scope of power conferred by Articles 72 and 161 of the Constitution was examined by the Constitution Bench in *Maru Ram v. Union of India* (supra) wherein it was held that in the matter of exercise of powers under Articles 72 and 161, the two highest dignitaries in our Constitutional Scheme must act not on their own judgment but in accordance with the aid and advice of the ministers. In para 54, it was held that the exercise of this plenary power cannot be left to the fancy, frolic or frown of Government, State or Central, but must embrace reason, relevance and reformation, as all public power in a republic must. It will be useful to reproduce certain observations made in paras 62, 63 and 65 of the reports:

62. An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order.

63. The jurisprudence of constitutionally canalised power as spelt out in the second proposition also did not meet with serious resistance from the learned Solicitor General and, if we may say rightly. Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism ...

65. Pardon, using this expression in the amplest connotation, ordains fair exercise, as we have indicated above. Political vendetta or party favouratism cannot but be interlopers in this area. The order which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable....."

23. In *Kehar Singh v. Union of India* (supra), it was held that the order of the President cannot be subjected to judicial review on its merit except within certain

limitation. However, the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on erroneous appreciation of the full amplitude of the scope of the power is a matter for the Court. Again in [Swaran Singh Vs. State of U.P. and Others,](#) the contention that the Court has no power to touch the order passed by the Governor under Article 161 of the Constitution was rejected and it was held that if the power was exercised arbitrarily, malafidely or in absolute disregard of the finer canons of the constitutionalism, the same cannot get the approval of law and the judicial hand must be stretched to it. The same principle was reiterated in [Union of India \(UOI\) through Central Bureau of Narcotics Commissioner Vs. Aharwa Deen,](#) . Therefore, the contention of Sri Mahendra Pratap learned A.G.A. and Sri R. K. Jain who has appeared for private Respondents that the impugned order being an order of pardon granted by the Governor in exercise of power conferred under Article 161 cannot be assailed has no merit and has to be rejected. A distinction has also to be made where pardon has been granted in favour of an individual or a small group of persons identically placed where a wrong pardon may not have a big impact on the society from a case like the present one where the entire State would be affected. In such a case, the Court would be more circumspect and the matter would be examined with greater care and scrutiny in order to see whether the exercise of power is within the constitutional limits and is in public interest.

24. Sentencing is an important part of criminal jurisprudence. While trying a person accused of having committed an offence, the Court has to perform two important functions, viz., (1) to determine on the basis of the evidence adduced whether the accused has committed an offence and if so, what is the nature of offence, and (2) to determine what will be the appropriate sentence which may be awarded to him. Sentencing decision is probably the most important one made by a Judge in a criminal case and host of factors like general deterrence, special deterrence, incapacitation, expression of society's outrage, restitution (compensation to the victim), age of the accused, his social condition, period which has elapsed since the commission of the crime and many others have to be weighed and taken into consideration. Special cases apart, where a minimum sentence is also provided otherwise the Statutes lay down the maximum sentence with which the offence is punishable. For an offence u/s 326, I.P.C., the Court may award imprisonment till the rising of Court or imprisonment for life. Several accused in the same case may be awarded different sentences taking into consideration the role played by them and number of other factors, Statutes confer a wide discretion in the matter of awarding sentence which has to be done on sound judicial principles. Sub-section (2) of Section 235, Cr. P.C. enjoins giving an opportunity of hearing to an accused on the question of sentence after a finding of conviction has been recorded and this provision has been held to be mandatory in *Santa Singh v. State of Punjab* AIR 1978 SC 2381. Therefore, there cannot be even the slightest doubt that sentencing an

accused is an important part of the judicial function to be performed by the Court.

25. Under the Scheme of the Constitution, there are three limbs of the State, namely, Legislature, executive and judiciary and there is complete distribution of powers amongst them. It is not permissible for one limb to trench upon the power of another. The higher judiciary can, no doubt, examine whether the laws made by the Legislature are within the limits imposed by the Constitution. The executive cannot exercise any control over the judiciary. It has no authority or jurisdiction to convict a person accused of having committed an offence or to award him any sentence. This power rests entirely with the Courts, which have been constituted in accordance with the constitutional scheme. In [His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala](#), separation of powers between the Legislature, the executive and the judiciary was held to be the basic structure of the Constitution. This was reiterated in [Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another](#). In para 320, it was emphasised that a reign of law, in contrast to the tyranny of power, can be achieved only through separating appropriately the several powers of Government. The sentence awarded to an accused can be set aside, altered or varied only by a superior court and not by the executive. However, by the Government order, the sentences awarded to all the prisoners have been drastically reduced and virtually set aside by one stroke. This has not been done in favour an individual or a small group of prisoners but for all the convicts who were undergoing imprisonment and were confined in jail in the State of U.P. The sentences had been imposed upon them as a result of judgments delivered by Courts including superior courts, High Court and Supreme Court on sound judicial principles. Where pardon is granted to a named individual or a small group of persons having common or identical features whose identity is known, it is a case of mercy as it only affects the execution of their sentence. Where, however, a general order is passed whole hog without identifying the persons and its applicability being dependent entirely upon the period of imprisonment suffered, it cannot be termed as an act of mercy or pardon, as in reality it impinges upon the judicial orders passed by the Courts imposing sentences upon the convicts. The release of prisoners under this order does not take place on a particular fixed day which would normally be the case in a pardon but on different dates depending upon when they fulfil the criteria fixed in the order, namely, undergoing of 2 or 3 years sentence. The power of pardon under Article 161 cannot be exercised in a manner which completely negates the scheme of constitution regarding division of powers. An essential function performed by the judiciary cannot be altered or modified or its effect taken away in the garb of power of pardon by the Governor under Article 161 of the Constitution. It is a clear misuse of power which cannot be countenanced and must be struck down.

26. The provisions of Government order show that anyone who has been sentenced to imprisonment for life and who satisfies the requirement of age will be released after he has undergone 3 years of sentence. The period undergone as under-trial

will also be taken into consideration for counting the aforesaid period of 3 years in view of the provisions of Section 428, Cr. P.C. and, therefore, the actual period to be undergone after a verdict of conviction has been pronounced by the Court will be still less. This benefit will be available to even those who may have been convicted under Sections 302, 304B, 307, 376, 364, 395 or 396, I.P.C. or under N.D.P.S. Act or T.A.D.A. A person may have committed a large number of murders in a most brutal or heinous manner. The murders may be of important functionaries of the State or members of law and order enforcement agencies like police or for extracting heavy ransom. A person may have been convicted for having committed gang rape upon a girl of tender age and thereafter committing her murder or for having committed dacoity in a bank where he may have looted crores of rupees after killing the security guards or cashier, etc. or for possession or transportation of huge quantity of heroin or some such contraband substances or for drug trafficking under the N.D.P.S. Act for having planted bomb or explosives in a bus or train or a public place which may have caused deaths of many innocent persons. They are all entitled to get the benefit of the Government order as it places no restriction on their release. Even though a person may be member of an international gang indulging in terrorist activities or in supply and distribution of huge quantity of narcotics drugs, he can claim the benefit as a matter of right. Clauses 4 and 5 apply to those who have been sentenced to any term of imprisonment other than life sentence and if they satisfy the requirement of age, they will be entitled for premature release after undergoing only two years or 1/3 of sentence, whichever is less. Here also after taking into consideration the period of detention as under-trial in view of Section 428, I.P.C., the requirement of 2 years may get further reduced and he will be entitled to be released after undergoing still lesser sentence. The manner and method of commission of the crime, his involvement in other criminal cases, his past conduct and the impact of his release on the society have not at all to be taken into consideration and sole criteria is undergoing of three years of sentence for those sentenced to imprisonment for life and for others undergoing of 1/3 of the sentence or two years whichever is less. Curiously enough, convicts under some provisions of I.P.C. and other enactments which provide for a much lesser sentence and are generally not treated as serious crimes have been placed in para 4 of the Government order which is the exception clause and are not to be released. A person convicted for outraging the modesty of a woman, which is an offence defined u/s 354, I.P.C. and is punishable with a maximum sentence of 2 years R.I. is under the exception clause though there is no such restriction for more serious offences like Sections 366 and 376, I.P.C. Same is the case with Section 2(2) of Criminal Law Amendment Act which is punishable with a maximum sentence of 6 months R.I. and the offences u/s 2(1) and Section 3(2) of the same Act which are punishable with a maximum sentence of 3 years R.I. The offences under Sections 171 and 186, I.P.C. are punishable with a maximum sentence of 3 months R.I. and the offences under Sections 167 and 170, I.P.C. are punishable with a maximum sentence of 3 years R.I. have been included under the exception clause. Sections 191

and 192, I.P.C. which only define "giving of false evidence" or "fabricating false evidence" and do not provide for any punishment have also been included in the exception clause. There does not appear to be any rationale or logic in giving benefit to those who have been found guilty and have been convicted for very serious offences which even carry a death sentence but not giving benefit to those who have been convicted for petty offences providing for much lighter punishment. In [Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others,](#), it was held that the question whether an act is arbitrary or not, is ultimately to be answered on the facts and circumstances of the given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. It was further held that every State action must be informed by reason and that an act uninformed by reason is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for time being. In the same decision, reference is also made to [S.G. Jaisinghani Vs. Union of India \(UOI\) and Others,](#), wherein it was highlighted that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitution system is based. In a system governed by rule of law, discretion when conferred upon the executive authorities, must be confined within clearly defined limits and the decision should be made by the application of known principles and rules. In our opinion, no discernible principle can be found in the Government orders and they are wholly arbitrary. As said in Maru Ram v. Union of India (supra), the authorities while exercising the power of pardon under Articles 72 and 161 cannot act in an arbitrary manner but must be informed by finer canons of constitutionalism. Therefore, the impugned Government orders being wholly arbitrary and without any rationale or basis are hit by Article 14 of the Constitution and are void.

27. In the Government order issued on 11.1.2000 in clauses 2 and 3, the age for male prisoners was 65 years or above and for lady prisoners 60 years and above. By the subsequent Government order dated 25.1.2000, the same was reduced to 60 years and 50 years respectively. It is not understandable as to why and on what basis prisoners of that age group have been selected for premature release just after undergoing a sentence of three years although they had been sentenced to imprisonment for life. State has not placed on record any material or data to show that males at the age of 60 years and females at the age of 50 years become so incapacitated that it is in public interest to release them and set them free. The health of a person is not necessarily dependent upon his age. At least the ages fixed in the Government order are not such where it may be said with a reasonable amount of certainty that the prisoner has become so weak, infirm and incapacitated that he is incapable of abetting or planning or committing a crime and is completely reformed and, therefore, his keeping in prison any further would be grossly detrimental to his health or to his life. A large number of cases u/s 304B, I.P.C. (dowry death) are coming before the Courts wherein the chief culprit is either the

mother-in-law or the father-in-law and they are likely to be in the age groups of 50 or 60 years. A mother-in-law who on account of greed for dowry has set her daughter-in-law on fire by pouring kerosene would invariably get benefit of the Government orders as he is likely to be 50 years of age or near about the said age.

28. For getting benefit under the Government order, the decisive factor is the age of the prisoner. A Government order was issued on 21.1.2000, laying down the guidelines for determining the age of the prisoners. It provides that the date of birth mentioned in the High School Certificate or Certificate of equivalent examination or if the prisoner was in Government or private service, the date in his service record, and in the event of non-availability of any one of these documents, the birth certificate issued by any competent authority shall be accepted as the correct date of birth. However, if none of the aforesaid documents are available or the age is disputed, then the age recorded by the Court shall be accepted. The last clause provides that if nothing as aforesaid was available, the age determined by the Medical Board constituted in accordance with U.P. Jail Manual shall be accepted.

29. On a practical plane, it would be extremely difficult, well nigh impossible, to get a correct assessment of age. The types of society from which most of the criminals come are not such where they would be possessing a High School Certificate in proof of their age. Even if a prisoner has any such kind of school certificate or birth certificate or a service record, he is not likely to produce the same and would like to take the benefit of the record of the criminal case where his age may have been mentioned. It is common knowledge that persons accused of having committed a criminal offence tend to give wrong age at the time of recording of their statements u/s 313, Cr. P.C. If an accused is young and is up to 18 or 19 years of age, he gives his age below 16 years in order to claim the benefit of Juvenile Justice Act or some leniency in sentence. Similarly, if an accused is near about 50 years in age, he increases his age and gives exaggerated figure in order to plead that on account of his advance age, he was not in a position to commit the crime or for some mercy in sentence. Reliance on report of the medical board would lead to corruption as there is no scientific method by which age of a person of that age group (50 or 60 years, as the case may be) may be determined with accuracy. The point which we want to highlight is also illustrated by the case in hand. It is averred in para 8 of the counter-affidavit of the Chief Secretary that the age of the accused Munna was mentioned as 48 years on 26.4.1993 in record of Central Prison, Agra but his age in his statement u/s 313, Cr. P.C. which was recorded earlier in 1992 is mentioned as 60 years. So there is a difference of 13 years. Similarly, the age of Masita alias Ranjha was mentioned as 50 years on 17.6.1994 in the record of Jail at Agra. But in his statement u/s 313, Cr. P.C. which was recorded in 1992, it is mentioned as 55 years. Here there is a difference of 7 years. Both the accused secured release taking advantage of the age mentioned in their statements u/s 313, Cr. P.C. There is no judicial determination of age when statement u/s 313, Cr. P.C. is recorded. Therefore, the whole foundation of the Government order rests on shaky grounds

which is capable of tremendous misuse in execution thereof.

30. There is yet another significant feature which points towards inherent contradiction, unequal treatment and arbitrariness in the Government orders. An offence is often committed by a group of persons. They are tried together and are convicted and sentenced according to the role played by each of them in the commission of crime. In the same case, it is likely that an accused of younger age may have played a minor or insignificant role while another accused, elder in age, may have played more active or prominent role and the Court on finding them guilty may have sentenced both of them to imprisonment for life by virtue of Section 34 or 149, I.P.C. In terms of the Government order, the accused of the higher age group would get the benefit and will be out of jail earlier while the accused of younger age, having played a lesser role, would continue to languish there. Will it not generate a feeling of extreme hatred and repulsion against the system and the State in the minds of people that though his role in the commission of crime was much less, an accused younger in age continues to suffer the hardship and torture of confinement in jail while one who played the more active or major role was enjoying liberty and freedom? It is well-settled principle of criminal jurisprudence that there should be no disparity in the matter of sentencing. It will be apt to recall the words of famous jurist Jeremy Bentham on punishment who called for rules ensuring that punishment would be variable, to fit the particular case and equable so as to inflict equal pain for similar offences.

31. There is an article "Sentencing: Disparity" by Elyce H. Zenoff, Prof, of Law, The George Washington University in Encyclopedia of Crime and Justice (Vol. IV) (Published by Macmillan and The Free Press, New York) and it will be useful to notice the views of the author on this issue:

Fairness requires that equally blameworthy offenders receive substantially similar sanctions. The imposing of different sanctions for the same crime without apparent justification is called "sentencing disparity" and is uniformly condemned...

Disparity is condemned for a variety of reasons. First and foremost, it is unjust for persons who have similar criminal histories, and who have committed essentially the same criminal act, to receive widely dissimilar punishments. Some believe that disparity results in sanctions which are too lenient, whereas others fear that, it leads to sentences that are too severe. All agree, however, that disparity lessens faith in the entire judicial system. In addition, many people including prison administrators, believe that disparity may breed more crime by arousing the anger of offenders against society. The perception of having been treated unjustly is thought to be one of the causes of prison riots and of recidivism.

The Government orders which have the effect of treating the accused of the same crime unjustly is, therefore, wholly discriminatory. It is not in public interest as it may lead to more crime on account of its an impact on an accused younger in age

who may feel immensely hurt by the injustice meted out to him for no fault of his.

32. It is also necessary to place on the record that though a criminal trial should be completed as early as possible but in the current scenario in the State of U.P., they drag on for a long period and take many years before the final judgment is pronounced. There are variety of reasons for this delay and an important reason is the delaying tactics being adopted by the accused in order to win over a witness or to tire him out by making him to attend the Court on innumerable dates or to make him disinterested in giving testimony against the accused. Experience shows that even where accused has not been granted bail and is in custody, he is prepared to wait for any length of time and delay the trial until the witness is won over. There is huge back-log of cases in Allahabad High Court and currently criminal appeals filed in the year 1980 (except those in which capital sentence has been awarded) are being listed for final hearing. Exceptional cases apart, most of the life convicts after filing of appeal get bail sooner or later and the main reason being that the hearing of the appeal takes such a long time. If a person commits a crime at the age of 35, the trial may take 3 years or more and by the time the appeal is decided, he may be only a few years short of 60 years. Even though the High Court may uphold his conviction and sentence of imprisonment for life but under the terms of the Government order, he would be released by merely undergoing 3 years R. I. A lady accused who commits a crime at the age of 25 years or more will also get a similar benefit as in her case the age limit fixed is only 50 years, Section 428, Cr. P.C. provides that where an accused person has, on conviction, been sentenced to imprisonment for a term, the period of detention, if any, undergone by him during the investigation, enquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him. In view of this provision, the period of detention during investigation, enquiry or trial is to be treated as a sentence undergone. See [Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another](#), and [Hardev Singh and Another Vs. The State of Punjab](#), . In view of this legal position, the period undergone as undertrial is also being taken into consideration for counting the period of 2 years or 3 years of imprisonment for the purpose of the applicability of the Government order. This feature came to the notice of one of us while hearing Criminal Appeal No. 491 of 2000, a case relating to triple murder, where the accused who was sentenced to imprisonment for life was released within 6 months of his conviction by the Sessions Judge on the basis of the aforesaid Government orders.

33. In view of the discussions made above, the exercise of power of pardon by the Governor is wholly arbitrary and contrary to the scheme and mandate of the Constitution. Therefore, the Government orders dated 11.1.2000 and 25.1.2000, deserve to be quashed.

34. Another question, which is germane to the controversy and is to be considered what final should be passed by this Court. The Petitioner has no doubt made prayer for quashing of the Government orders and for direction that Respondent Nos. 7 to 19 should not be released and if released, should be sent back to prison. Whether the Court should stop here? There can be no manner of doubt that large scale premature release of prisoners who were sentenced to long terms of imprisonment, including life imprisonment, is wholly against the public interest. To secure a conviction is not an easy job. The rate of final conviction in criminal cases bears a small proportion to the number of crimes committed. Letting lose a large number of criminals, who have undergone a very short sentence, will have a detrimental effect on the society at large. The people of this State would lose faith in the judicial system itself as not many would come to know that a convict has secured his release from jail on the basis of pardon granted by the Governor. Once the Government orders are struck down, necessary consequences must follow and position ante must be restored. Therefore, in larger public interest, the appropriate direction which should be issued by this Court is to direct the State to put all such persons back to prison who have been granted premature release on the strength of the impugned Government orders.

35. In the result, the writ petition succeeds and is hereby allowed. The impugned Government orders dated 11.1.2000 and 25.1.2000 (Annexures-CA-1 and CA-2 to the counter-affidavit of Sri Bhola Nath Tiwari, Chief Secretary, Government of U.P.) are quashed. The Respondent Nos. 7 to 19 shall be taken into custody and shall be sent to jail to undergo the sentences awarded to them. We further direct the Chief Secretary and the Principal Secretary (Home), Government of U.P., to ensure that all such prisoners who have been released from jails on the basis of the aforesaid Government orders shall be taken into custody to undergo the sentences imposed upon them. This direction shall be complied with within two months of the receipt of the copy of the judgment. Office is directed to send authenticated copy of the judgment to the Principal Secretary (Home) and the Chief Secretary, U.P. Government, Lucknow, within a week.