Smt. Kusum Vs State of Madhya Pradesh and Others

Court: Madhya Pradesh High Court

Date of Decision: Feb. 6, 2006

Acts Referred: Constitution of India, 1950 â€" Article 226
Criminal Procedure Code, 1973 (CrPC) â€" Section 401, 432, 433, 433A
Madhya Pradesh Prisoners Release on Probation Act, 1954 â€" Section 2, 4, 6, 9, 9(4)
Madhya Pradesh Prisoners Release on Probation Rules, 1964 â€" Rule 3, 3A, 4, 6
Penal Code, 1860 (IPC) â€" Section 302

Citation: (2007) 2 JLJ 9 : (2006) 3 MPLJ 187

Hon'ble Judges: S.K. Pandey, J; Dipak Misra, J

Bench: Division Bench

Advocate: D.D. Bhargava, for the Appellant; Vinod Mehta, Government Advocate, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Dipak Misra, J.

Invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India, the petitioners in each of the writ petitions have

called in question the validity of the circular dated 3-8-2005 on the foundation that the same is contrary to the M.P. Prisoners Release on

Probation Act, 1954 (in short "the Act") and sought for issue of a writ of certiorari for quashment of the same.

For the sake of clarity and convenience, we shall advert to the factual scenario in W.P. No. 1618 of 2006. The petitioner, Kusum, was convicted

u/s 302 of the Indian Penal Code (in short, "the IPC") and sentenced to rigorous imprisonment for life in the Sessions Trial No. 176 of 1997 by

the learned Additional Sessions Judge, Damoh. After completing five years of incarceration, she filed an application to be released on license under

the aforesaid enactment and the rules framed thereunder. Her prayer for release on probation was rejected by the Probation Board on 8-8-2005,

which was conferred the stamp of approval by the State Government on 2940-2005. It is contended that the Inspector General of Prisons had

issued a circular dated 3-8-2005 indicating that the prisoners whose appeals are pending before the Appellate Court are not entitled to be

considered for the purpose of release on probation which is absolutely impermissible as the same runs counter to the express provisions of the Act

and the Rules.

Mr. D.D. Bhargava, learned Counsel appearing for the petitioner propounded that such a circular contravenes to the provisions of the Act and the

M.P. Prisoners" Release on Probation Rules, 1964 (in short "the Rules") and a circular, by no stretch of imagination, can transgress the mandate of

the Act or Rules. It is urged by him that a circular cannot supplant any provision of the Act and if there is any repugnancy, the circular has to pave

the path of vitiation.

Mr. Vinod Mehta, learned Government Advocate, submitted that the circular has been issued keeping in view the direction issued in W.P. No.

941 of 2005 and, therefore, it should be held as intra vires being the sequitur of the decision rendered by the Division Bench.

To appreciate the rivalised submission raised at the Bar, it is thought seemly to understand and appreciate the decision rendered in W.P. No. 941

of 2005. In the aforesaid case, the Division Bench was dealing with the grievance of one Vinod Kumar Nigam, who had called in question the

rejection of grant of benefit of probation by the Probation Board and affirmation thereof by the State Government, on many a ground. The Division

Bench referred to the earlier writ petition filed by said Vinod Kumar Nigam forming the subject matter of W.P. No. 2319 of 2002 which had

faced rejection. In course of hearing of the writ petition, the Division Bench adverted to the concept of conditions precedent and the irregularities in

release on probation of certain convicts particularly those whose applications for bail had been rejected and their appeals are pending. In this

backdrop, the Division Bench directed as under:

We are, therefore, of the opinion that all the cases where probationers have been released and where appeals are pending or on mere completion

of 5 years or 6 years should be reviewed again. Board is directed to review all the cases and shall also decide the application of the petitioner in

the light of the directions given above. Order rejecting the application of petitioner passed by the Board is quashed with a direction to the Board to

reconsider the case in the light of judgment in the case of Arvind Yadav v. Ramesh Kumar and Ors. and State of M.P. v. Bhola (supra) and earlier

order passed. As petitioner has remained in jail for more than 13 years, Board is directed to reconsider the case of the petitioner within a period of

two months from today.

At this juncture, it is condign to mention that the Division Bench had also observed that in some appeals where prayers for bail had been rejected

convicts have been released on bail which puts a question mark on the decision making process of the Probation Board. On a perusal of the

circular dated 3-8-2005, it transpires that the concerned authorities namely, the Director General and Inspector General of Prison, have directed

that the Probation Board should not consider the cases of the convicts whose appeals are pending in the High Court. That apart, there has also

been a direction not to consider the mercy applications for grant of release.

The question that arises for consideration is whether such a circular can withstand scrutiny in the backdrop of the Act and the Rules. Before we

refer to the same, we must make it absolutely clear that the submission of Mr. Mehta, learned Government Advocate is totally unacceptable that

the circular is the fall out of the decision rendered in W.P. No. 941 of 2005. We have referred to the directions issued by the Division Bench. The

Division Bench has not stated that the application for release on probation cannot be considered when the appeals are pending. What the Division

Bench has stated is that where the applications for bail in respect of dreaded criminal are rejected, their applications are considered for release on

probation and they have been conferred the benefit. Quite apart from the above, the Division Bench has observed that the decision making process

of the Competent Authority is a matter of suspect. Needless to emphasise, all these observations and directions would be kept in one

compartment, namely, consideration of the criminal antecedents and other such factors but it cannot be construed to mean that a direction has been

given that applications are not to be considered because consideration of an application is the mandate under the Act and Rules.

In this context, we may refer with profit to Section 2 of the Act which deals with power of the Government to release by license on conditions

imposed by it. The said provision reads as under:

2. Notwithstanding anything contained in Section 401 of the Code of Criminal Procedure, 1989 where a person is confined in a prison under a

sentence of imprisonment, and it appear to the Government from his antecedents and his conduct in the prison that he is likely to abstain from crime

and lead a peaceable life, he is released from prison, the Government may by license permit him to be released on condition that he be placed

under the supervision or Authority of a Government Officer or of a person professing the same religion as the prisoner or such institution of society

as may be recognized by the Government for the purpose, provided such other person, institution or society is willing to take charge of him.

Section 4 of the Act stipulates that period of release is to be reckoned as imprisonment for computing period of sentence served. Section 6

empowers the Government to revoke the licence. Section 9 empowers the Government to make rules. In pursuance of the power conferred u/s 9,

the Rules have been framed. Rule 3 provides classes of prisoners not to be released. Rule 4 deals with the eligibility of release. The said rule reads

as under:

4. Eligibility for release.-- Save the prisoners specified in Rule 3 any other prisoner who has served one-third of his sentence of imprisonment or a

total period of five years [without remission], whichever is less, may be released by the Government on licence.

Rule 6 deals with the procedure. It is appropriate to reproduce the said rule:

6. Procedure.-- (1) Any prisoner eligible for release under these Rules may make an application in Form A to the Superintendent. Such forms shall

be printed at the cost of the Government and supplied free of charge to prisoners, to their relatives and persons offering themselves as their

guardians.

(2) On receipt of the application, the Superintendent shall examine the application to see if the prisoner and his proposed guardian have duly filled

in the columns of the application, meant to be filled in by them. If the application is in order, the Superintendent shall entertain it and cause it to be

entered in a register maintained in Form B. If the prisoner is ineligible under Rule 3 he shall reject the application and inform the prisoner of his

order. If the prisoner is eligible for release under Rule 4 he shall fill in the columns in the application meant to be filled in by him and forward the

same as soon as may be, to the District Magistrate of the district in which the prisoner was convicted. If the application is not in order, the

Superintendent shall return it to the prisoner for necessary correction or supplying the omissions.

(3) On receipt of an application under Sub-rule (2) the District Magistrate shall immediately consult the Superintendent of Police and the Probation

Officers, where one is appointed and, if necessary, the District Magistrate of the district in which the prisoner ordinarily resides and on receipt of

their reports fill in the entries meant to be filled in by him and shall, without delay, forward the same to the Inspector-General of Prisons, Madhya

Pradesh.

(4) The District Magistrate shall maintain a register in Form C in which all applications received from the Superintendent under Sub-rule (2) shall

be duly entered.

(5) The applications received from the district, by the Inspector-General Prisoner shall be considered by a board consisting of the Home Secretary

to the Government of Madhya Pradesh in the Home Department or any other officer empowered in this behalf by the Government, the Inspector-

General of Prisons, Madhya Pradesh, or the Deputy Inspector-General of Prisons, as the case may be, and a non-official member to be appointed

by the Government. Meeting of the Board shall be held at least once every month to make necessary recommendations. The Secretary to the

Government in the Home Department or any other officer empowered in this behalf by the Government, shall be the Chairman of the Board. A

non-official member shall unless the State Government terminates his appointment earlier, hold office for a term of three years.

(6) The Government shall, on the receipt of recommendation of the Board, pass such orders as it may deem proper.

[(7) A prisoner, whose application for release on licence is rejected by the Government, may again make an application, in Form "A", to the

Superintendent, after a period of two years, such application will be considered in accordance with the procedure prescribed under these rules.]

In this context, it would be proper to refer to the decision rendered in the case of Maru Ram and Others Vs. Union of India (UOI) and Others, ,

wherein the Constitution Bench, in the majority opinion in Paragraph 71 expressed the view asunder:

71. The U.P. Prisoners" Release on Probation Act, 1938, a welcome measure, what with population pressure on prisons and burden on the public

exchequer, will survive Section 433A for two reasons. Firstly, Government may resort to the statutory scheme, not qua law but as guideline.

Secondly, and more importantly, the expression "prison" and "imprisonment" must receive a wider connotation and include any place notified as

such for detention purposes. "Stone walls and iron bars do not a prison make"; nor are "stonewalls and iron bars do not a prison make"; nor are

"stonewalls and iron bars" a sine qua non to make a jail. Open Jails are capital instances. 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. House detentions, for example. Places, where Gandhiji was detained, were

prisons. Restraint on freedom under the prison law is the test. Licensed releases where instant recapture is sanctioned by the law, and likewise,

parole, where the parole is no free agent, and other categories under the invisible fetters of the prison law may legitimately be regarded as

imprisonment. This point is necessary to be cleared even for computation of 14 years u/s 433A. Sections 432, 433 and 433A read together, lead

to the inference we have drawn and liberal though guarded, use of this Act may do good. Prison reform, much bruited about though, is more visible

on the skin than in the soul and needs a deeper stirring of consciousness than tantrums, threats and legalized third chain the man is not to change

him; the error is obvious-- a human is more than a simian. Our reasoning upholds Section 433A of the Procedure Code but upbraids the

abandonment of the healing hope of remissions and release betimes. To legislate belongs to another branch but where justice is the subject the

Court must speak. There was some argument that Section 433A is understood to be a ban on parole. Very wrong. The section does not obligate

continuous fourteen years in jail and so parole is permissible. We go further to say that our Prison Administration should liberalize parole to prevent

pent-up tension and sex perversion which are popular currency in many a penitentiary.

In Paragraph 72 in sub-paragraph 11, Their Lordships expressed the view as under:

(11) The U.P. Prisoners'' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned

imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14 year duration. Similar other

statutes and rules will enjoy similar efficacy.

Recently, in the case of State of Madhya Pradesh and Another Vs. Bhola @ Bhairon Prasad Raghuvanshi, , Their Lordships expressed the view

that specifying prisoners ineligible for release is mtra vires. Their Lordships further ruled that Rule 3(a) is neither in excess of rule making power u/s

9(4) nor violative of substantive provisions of Section 2 of the Act. The Apex Court expressed the opinion that classification of prisoners on the

basis of serious nature of offences committed by them as not eligible to be released on probation under the Act is permissible in the framework of

the statute. Rule 3-A impliedly permits classification of offenders not only on the basis of their antecedents and conduct envisaged u/s 2 but also

further on the basis of gravity of offences. In the aforesaid case decision rendered in the case of State of U.P. v. Sadhu Saran Shukla, (1994) 2

SCC 445 , was overruled. We have referred to the aforesaid pronouncements, the provisions of the Act and the rules only to understand what has

been prohibited under the Act and the Rules are justified and the classification cannot be frowned upon, but what the present circular has stipulated

is that in all cases, where appeals filed by the convicts are pending, their cases for consideration on release on licence are not to be considered.

In our considered opinion, the said circular is absolutely general, sweeping and not in consonance with the Act and the Rules. The cases which are

not to be considered under the rules by exclusion could have been segregated by giving instructions to the concerned authorities but a circular of

this nature could not have been issued by directing the probation Board not to consider the cases of prisoners where appeals are pending. There

can be no trace of doubt, the said circular supplants the rules. The authority that had issued the circular, if we allow ourselves to say so, has

misconstrued the Division Bench judgment and also not kept in view the rules which are in vogue. The jurisdiction vested in an authority has to be

exercised as per rules. Be it noted, the Division Bench decision of this Court was rendered to curb the illegality in the decision making process, but

a circular to the effect that no case would be considered by the Probation Board where the appeal is pending could not have been issued. The

entertainment of mercy petition was not prohibited by the Division Bench. Hence, the same cannot be prohibited by the circular, if otherwise

entertainable in law.

In view of the aforesaid, we unhesitatingly declare that the circular dated 3-8-2005, Annexure P-1 is invalid and ultra vires. We only command the

respondents to consider the cases of the petitioners afresh keeping in view the observations and directions issued in W.P. No. 941 of 2005.

Needless to emphasise, adverse orders passed against the petitioners in all the cases stand quashed as there has been really no consideration. The

Board shall keep in view the guidelines issued in W.P. No. 941 of 2005 and decide the same afresh. Mr. Mehta has submitted that the

applications shall be considered as per the decision rendered in the aforesaid case within a period of six weeks from the date of receipt of the

order passed today.

The writ petitions are allowed to the extent indicated above. There shall be no order as to costs.