State Of Haryana & Ors vs Jagdish on 22 March, 2010

Equivalent citations: AIR 2010 SUPREME COURT 1690, 2010 (4) SCC 216, 2010 AIR SCW 2178, AIR 2011 SC (CRIMINAL) 1121, 2010 (2) AIR KANT HCR 854, (2010) 2 RECCRIR 464, 2010 (3) SCALE 285, (2010) 89 ALLINDCAS 156 (SC), (2010) 2 MAD LJ(CRI) 996, 2010 (2) SCC(CRI) 806, (2010) 1 CRILR(RAJ) 365, (2010) 2 ALLCRILR 624, (2010) 2 CHANDCRIC 128, (2010) 70 ALLCRIC 422, (2010) 2 DLT(CRL) 26, (2010) 80 ALL LR 258, (2010) 2 RAJ LW 1185, (2010) 3 JCR 109 (SC), (2010) 46 OCR 79, (2010) 2 ALLCRIR 1514, (2010) 2 CURCRIR 20, (2010) 3 SCALE 285, 2010 CRILR(SC MAH GUJ) 365, 2010 CRILR(SC&MP) 365, 2010 (2) CRIMES 73 SN

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Bench: K.G. Balakrishnan, J.M. Panchal, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 566 OF 2010
(Arising out of SLP (Crl.) No. 6638 of 2009)

STATE OF HARYANA AND ORS. ..APPELLANTS

Versus

JAGDISH ..RESPONDENT

JUDGMENT

Dr. B.S. CHAUHAN, J

1. Delay condoned. Leave granted.

2. This matter has come up before us upon reference having been made by a Two-Judge Bench vide order dated 04.11.2009 upon noticing an inconsistency in the views expressed by this Court in the case of State of Haryana & Ors. v. Balwan AIR 1999 SC 3333 on one hand and in the cases of State of Haryana v. Mahender Singh & Ors. (2007) 13 SCC 606; and State of Haryana v. Bhup Singh AIR 2009 SC 1252, on the other hand. The inconsistency, which was pointed out in the said order was noticed by taking into account the para 5 of the judgment in Balwan (supra) which is as follows :-

> "……..However, in order to see that a life convict does not lose any benefit available under the remission scheme which has to be regarded as the guideline, it would be just and proper to direct the State Government to treat the date on which his case is/was required to be put up before the Governor under Article 161 of the Constitution as the relevant date with reference to which their cases are to be considered ....."

3. The views expressed in Mahender Singh (supra) and Bhup Singh (supra) were as follows :-

> Mahender Singh (supra) "40. Whenever, thus, a policy decision is made, persons must be treated equally in terms thereof. A' fortiori the policy decision applicable in such cases would be which was prevailing at the time of his conviction."

Bhup Singh (supra) "10….. The right to ask for remission of sentence by a life convict would be under the law as was prevailing on the date on which the judgment of conviction and sentence was passed …….

11. …..It is, therefore, directed that if the respondents have not already been released, the State shall consider their cases in terms of the judgment of this Court in Mahender Singh case having regard to the policy decision as was applicable on the date on which they were convicted and not on the basis of the subsequent policy decision of the year 2002...."

4. The question that has been posed before us is as to whether the policy which makes a provision for remission of sentence, should be that which was existing on the date of the conviction of the accused or it should be the policy that exists on the date of consideration of his case for pre-mature release by the appropriate authority?

5. In the instant case, we find that the respondent, herein, has been granted the relief by the Punjab and Haryana High Court for consideration of his case for grant of clemency as per the policy prevailing on the date of his conviction. The respondent was convicted and sentenced for life imprisonment vide judgment and order dated 20.05.1999 and the policy which was in existence at that point of time was dated 04.02.1993. The respondent, having served more than 10 years imprisonment, approached the High Court that in spite of having undergone the sentence as per the aforesaid policy dated 04.02.1993, his case for pre-mature release was not being considered in view of the new policy of short sentencing, introduced on 13.08.2008. The policy dated 13.8.2008 has been brought on record, which expressly recites that the same was being issued in exercise of the powers conferred by Sub-Section (1) of Section 432 read with Section 433 of Criminal Procedure Code (hereinafter called Cr.P.C.), 1973. The same further recites that it is in supersession of the Government Memorandum dated 12.04.2002 and all other earlier policies.

6. The respondent was involved in a case, the FIR whereof was registered on 16.01.1995 and he was convicted vide judgment and order dated 20.5.1999 under Sections 302, 148 and 149 Indian Penal Code (hereinafter called IPC), 1860. In the above background, the respondent filed a Criminal Misc. Application before the High Court. The Court placing reliance on the judgments of this Court in

Mahender Singh (supra) and Bhup Singh (supra) came to the conclusion that the case of the respondent for pre-mature release was to be considered in the light of the short sentencing policy existing on the date of his conviction and thus, a direction was issued to the State Authorities to consider his case for pre- mature release in view of the policy dated 4.2.1993 existing on the date of his conviction i.e. 20th May, 1999 within a period of one month from the date of receipt of the certified copy of the judgment. Hence, this appeal. In view of the conflicting views in various judgments of this Court, reference has been made to the larger Bench.

7. Heard Shri Gopal Subramanium, learned Solicitor General, Amicus Curiae, Shri P.N. Mishra, learned senior counsel appearing for the State of Haryana, Shri B.S. Malik, Senior Advocate, Shri Manoj Swarup, Shri D.P. Singh and Shri Sanjay Jain, Advocates for respondents.

8. Shri P.N. Mishra, learned senior counsel appearing for the State of Haryana has submitted that State has unfettered power to lay down a policy in regard to remission of sentence. The short sentencing policies are merely executive instructions having no statutory force, therefore, do not create any legal/vested right in favour of the convict. Having regard to the provisions of Sections 54, 55 IPC and Section 433-A Cr.P.C., no interference was required by the High Court. Case of the respondent for pre-mature release would be considered in view of the policy dated 13.8.2008. Thus, the judgment and order of the High Court impugned herein, is liable to be set aside.

9. On the contrary, learned counsel appearing for the respondent in this appeal and other connected cases, which are being disposed of by separate order, have contended that all remission schemes were issued making reference to Article 161 of the Constitution of India (hereinafter called the Constitution). The clemency power of the executive cannot be subjected to any law whatsoever and thus, a legal right stood crystallised in favour of the convict, to be considered for pre-mature release in view of the scheme prevailing on the date of his conviction. They have emphasised that such scheme envisaged at least a promise and in view of the provisions of Articles 20(1) and 21 of the Constitution, the conditions contained in subsequent policies being more stringent cannot be enforced against the "lifer". Provisions of the Prisons Act, 1894 (hereinafter called as `Act 1894') and rules framed under it create legal right in favour of the convict. Such rights cannot be taken away by presently prevailing policy dated 13.8.2008. No policy can be framed in derogation of the statutory rules. However, in case a lenient policy is enforced at subsequent stage, the same can be made applicable and thus, the judgment and order of the High Court does not require any interference. The appeal is liable to be dismissed.

10. Shri Gopal Subramanium, learned Solicitor General who appeared as Amicus Curiae, has submitted that even if there is no vested right of the convict to be considered for pre-mature release, in view of the policy prevailing on the date of his conviction, at least a human element of expectation that the convict would have remission as per the guidelines prevailing on the date of his conviction cannot be ruled out. Even if the convict does not satisfy the requirement of presently existing remission policy dated 13.8.2008, his case can always be considered for remission under the provisions of Article 72 or 161 of the Constitution and it will be for the President or the Governor, as the case may be, to take a view in the matter in conformity with the decision in Maru Ram v. Union of India (1981) 1 SCC 107.

11. We have considered the rival submissions made by learned counsel for the parties and perused the record.

12. In the instant case, the respondent was convicted on 20th May, 1999 and sentenced for life imprisonment. Remission policy has been changed from time to time and provided mainly as under:

Date of Policy	Minimum required sentence for pre-mature release
4th February, 1993	
(a) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life for having committed a heinous crime such as:- murder with wrongful confinement, for extortion/robbery; murder with rape; murder while undergoing life imprisonment; murder with dacoity .... ; murder of a child under the age of 14 years; and murder on professional/hired basis....	Their cases may be considered after completion of 14 years actual sentence including under trial period and after earning at least 6 years remission.
(b) Adult life convicts who have been imprisoned for life but whose cases are not covered under (a) above and who have committed crime which are not considered heinous as mentioned in clause (a) above, or other life convicts imprisoned for life for offence for which death penalty is not a punishment.	Their cases may be considered after completion of 10 years of actual sentence including under trial period, provided that the total period of such sentence including remission is not less than 14 years.
8th August, 2000	
(a) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life having committed a heinous crime such as:- (i) murder with wrongful confinement, for extortion/robbery; (ii) murder with rape; (iii) murder while undergoing life imprisonment; (iv) murder with dacoity .... ; (viii) murder of a child under the age of 14 years; (ix) murder of woman; and	Their cases may be considered after completion of 14 years actual sentence including under trial period provided that the total period of such sentence including remission is not less than 20 years.

(xi) murder on professional/hired basis.... (xvi) convicts who have been awarded life imprisonment a second time under any offence....		
(b) Adult life convicts who have been imprisoned for life but whose cases are not covered under (a) above and who have committed crime which are not considered heinous as mentioned in clause (a)		Their cases may be considered after completion of 10 years actual sentence including under trial period provided that the total period of such sentence including remission is not less than 14 years.
29th October, 2001		
(aa) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life having committed a heinous crime such as:- (i) murder after rape repeated chained rape/unnatural offences; (ii) murder with intention for the ransom; (iii) murder of more than two persons; (iv) persons convicted for second time for murder; and (v) sedition with murder.		Their cases may be considered after completion of 20 years actual sentence and 25 years total sentence with remissions.

(a) Convicts who have been Their cases may be considered after imprisoned for life having committed completion of 14 years actual a heinous crime such as:- sentence including under trial period provided that the total period of such sentence including remissions

(i) murder with wrongful is not less than 20 years.

confinement for extortion/robbery;

(ii) murder while undergoing life sentence; murder with dacoity.....

and (vii) murder of a child under the age of 14 years.....

(b) Adult life convicts who have Their cases may be considered after been imprisoned for life but whose completion of 10 years actual cases are not covered under (aa) and sentence including under trial period

(a) above and who have committed provided that the total period of crime which are not considered such sentence including remissions heinous as mentioned in clause (aa) is not less than 14 years. &

(a) above.

13th August, 2008

(a) Convicts whose death sentence Their cases for pre-mature release has been commuted to life may be considered after completion imprisonment and convicts who have of 20 years actual sentence and 25 been imprisoned for life having years total sentence with committed a heinous crime such as:- remissions.

(i) murder with rape/unnatural offences; (ii) murder with intention to collect ransom/robbery/ kidnapping/abduction; (iii) murder of more than two persons; (iv) persons convicted for second time for murder; (v) sedition; (vi) sedition with murder; and (vii) murder while undergoing life sentence.....	
(b) Convicts who have been imprisoned for life having committed any crime which is defined in IPC and/or NDPS Act as punishable with death sentence.	Their cases for pre-mature release may be considered after completion of 14 years actual sentence including under trial period; provided that the total period of such sentence including remissions is not less than 20 years.
(c)	.....

It may also be pertinent to mention here that all the aforesaid policies made a clear-cut distinction and categorised the offence of murder in two separate categories. Heinous crime means murder, i.e., (i) murder with wrongful confinement, for extortion/robbery; (ii) murder with rape; (iii) murder undergoing life imprisonment; (iv) murder with dacoity .... ; (v) murder of a child under 14 years; and (vi) murder on professional/hired basis etc. Murders not mentioned in either of these above categories have been treated differently for the purpose of grant of pre-mature release. In all the policies issued by the Government except policy dated 13th August, 2008, the provisions of Article 161 of the Constitution have been referred to. All the said policies provided that the cases of life convicts would be put to the Governor through the Minister for Jails and the Chief Minister, Haryana with full background of the prisoners and recommendations of the Committee alongwith the copy of the judgment etc. for orders under Article 161 of the Constitution.

13. This Court in Gopal Vinayak Godse v. State of Maharashtra & Ors. AIR 1961 SC 600 considered the provisions of Section 53-A IPC, Cr.P.C. and also considered the Code of Criminal Procedure Amendment Act, 1955 which provided that a person sentenced to transportation for life before the

Amendment Act would be considered as sentenced to rigorous imprisonment for life. The life convict was bound to serve the remainder of sentence imprisoned. Unless the sentence was commuted or remitted by the Competent Authority, such sentence would not be equated with any fixed term. The benefit of remission or any short sentencing policy in accordance with the rules framed under the Act 1894, if any, would be considered towards the end of the term and the said question was within the exclusive domain of the appropriate Government. In the said case, in spite of the fact that certain remissions had been made, the competent authority did not remit the entire sentence. While deciding the said case, this court placed reliance on the judgment of the Privy Council in Pt. Kishorilal v. Emperor AIR 1946 P.C. 64.

14. In Dalbir Singh & Ors. v. State of Punjab AIR 1979 SC 1384, this court came to the conclusion that `life imprisonment' means imprisonment for the whole of the man's life. But in practice it amounts to incarceration for a period between 10 to 14 years.

15. In State of Haryana v. Nauratta Singh & Ors. AIR 2000 SC 1179, this Court clearly held that 14 years mentioned in Section 433-A Cr. P.C. is the actual period of imprisonment undergone without including any period of remission.

16. In Swamy Shraddananda@Murali Manohar Mishra v. State of Karnataka AIR 2008 SC 3040, this Court had passed the order that the appellant therein would not be released from prison till the rest of his life. Such a punishment was considered necessary because this Court substituted the death sentence given to the appellant by the Trial Court and confirmed by the High Court, with imprisonment for life with a direction that the said appellant would not be released from prison for the rest of his life. Thus, the Court came to the conclusion, on the facts of that case, that in such an eventuality the pre-mature release after a minimum incarceration for a period of 14 years as envisaged under Section 433-A Cr.P.C. would not be acceded to, since the sentence of death had been stepped down to that of life imprisonment which was definitely a lenient punishment.

17. In Ramraj @ Nanhoo @ Bihnu v. State of Chhattisgarh AIR 2010 SC 420, this Court held as under:

> "In the various decisions rendered after the decision in Godse case, "imprisonment for life" has been repeatedly held to mean imprisonment for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned. But in no case, with the possible exception of the powers vested in the President under Article 72 of the Constitution and the powers vested in the Governor under Article 161 of the Constitution, even with remissions earned, can a sentence of imprisonment for life be reduced to below 14 years. It is thereafter left to the discretion of the authorities concerned to determine the actual length of imprisonment having regard to the gravity and intensity of the offence."

18. In Mohd. Munna v. Union of India (2005) 7 SCC 417, this Court came to the conclusion that life imprisonment was not equivalent to imprisonment for 14 years or 20 years. Life imprisonment means imprisonment for the whole of the remaining period of the convicted person's natural life.

There was no provision either in the IPC or Cr.P.C. whereby life imprisonment could be treated as either 14 years or 20 years incarceration without there being a formal remission by the Appropriate Government. The contention that having regard to the provisions of Section 57 IPC, a prisoner was entitled to be released on completing 20 years of imprisonment under the West Bengal Correctional Services Act, 1992 and the West Bengal Jail Code, was rejected.

19. Before we proceed to consider the exercise of powers with regard to remission, as provided for either under the Constitution, the IPC or the Cr.P.C., it would be worth reiterating what has already been traversed and laid down by this Court right from the case of Maru Ram (supra) to the decision in the case of Ram Raj (supra).

20. In Maru Ram (supra), this Court elaborately dealt with the issue of validity of Section 433-A Cr.P.C. and the remission/short sentencing policies and held as under:

> "54. The major submissions which deserve high consideration may now be taken up. They are three and important in their outcome in the prisoners' freedom from behind bars. The first turns on the `prospectivity' (loosely so called) or otherwise of Section 433-A. We have already held that Article 20(1) is not violated but the present point is whether, on a correct construction, those who have been convicted prior to the coming into force of Section 433-A are bound by the mandatory limit. If such convicts are out of its coils their cases must be considered under the remission schemes and `short- sentencing' laws. The second plea, revolves round `pardon jurisprudence', if we may coarsely call it that way, enshrined impregnably in Articles 72 and 161 and the effect of Section 433-A thereon. The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. Thirdly, 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. On this basis, we will have to scrutinize and screen the survival value of the various remission schemes and short-sentencing projects, not to test their supremacy over Section 433-A, but to train the wide and beneficent power to remit life sentences without the hardship of fourteen fettered years.
>
> xx xx xx
>
> 67. All these go to prove that the length of imprisonment is not regenerative of the goodness within and may be proof of the reverse -- a calamity which may be averted by exercise of power under Article 161..... In short, the rules of remission may be effective guidelines of a recommendatory nature, helpful to Government to release the prisoner by remitting the remaining term.
>
> xx xx xx 72(7) We declare that Section 433-A, in both its limbs (i.e. both types of life imprisonment specified in it), is prospective in effect..... It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release

> thereunder if his conviction by the court of first instance was before Section 433-A was brought into effect.
>
> xx xx xx 72(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433-A, they will override Section 433-A if the Government, Central or State, guides itself by the selfsame rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking--a desirable step, in our view--the present remission and release schemes may usefully be taken as guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, Section 433-A is itself treated as a guideline for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme."

21. Thus, the Court held that the amendment would apply prospectively. The life convicts who had been sentenced prior to 18.12.1978 i.e. date of enforcement of amendment would not come within the purview of the provisions of Section 433-A Cr.P.C. and short sentencing policy would also apply prospectively. Remission rules/short sentencing policies could be taken as guidelines for exercise of power under Articles 72 or 161 of the Constitution and in such eventuality, remission rules will override Section 433-A Cr.P.C.

22. In State of Punjab v. Joginder Singh AIR 1990 SC 1396 this Court held that remission cannot detract from the quantum and quality of judicial sentence except to the extent permitted by Section 433 Cr.P.C. subject of course, to Section 433-A or where the clemency power under the Constitution is invoked. But while exercising the constitutional power under Articles 72/161 of the Constitution, the President or the Governor, as the case may be, can exercise an absolute power which cannot be fettered by any statutory provision such as Sections 432, 433 and 433-A Cr.P.C. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules.

23. In Sadhu Singh v. State of Punjab AIR 1984 SC 739, this Court examined the nature of the provisions contained in para 516-B of the Punjab Jail Manual which provided for remissions etc. and executive instructions issued by the Punjab Government from time to time and came to the conclusion that the Jail Manual contained merely executive instructions having no statutory force. Thus, it was always open to the State Government to alter, amend or withdraw the executive instructions or supersede the same by issuing fresh instructions. But the Court observed as under:

> "Any existing executive instruction could be substituted by issuing fresh executive instructions for processing the cases of lifers for pre-mature release but once issued these must be uniformly and invariably apply to all cases of lifers"

24. A similar view has been re-iterated by this Court in Balwan (supra); and Laxman Naskar v. Union of India & Ors. (2000) 2 SCC 595.

25. In Ashok Kumar @ Golu v. Union of India & Ors. AIR 1991 SC 1792 this Court considered the scope and relevancy of Rajasthan Prisons (Shortening of Sentences) Rules, 1958 qua the provisions of Section 433-A Cr.P.C. The said Rajasthan Rules 1958 provided that a "lifer" who had served actual sentence of about nine years and three months was entitled to be considered for pre-mature release if the total sentence including remissions worked out to 14 years and he was reported to be of good behaviour. The grievance of the petitioner therein had been that his case for pre-mature release had not been considered by the Concerned Authorities in view of the provisions of Section 433-A Cr.P.C. This Court considered the matter elaborately taking into consideration large number of its earlier judgments including Maru Ram (supra), Bhagirath v. Delhi Administration AIR 1985 SC 1050; Kehar Singh & Anr. v. Union of India & Anr. AIR 1989 SC 653, and came to the following conclusions:

> (i) Section 433-A Cr.P.C. denied pre-mature release before completion of actual 14 years of incarceration to only those limited convicts convicted of a capital offence i.e. exceptionally heinous crime;
>
> (ii) Section 433-A Cr.P.C. cannot and does not in any way affect the constitutional power conferred on the President/Governor under Article 72/161 of the Constitution;
>
> (iii) Remission Rules have a limited scope and in case of a convict undergoing sentence for life imprisonment, it acquires significance only if the sentence is commuted or remitted subject to Section 433-A Cr.P.C. or in exercise of constitutional power under Article 72/161 of the Constitution; and
>
> (iv) Case of a convict can be considered under Articles 72 and 161 of the Constitution treating the 1958 Rules as guidelines.

The aforesaid case was disposed of by this Court observing that in case the clemency petition of the petitioner therein was pending despite of the directive of the High Court, it would be open to the said petitioner to approach the High Court for compliance of its order.

26. In Mahender Singh (supra), this Court as referred to hereinabove held that the policy decision applicable in such cases would be which was prevailing at the time of his conviction. This conclusion was arrived on the following ground:

> "38. A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder."

27. Nevertheless, we may point out that the power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the Constitution of India. This responsibility was cast upon the Executive through a Constitutional mandate to ensure that some public purpose may require fulfillment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the Executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. However, the exercise of such power under Article 161 of the Constitution or under Section 433-A Cr. P.C. may have a different flavour in the statutory provisions, as short sentencing policy brings about a mere reduction in the period of imprisonment whereas an act of clemency under Article 161 of the Constitution commutes the sentence itself.

28. In Epuru Sudhakar & Another v. Govt. of A.P. & Ors. AIR 2006 SC 3385 this Court held that reasons had to be indicated while exercising power under Articles 72/161. It was further observed (per Kapadia, J) in his concurring opinion:

> "Pardons, reprieves and remissions are manifestation of the exercise of prerogative power. These are not acts of grace. They are a part of Constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.....
>
> Exercise of Executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty.....
>
> Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or sets aside the punishment for a crime.....
>
> The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case."

29. There is no dispute to the settled legal proposition that the power exercised under Articles 72/161 could be the subject matter of limited judicial review. (vide Kehar Singh (supra); Ashok Kumar (supra); Swaran Singh v. State of U.P. AIR 1998 SC 2026; Satpal & Anr. v. State of Haryana & Ors. AIR 2000 SC 1702; and Bikas Chatterjee v. Union of India (2004) 7 SCC 634). In Epuru Sudhakar (supra) this Court held that the orders under Articles 72/161 could be challenged on the

following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness.

30. The power of clemency that has been extended is contained in Articles 72 and 161 of the Constitution. This matter relates to the State of Haryana. The Governor of Haryana may exercise the clemency power. Article 161 of the Constitution enables the Governor of a State "to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends"

31. Sections 54 and 55 IPC provide for punishment. However, the provisions of Sections 432 and 433-A Cr.P.C., relate to the present controversy. Section 432(1) Cr.P.C. empowers the State Government to suspend or remit sentences of any person sentenced to punishment for an offence, at any time, without conditions or upon any conditions that the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. Section 433-A Cr.P.C. imposes restriction on powers of remission or commutation 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 under section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment.

32. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, whoever the sovereignty might be. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, Sovereignty has always been associated with the source of power -- the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes etc. The rule of law, in contradiction to the rule of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and the equal protection of the laws. As a result of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government, (Vide K.M. Nanavati v. State of Bombay AIR 1961 SC 112).

33. Articles 72 and 161 of the Constitution provide for a residuary sovereign power, thus, there can be nothing to debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances so warrant. (Vide G. Krishta Goud & J. Bhoomaiah

v. State of Andhra Pradesh & Ors. (1976) 1 SCC 157)

34. In Regina v. The Secretary of State for the Home Department (1996) EWCA Civ 555, the question came for consideration, before the Court that if the short-sentencing policy is totally inflexible, whether it amounts to transgression on the clemency power of the State which is understood as unfettered? The court considered the issue at length and came to the conclusion as under:

> "..... the policy must not be so rigid that it does not allow for the exceptional case which requires a departure from the policy, otherwise it could result in fettering of the discretion which would be unlawful.... It is inconsistent with the very flexibility which must have been intended by the Parliament in giving such a wide and untrammeled discretion to the Home Secretary.....Approximately 90 years ago an enlightened Parliament recognised that a flexible sentence of detention is what is required in these cases with a very wide discretion being given to the person Parliament thought best suited to oversee that discretion so that the most appropriate decision as to release could be taken in the public interest. The subsequent statutes have not altered the nature of the discretion." (Emphasis added).

Thus, it was held therein that the clemency power remains unfettered and in exceptional circumstances, variation from the policy is permissible.

35. In view of the above, it is evident that the clemency power of the Executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A Cr. P.C. though the Authority has to meet the requirements referred to hereinabove while exercising the clemency power.

To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short- sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered.

The Constitution Bench of this Court in Maru Ram (supra) clarified that not only the provisions of Section 433-A Cr. P.C. would apply prospectively but any scheme for short sentencing framed by the State would also apply prospectively. Such a view is in conformity with the provisions of Articles 20 (1) and 21 of the Constitution. The expectancy of period of incarceration is determined soon after the conviction on the basis of the applicable laws and the established practices of the State. When a short sentencing scheme is referable to Article 161 of the Constitution, it cannot be held that the said scheme cannot be pressed in service. Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency under the provisions of Article 72 and 161 of the Constitution. Right of the convict is limited to the extent that his case be considered in accordance with the relevant rules etc., he cannot claim pre-mature release as a

matter of right.

36. Two contrary views have always prevailed on the issue of purpose of criminal justice and punishment. The punishment, if taken to be remedial and for the benefit of the convict, remission should be granted. If sentence is taken purely punitive in public interest to vindicate the authority of law and to deter others, it should not be granted.

In Salmond on Jurisprudence, 12th Edition by P.J. Fitzgerald, the author in Chapter 15 dealt with the purpose of criminal justice/punishment as under :-

> "Deterrence acts on the motives of the offender, actual or potential; disablement consists primarily in physical restraint. Reformation, by contrast, seeks to bring about a change in the offender's character itself so as to reclaim him as a useful member of society. Whereas deterrence looks primarily at the potential criminal outside the dock, reformation aims at the actual offender before the bench. In this century increasing weight has been attached to this aspect. Less frequent use of imprisonment, the abandonment of short sentences, the attempt to use prison as a training rather than a pure punishment, and the greater employment of probation, parole and suspended sentences are evidence of this general trend. At the same time, there has been growing concern to investigate the causes of crime and the effects of penal treatment..... The reformative element must not be overlooked but it must not be allowed to assume undue prominence. How much prominence it may be allowed, is a question of time, place and circumstance."

R.M.V.Dias, in his book Jurisprudence (Fifth Edition- 1985) observed as under :-

> "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 despotio variant of democracy all too often has jeopardized human rights, its permissive variant threatens these rights by exposing citizens to the crimes of their fellowmen.....
>
> ..... 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 liberty-minded philanthropists seem inclined to allow....."

Legal maxim, "Veniae facilitas incentivum est delinquendi", is a caveat to the exercise of clemency powers, as it means - "Facility of pardon is an incentive to crime." It may also prove to be a "grand farce", if granted arbitrarily, without any justification, to "privileged class deviants". Thus, no convict should be a "favoured recipient" of clemency.

37. Liberty is one of the most precious and cherished possessions of a human being and he would resist forcefully any attempt to diminish it. Similarly, rehabilitation and social reconstruction of life

convict, as objective of punishment become of paramount importance in a welfare state.

> "Society without crime is a utopian theory". The State has to achieve the goal of protecting the society from convict and also to rehabilitate the offender. There is a very real risk of revenge attack upon the convict from others. Punishment enables the convict to expiate his crime and assist his rehabilitation. The Remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activity and is required to be rehabilitated. Objectives of the punishment are wholly or predominantly reformative and preventive. The basic principle of punishment that "guilty must pay for his crime" should not be extended to the extent that punishment becomes brutal. The matter is required to be examined keeping in view modern reformative concept of punishment. The concept of "Savage Justice" is not to be applied at all. The sentence softening schemes have to be viewed from a more human and social science oriented approach. Punishment should not be regarded as the end but as only the means to an end. The object of punishment must not be to wreak vengeance but to reform and rehabilitate the criminal. More so, relevancy of the circumstances of the offence and the state of mind of the convict, when the offence was committed, are the factors, to be taken note of.

38. At the time of considering the case of pre-mature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances.

39. Considerations of public policy and humanitarian impulses - supports the concept of executive power of clemency. If clemency power exercised and sentence is remitted, it does not erase the fact that an individual was convicted of a crime. It merely gives an opportunity to the convict to reintegrate into the society. The modern penology with its correctional and rehabilitative basis emphasis that exercise of such power be made as a means of infusing mercy into the justice system. Power of clemency is required to be pressed in service in an appropriate case. Exceptional circumstances, e.g. suffering of a convict from an incurable disease at last stage, may warrant his release even at much early stage. `Vana Est Illa Potentia Quae Nunquam Venit In Actum' means-vain is that power which never comes into play.

40. Pardon is an act of grace, proceedings from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment which law inflicts for a crime he has committed. Every civilised society recognises and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in appropriate cases. This power has been exercised in most of the States from time immemorial, and has always been regarded as a necessary attribute of sovereignty. It is also an act of justice, supported by a wise public policy. It cannot, however, be treated as a privilege. It is as much an official duty as any other act. It is vested in the Authority not for the benefit of the convict only, but for the welfare of the people; who may

properly insist upon the performance of that duty by him if a pardon or parole is to be granted.

41. This Court in Mahender Singh (supra) has taken note of the provisions of Act 1894 and rules framed thereunder as well as the relevant paragraphs of Punjab Jail Manual. Section 59 (5) of Act 1894 enables the Government to frame rules for "award of marks and shortening of sentence". Rules define prisoner including a person committed to prison in default of furnishing security to keep peace or be of good behaviour. Rules further provide for classification of prisoners according to the intensity and gravity of the offence. According to the classification of prisoners, Class 1 prisoners are those who had committed heinous organized crimes or specially dangerous criminals. Class 2 prisoners include dacoits or persons who commit heinous organized crimes. Class 3 prisoners are those who do not fall within Class 1 or Class 2. Rule 20 thereof provides that life convict being a Class 1 prisoner if earned such remission as entitles him to release, the Superintendent shall report accordingly to the Local Government with a view to the passing of orders under Section 401 Cr.P.C. Rule 21 provides that save as provided by Rule 20, when a prisoner has earned such remission as entitles him to release, the Superintendent shall release him. Instant case falls in Class 3, not being a case of organized crime or by professionals or hereditary or specially dangerous criminals.

Undoubtedly, the aforesaid rules are applicable in Haryana in view of the State Re-organisation Act. These are statutory rules, not merely executive instructions. Therefore, a "lifer" has a right to get his case considered within the parameters laid down therein.

It may not be out of place to mention here that while deciding the case in Sadhu Singh (supra), provisions of the aforesaid Act 1894 and Rules referred to hereinabove, had not been brought to the notice of this Court. More so, consistent past practice adopted by the State can furnish grounds for legitimate expectation (vide Official Liquidator v. Dayanand & Ors. (2008) 10 SCC 1).

42. We have already noticed that the earlier policies including the policy dated 04.02.1993 refers to the exercise of powers under Article 161 of the Constitution whereas the policy dated 13.08.2008 is in exercise of the powers under Section 432 read with Sections 433 and 433-A of Cr. P.C. The restriction under Section 433-A is only to the extent of the powers to be exercised in respect of offences as referred to under Section 432 Cr.P.C. The notification dated 13.08.2008 is, therefore, under a rule of procedure, which is subordinate to the Constitution. The power exercised under Article 161 of the Constitution is obviously a mandate of the Constitution and, therefore, the policy dated 13.08.2008 cannot override the policy dated 04.02.1993.

43. The right of the respondent prisoner, therefore, to get his case considered at par with such of his inmates, who were entitled to the benefit of the said policy, cannot be taken away by the policy dated 13.08.2008. This is evident from a bare perusal of the recitals contained in the policies prior to the year 2008, which are referable to Article 161 of the Constitution. The High Court, therefore, in our opinion, was absolutely justified in arriving at the conclusion that the case of the respondent was to be considered on the strength of the policy that was existing on the date of his conviction. State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for pre-mature release would be considered after serving the sentence, prescribed in the short sentencing policy existing on that date.

The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose, in our opinion, it should relate to a policy which, in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a "lifer" for pre-mature release, he should be given benefit thereof.

44. As per the information furnished by the appellant-State of Haryana, the respondent Jagdish has served more than 14 years (actual) on 12.2.2009 i.e. prior to the date of judgment impugned herein dated 17.2.2009. By now, the respondent has served (actual) for more than 15 years. Respondent falls in category 3 of the prisoners as he did not indulge in any organised crime.

45. Accordingly, for the reasons given hereinabove, we find no reason to interfere with the judgment of the High Court, which is hereby affirmed. The appeal is dismissed accordingly, subject to the direction that the appellant-State Government shall proceed to calculate the sentence for the purpose of consideration of remission in the case of the respondent as per the policy dated 04.02.1993.

.....CJI.

.....J. (J.M. PANCHAL) .....J. (Dr. B.S. CHAUHAN) New Delhi, March 22, 2010 REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION SPECIAL LEAVE PETITION (CRL.) NO. 5842 OF 2009 State of Haryana &Ors. ...Appellants Versus Harpal ...Respondent WITH SLP (Crl.) No..... /2009 @Crl.M.P. No.13253 SLP (Crl.) No. ..... /2009 @Crl.M.P. No.12754 SLP (Crl.) No. ..... /2009 Crl.M.P. No.13045 SLP (Crl.) No..... /2009 @Crl.M.P. No.18221 SLP (Crl.) No...../2009 @Crl.M.P. No.18264 SLP (Crl.) No..... /2009 @Crl.M.P. No. 18402 JUDGMENT Dr. B.S. CHAUHAN, J.

In view of our judgment pronounced today in Criminal Appeal No... .....of 2010 @ SLP(Crl.) No. 6638 of 2009 (State of Haryana & Ors. v. Jagdish), these Special Leave Petitions are dismissed.

.....CJI.

.....J. (J.M. PANCHAL) .....J. (Dr. B.S. CHAUHAN) New Delhi, March 22, 2010 .