IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

Reserved on: 06.08.2024
Pronounced on: 27.09.2024

LPA No.230/2012
c/w
WP(Crl) No.02/2024
WP(Crl) No.03/2024

DR. ASHIQ HUSSAIN FACTOO & ANR.

...APPELLANT/PETITIONER(S)

Through: - Mr. Collin Gonsalves, Senior Advocate, with
Ms. Mughda, Advocate
(Through Virtual Mode); and
M/S Ubaid Mir & Kamran Khawaja, Advocates.

Vs.

STATE OF J&K & OTHERS ...RESPONDENT(S)

Through:- Mr. Mohsin-ul-Showkat Qadri, Sr. AAG, with
Ms. Maja Majeed and Ms. Nadiya Abdullah, Assisting Counsel.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE
HON'BLE MR. JUSTICE M. A. CHOWDHARY, JUDGE

JUDGMENT

Per Sanjay Dhar 'J'

1) By this common judgment, we propose to decide the afore-titled Letters Patent Appeal filed by Ashiq Hussain Factoo, and two writ petitions, one filed by petitioner Ashiq Hussain Factoo and another filed by Nazir Ahmad Sheikh.

2) The Letters Patent Appeal arises out of judgment dated 16.11.2012 passed by the learned Single Judge, whereby the writ petition filed by Ashiq Hussain Factoo

has been dismissed. Vide Writ petition bearing WP(Crl) No.02/2024, petitioner Ashiq Hussain Factoo has challenged Rule 54.1 of the Manual for Superintendence and Management of Jails in the State of J&K as also Order No.Home-73 of 2012 dated 23.08.2012 issued by the State of J&K. Vide order dated 23.08.2012 (supra), the claim of the petitioner for grant of remission has been declined. Vide Writ petition bearing WP(Crl) No.03/2024, petitioner Nazir Ahmad Sheikh has challenged Rule 20.10 of the Prison Manual of 2022 for the Superintendence and Management of Prisons in the Union Territory of Jammu and Kashmir.

3) It is pertinent to mention here that both the writ petitions i.e. WP(Crl) No.02/2024 and WP(Crl) No.03/2024 were initially filed before the Supreme Court of India. However, in terms of order dated 17.01.2024 passed by the Supreme Court, these writ petitions were remitted to this Court with a direction to dispose of the same as also the afore-titled LPA within a period of nine months from the date of the said order. It is in these circumstances that the aforesaid two writ

petitions and the LPA are being taken up together for disposal under law.

(A)Background facts:

4) Appellant Ashiq Hussain Factoo was booked in FIR No.204/1992 for offences under Section 302 RPC, 3/4 TADA Act and 3/25 Arms Act registered with Police Station, Shaheed Gunj, Srinagar, and it was alleged that he along with co-accused was involved in murder of one Shri H. N. Wanchoo so as to create an imminent sense of terror in the minority community in Kashmir. Thereafter he was charged along with eleven more persons for offences under Section 302, 120-B RPC and Section 3 of the TADA Act by the Designated Court (under TADA Act, 1987), Jammu. Out of these twelve persons, four died and five others absconded, therefore, the appellant along with two other persons was put on trial. They were acquitted of the charges by the Designated Court in terms of judgment dated 14th July, 2001. The said judgment was assailed by the investigating agency i.e. CBI before the Supreme Court by way of Criminal Appeal No.889 of 2001. The Supreme

Court vide judgment dated 30th January, 2003, allowed the appeal and the judgment of the Designated Court, Jammu, was set aside. The appellant along with other accused were convicted of offences under Section 3 of TADA Act as well as Section 302 read 120-B RPC. Consequently they were sentenced to undergo life imprisonment. The appellant Ashiq Hussain Factoo is in custody since 6th February, 1993.

5) Petitioner Nazir Ahmad Sheikh was booked in FIR No.105/1990 for offences under Section 302 of RPC, 3(2) of TADA(P) Act. It was alleged that the said petitioner along with ten other co-accused, was involved in the murder of a BSF personnel, namely, Shri Dharamveer Sharma with a view to spread terror in the Valley amongst the security forces. After the charge sheet was filed before the Designated Court (under TADA Act), Jammu, one of the co-accused was discharged and two more co-accused died. Vide judgment dated 03.12.2012 passed by the Designated Court, petitioner Nazir Ahmad Sheikh along with two

more co-accused were convicted. Petitioner Nazir Ahmad Sheikh was convicted of offences under Section 302 RPC, 3(2)(i) and 4 of TADA Act and 7/27 Arms Act. Vide order dated 03.12.2012 passed by the Designated Court, the aforenamed petitioner has been sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/ in proof of offence under Section 302 RPC, whereas in proof of offence under Section 3(2)(i) of TADA Act, he has been sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/. In proof of offence under Section 4 of TADA Act, petitioner Nazir Ahmad Sheikh has been sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/ whereas in proof of offence under Section 25 and 27 of the Arms Act, he has been sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/. The appeal against the said judgment of conviction and order of sentence passed by the Designated Court, Jammu, is stated to be pending before the Supreme Court. As per the custody certificate annexed to the writ petition, the aforenamed petitioner

has been in custody for the last more than 22 years 02 months and 03 days as on 20.12.2022.

6) We have heard learned counsels appearing for the parties and perused the record.

(I). LPA No.230/2012

(B)Contentions/grounds raised by the Appellant:

7) By way of the present appeal, appellant Ashiq Hussain Factoo has challenged judgment dated 16.11.2012 passed by the learned Singe Judge, whereby his writ petition seeking a mandamus against the respondents to release him from custody on the ground that he has completed more than 20 years in jail, has been dismissed.

8) It seems that initially the appellant had filed a writ petition bearing OWP No.997/2009 challenging order dated 14.09.2009 passed by the respondents, whereby his claim for premature release after having completed sentence of more than 14 years, was rejected. The said writ petition was allowed by a Single Judge of this Court in terms of judgment dated 05.06.2010 and the

respondents were directed to reconsider the claim of the appellant. The aforesaid judgment came to be assailed by the respondents by way of LPA No.120/2010. A Division Bench of this Court vide judgment dated 08.09.2011, allowed the said appeal of the respondent State and set aside the judgment dated 05.06.2010 of the learned Single Judge. While allowing the appeal, the Division Bench of this Court held that impediment in the way of the appellant herein is Rule 54.1 of the Jail Manual which renders him ineligible for grant of remission.

9) It seems that the appellant, instead of challenging Rule 54.1 of the Jail Manual, filed another writ petition bearing OWP No.806/2012 before this Court, wherein he claimed that because he has been in custody for more than 20 years, as such, he is entitled to be released from custody. It was contended by the appellant that imprisonment for life in terms explanation to Section 3 of the J&K Prisons Act means sentence of 20 years, as such, he has completed the

sentence of life imprisonment and is entitled to be released from custody.

10) The learned Single Judge vide judgment dated 16.11.2012, after noticing the provisions contained in Sections 45, 54, 55 and 57 of the RPC and Section 3 of the Prisons Act and relying upon the judgment of the Supreme Court in the case of **Gopal Vinayak Godse vs. State of Maharashtra**, AIR 1961 SC 601, and its subsequent judgments, came to the conclusion that the sentence of life imprisonment means imprisonment for entire natural life of the person, as such, the appellant is not entitled to be released from custody simply because he has completed 20 years of imprisonment.

11) The aforesaid judgment has been put to challenge by the appellant by way of present appeal on the ground that in terms of explanation to Section 3 of the Jammu and Kashmir Prisoners Act, 1977, for the purpose of execution, sentence of imprisonment for life would mean imprisonment for 20 years but the Writ Court has not adverted to this aspect of the matter. It has been further

contended that even in terms of Para 46.18 of Chapter XLVI of Jail Manual, which relates to execution of sentence, the sentence of imprisonment for life has to be taken as imprisonment for 20 years.

(C) Discussion:

12) So far as the question as to whether imprisonment for life means imprisonment for the natural life of a convict or whether it conveys a certain fixed period less than the natural life of the convict is concerned, the same is no longer *res integra*. It has been the consistent view of the Supreme Court right from the decision in **G. V. Godse's** case (supra) that life imprisonment means imprisonment for natural life of a convict. The learned Senior Counsel appearing for the appellant, Shri Colin Gonzalves, has fairly conceded this position of law. In any case, it would be apt to refer to some of the decisions rendered by the Supreme Court on this issue in order to clear any confusion on the issue.

13) In **Gopal Vinayak Godse vs. State of Maharashtra**(supra),the Supreme Court, while

considering the aforesaid question, answered the same by holding that a sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.

14) The aforesaid position of law has been repeated and reiterated by the Supreme Court in the case of **Sambha Ji Krishan Ji vs State of Maharashtra, (**1974)1 SCC 196.

15) In **State of Madhya Pradesh vs. Rattan Singh and others**, (1976) 3 SCC 470, the Supreme Court while dealing with the issue as to whether imprisonment for life would automatically expire at the end of 20 years, observed as under:

> "*(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence*

under Section 401 of the Code of Criminal Procedure;"

16) In **Maru Ram vs. Union of India and another,** (1981)1 SCC 107, the Supreme Court, while endorsing the view taken in **Godse's** case (supra), held as under:

> *"A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totalled upto 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoner cannot claim his liberty. The reason is that life sentence is nothing less than life-long imprisonment. Moreover, the penalty then and now is the same-life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by S 433A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14 years jail life once we realise the truism that a life sentence is a sentence for a whole life."*

17) Accordingly, it was held that imprisonment for life lasts until the last breath of the convict and whatever the length of remissions earned, the prisoner can claim

release only if the remaining sentence is remitted by the Government.

18) In **Subash Chander vs. Krishan Lal & others,** (2001) 4 SCC 458**,** the Supreme Court interpreted the provisions of Section 57 of the IPC and held that the same provides for calculation of fractions of terms of imprisonment and it does not mean that imprisonment for life is to be reckoned as equivalent to imprisonment for 20 years. It was held that a sentence of imprisonment for life must mean imprisonment for whole of the remaining period of convicted person's natural life.

19) All the aforesaid decisions of the Supreme Court were again considered by a Constitution Bench of seven Judges of the Supreme Court in the case of **Union of India vs. V. Sriharan @ Murugan & Ors.**(2016) 7 SCC 1**,** wherein the aforesaid issue was answered by holding that imprisonment for life in terms of Section 53 read with Section 45 of the IPC only means imprisonment for rest of the life of the prisoner, subject to his right to

claim remission etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by President and the Governor of the State and also as provided under Section 432 of the Code of Criminal Procedure.

20) From the foregoing analysis of law on the subject, there is no manner of doubt in holding that imprisonment for life would, in all cases, mean imprisonment for natural life of a convict and unless a part of the sentence is remitted by the appropriate authority in exercise of its constitutional powers under Article 72/161 of the Constitution of India or under Section 432 of the Code of Criminal Procedure, the convict has to remain in prison for rest of his natural life. He cannot claim his release from prison after undergoing 20 years imprisonment as a matter of right. It is only if the appropriate authority exercises its constitutional or statutory powers of remission in favour of the said life convict that he can be released.

21) So far as the contention of the appellant that in view of the provisions contained in explanation to

Section 3 of the J&K Prisoners Act and Para (46.18) of the Jail Manual, the life imprisonment has to be taken as imprisonment for 20 years, is concerned, the same is without any merit because, as per explanation to Section 3 of the J&K Prisoners Act, the imprisonment for life has to be taken as sentence of imprisonment for 20 years only for the purposes of execution and similarly, as per (Para 46.18) of the Jail Manual, imprisonment for life has to be taken as sentence of imprisonment for 20 years only for administrative purposes. The learned Single Judge has dealt with this argument of the appellant in para (17) of the impugned judgment, wherein it has been clearly stated that the provisions contained in Jail Manual, Prisons Act and Prisoners Act only lays down the provisions as to how to regulate and manage the prisoners in the prisons. We are in complete agreement with the view taken by the learned Single Judge on this aspect of the matter. These contentions have been dealt with and deliberated upon by the Supreme Court in the case of **G. V. Godse's** case (supra) and the relevant observations of the Supreme

Court have been noted by the learned Single Judge in para (8) of the impugned judgment. Even in **Rattan Singh's** case (supra), it has been clearly held that administrative rules framed under various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of Indian Penal Code. Therefore, the contention of the appellant in this regard is without any substance.

22) In view of what has been discussed hereinabove and in view of the settled legal position that imprisonment for life means imprisonment for the natural life of a convict, we do not find any ground to interfere with the impugned judgment of the learned Single Judge. The appeal lacks merit and deserves to be dismissed.

(II) WP(Crl) No.02/2024
WP(Crl) No.03/2023

(D) Background facts:

23) In these two writ petitions the petitioners have challenged the vires of Rule54.1 of the Manual for Superintendence and Management of Jails in the State

of J&K, 2000, Order No.Home-73 dated 23.08.2012 issued by the State of J&K and Rule 20.10 of the Prison Manual of 2022 for Superintendence and Management of Prisons in the Union Territory of Jammu and Kashmir.

24) Rule 54.1 of the Jail Manual reads as under:

> *"54.1. Prisoners convicted of any of the offences of rape, forgery, dacoity, terrorist crimes, corruption and black marketing, which are also excluded from the scope of Probation under the Probation of Offenders Act, 1966, shall not be eligible for being reviewed by the Review Board. Accordingly, offenders sentenced under sections 376 (except first part), 396, 400, 402, 467, 471, 472, 474 (latter part) 489-A, 489-B and 489-0 of the Ranbir Penal Code shall be excluded from such review."*

25) It is to be noted that Manual for Superintendence and Management of Jails has been framed by the erstwhile Government of Jammu and Kashmir in exercise of its powers under Sections 59 and 60 of the Prison Act, Svt. 1977and Section 51of the Prisoners Act, Svt.1977, for the purposes of superintendence and management of jails in the erstwhile State of Jammu and Kashmir.

26) So far as Rule 20.10 of the Prison Manual, 2022,is concerned, the same reads as under:

> *"Prisoners convicted of the following offences shall not come under purview of Apex Committee:*
>
> *vi) Terrorist crimes (undergoing life imprisonment)*
>
> *vii) Smuggling (undergoing life imprisonment)*
>
> *viii) NDPS Act*
>
> *ix) Prevention of Corruption (undergoing life imprisonment) Act*
>
> *x) Offences against State (undergoing life imprisonment)"*

27) It is pertinent to mention here that with the coming into effect of the Jammu and Kashmir Reorganization Act, 2019, both the J&K Prisoners Act and J&K Prisons Act stand repealed and consequently Manual for Superintendence and Management of Jails framed under the aforesaid enactments also stands repealed and the Central Prisons Act has been made applicable to the Union Territory of Jammu and Kashmir. In exercise of the rule making powers under the aforesaid Act, the Prisons Manual, 2022, has been framed by the Union Territory of Jammu and Kashmir.

28) From a perusal of both Rule 54.1 of the J&K Jail Manual and Rule 20.10 of the J&K Prisons Manual, 2022, what comes to the fore is that both these Rules are statutory in nature and both Rules exclude certain categories of offences including the offences relating to terrorist crimes from the purview of remission. It is an admitted case of the parties that both the petitioners, namely, Ashiq Hussain Factoo and Nazir Ahmad Sheikh, have been convicted and sentenced for having committed, *inter alia*, offences under TADA Act. Thus, the crimes committed by them would necessarily fall under the category of 'terrorist crimes' as indicated in the impugned Rules, unless the petitioners are able to persuade us to hold that the charges of which they have been convicted do not fall within the aforesaid category of crime.

29) First of all, we have to determine the question as to which of the two Rules i.e. Rule 54.1 of the J&K Jail Manual or Rule 20.10 of the Prisons Manual, 2022, would apply to the cases of the petitioners. The law in this regard is no longer *res integra*. The Supreme Court

in the case of **State of Haryana vs. Raj Kumar,** (2021) 9 SCC 292, has held that when the policy on the date of conviction and on the date of consideration for premature release are different, the policy prevailing on the date of conviction would be applicable. However, in **State of Haryana vs. Jagdish, (**2010) 4 SCC 216, it has been held that if a more liberal policy exists on the date of consideration, the benefit of that policy should be provided. In the instant case, both the policies that were in vogue at the time of conviction of the petitioners and the policy which is in vogue at present exclude the "terrorist crimes" from the purview of remission. So, we will have to determine the constitutional validity of both these policies in the present case.

(E) Question of Law:

30) The question of law that we have been called upon to decide is 'as to whether exclusion of certain categories of offences from the scope of grant of remission by way of rules and guidelines is violative of the fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India'?

(F) Contentions:

31) Learned Senior Counsel appearing for the petitioners has contended that both Rule 54.1 of J&K Jail Manual and Rule 20.10 of the J&K Prison Manual, 2022, are arbitrary and inconsistent with Articles 14 and 21 of the Constitution as the same prohibit the prisoners convicted for terrorist crimes from being considered by the Review Board. It has been contended that right to be considered for remission is an inalienable right of a convict guaranteed under Articles 20 and 21 of the Constitution and a policy, which takes away such right, has to be held as arbitrary and unconstitutional. It has been further contended that the Supreme Court has time and again held that typecasting a particular kind of offences beyond the purview of remission would amount to crushing the life out of such individual notwithstanding his good conduct in the prison. According to the learned Senior Counsel, any rule or guideline which takes a particular type of crime out of the purview of the review would be against the reformative policy of sentencing, which forms the

bedrock of sentencing policy in our country. Thus, according to the learned Senior Counsel, such a policy or statute would be violative of Articles 14 and 21 of the Constitution.

32) In order to buttress his arguments, the learned Senior Counsel has relied upon the judgments of the Supreme Court in the cases of:

(I) **Joseph vs. State of Kerala,** 2023 SCC Online SC 1211,

(II) **Rajo @ Rajwa @ Rajendra Mandal vs. State of Bihar**(Writ Petition (Criminal) No.252 of 2023 decided on August 25, 2023;

(III) **A. G. Perarivalan vs. State**, (2023) 8 SCC 257,

(IV) **Asfaq vs. State of Rajasthan & others**, (2017) 15 SCC 55.

33) *Per contra*, Mr. Mohsin Qadri, learned Senior AAG, has argued that the State is well within its powers to put certain types of crimes beyond the purview of remission in exercise of its rule making powers. It has been submitted that certain types of heinous crimes, having regard to the impact of such crimes on the society, form a class in themselves and, as such, putting

such types of crimes beyond the purview of remission do not fall foul of Article 14 of the Constitution of India. It has been contended that the Supreme Court has time and again upheld the constitutional validity of actions of the State and of the courts to put certain types of crimes beyond the purview of remission. In this regard, the learned Senior AAG has placed reliance upon the judgment of the Supreme Court in the case of **Union of India vs. V. Sriharan** (supra).

(G) Discussion:

34) Before determining merits of the rival contentions, it would be apt to notice as to which type of crimes have been placed beyond the purview of remission in terms of the impugned rules. As per Rule 54.1 of the J&K Jail Manual, the offences of rape, forgery, dacoity, terrorist crimes, corruption and black marketing have been put beyond the purview of review whereas, as per Rule 20.10 of J&K Manual, 2022, the offences like terrorist crimes (undergoing life imprisonment), smuggling (undergoing life imprisonment), NDPS Act, Prevention of

Corruption Act (undergoing life imprisonment) and offences against State (undergoing life imprisonment), have been put beyond the purview of review. The question arises as to whether the types of offences mentioned in the aforesaid Rules, are distinct from other categories of offences so as to justify the action of the respondents to put these types of offences beyond the purview of remission.

35) In the present case, we are concerned with 'terrorist crimes', so we have to ascertain whether this type of crime is a class apart from other crimes so as to justify a different treatment to convicts of such crime. In this regard it has to be noted that right from the inception of last decade of twentieth century, this part of the country has been facing onslaught of terrorist activities. More than 40,000 lives have been consumed during all these years in the State of Jammu and Kashmir, which includes deaths of civilians and security personnel. Due to the terrorist activities in this part of the country, lakhs of people lost their homes and

hearths and there has been large scale destruction of public and private properties on account of terrorist activities. Thus, the terrorist crimes in our country, more particularly in the erstwhile State of J&K, have adversely impacted the lives of the whole population. In fact, terrorism has been a scourge and menace for the people of this country. Therefore, learned Senior AAG is right in his submission that terrorist crimes or for that matter other crimes mentioned in the impugned Rules are a class apart and the classification of crimes made in the impugned Rules is reasonable and not arbitrary. It has a rational basis/reasonable nexus to the object of putting the persons convicted of terrorist crimes out of circulation. Therefore, it cannot be stated that the respondent State in classifying terrorist crimes as a category for putting the same beyond the purview of remission has violated provisions of Article 14 of the Constitution.

36) Learned Senior Counsel appearing for the petitioners has contended that Model Prison Manual, 2016 framed by Government of Delhi does not put any

restriction on grant of remission to terror convicts, therefore, there is no reason for the Union Territory of J&K to frame the impugned Rules.

37) We are not impressed by the aforesaid argument of the learned Senior Counsel. The conditions in the Union Territory of J&K are entirely different from the conditions prevailing in other parts of the Country. As already stated, this part of the Country has been reeling under militancy for the last more than three decades, as such, the State is justified in dealing with the crimes relating to terrorism in a manner that is different from dealing with similar crimes in Delhi or other part of the Country which are relatively free from such type of crimes.

38) Much emphasis has been laid by learned Senior Counsel appearing for the petitioners on the argument that if the persons convicted for life imprisonment in terrorist crimes are not considered for grant of remission, it would amount to crushing life out of such individuals altogether that amount to violation of their

right to life guaranteed under Article 21 of the Constitution. It has been contended that in such a situation the persons like the petitioners herein despite having a good track record as prisoners would not qualify for grant of remission and, therefore, the reformative policy of sentencing, which is bedrock of sentencing policy of our country, would take a back seat.

39) In support of his aforesaid argument, learned Senior Counsel has relied upon the ratio laid down by the Supreme Court in the case of **Joseph vs. State of Kerala** (supra).While analysing Government Order dated 04.06.2022 issued by the Government of Kerala, which provided for exclusion of certain categories of prisoners from eligibility for premature release, the supreme Court in the aforenoted case observed that denial to consider the real impact of prison good behaviour and other relevant factors results in violation of Article 14 of the Constitution. It has also been observed in the said judgment that excluding the relief of premature release

to prisoners who have served extremely long periods of incarceration not only crushes their spirit and instils despair but signifies society's resolve to be harsh and unforgiving and the idea of rewarding a prisoner for good conduct is entirely negated.

40) Reliance has also been placed upon the observations made by the Supreme Court in the case of **Rajo @Rajwa @Rajendra Mandal vs. State of Bihar** (supra), wherein the Supreme Court has noted the caution contained in minority view in **V. Sriharan's** case (supra). In the said case it has been observed that any order putting the punishment beyond remission would prohibit exercise of statutory power designed to achieve purpose under Section 432/433 of the Code of Criminal Procedure. It was also observed that non-consideration of remission of a prisoner will not be conducive to reformation of a person and it would push him in a dark hole without there being semblance of light at the end of the tunnel.

41) The aforesaid argument of learned Senior Counsel appears to be attractive at first blush but when analysed on the touchstone of the relevant provisions of the Constitution, the same does not hold much water. Article 21 of the Constitution safeguards the life and liberty of a person but at the same time it does leave scope for curtailing the life and liberty of a person in accordance with law. Once a person has been convicted of a terrorist crime after following due procedure of law by giving him opportunity of defending himself before the trial court and granting him right to appeal, it cannot be stated that by putting him behind the bars in accordance with the judgment of the criminal court, his right under Article 21 of the Constitution gets infringed. In fact, once it is established that a person has deprived another person of his life and liberty, such a person has no right to ask the court to uphold his liberty. The concept of reformative sentencing policy cannot be stretched to tyrannical limits so as to extend an undue favour to a person who has been convicted of a heinous offence after following due procedure of law.

42) In the above context, it would be apt to refer to the following observations of the Supreme Court in **Maru Ram's** case (supra):

> "*The dominant purpose and the avowed object of the legislature in introducing s. 433A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country. It is true that there appears to be a modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentance and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realises the consequences of playing with human lives. In the world of today and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.*

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The question, therefore, is-should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible.

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Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offences, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab. In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes

from being released through easy remissions or substituted form of punishments without undergoing at least a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of remissions has committed repeated offences. The mere fact that a long term sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the penal Code but what would have happened if deterrent punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent

punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty for ever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a one-sided concept, nor does Art. 21 of the Constitution contemplate such a concept. If a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Art. 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which an

appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals."

43) The Supreme Court has, in the case of **V. Sriharan** (supra), after noticing the aforesaid observations in **Maru Ram's** case (supra), held as under:

"*73. The above chiseled words of the learned Judge throw much light on the sentencing aspect of different criminals depending upon the nature of crimes committed by them. Having noted the above observations of the learned Judge which came to be made about three and a half decades ago, we find that what was anticipated by the learned Judge has now come true and today we find that criminals are let loose endangering the lives of several thousand innocent people in our country. Such hardened criminals are in the good books of several powerful men of ill-gotten wealth and power mongers for whom they act as paid assassins and Goondas. Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that in most of the cases, even the kith and*

kin, close relatives, friends, neighbours and passers-by who happen to witness the occurrence are threatened and though they initially give statements to the police, invariably turn hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. As was anticipated by the learned Judge, it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man. In this scenario, if any further lenience is shown in the matter of imposition of sentence, at least in respect of capital punishment or life imprisonment, it can only be said that that will only lead to further chaos and there will be no Rule of Law, but only anarchy will rule the country enabling the criminals and their gangs to dictate terms. Therefore, any sympathy shown will only amount to a misplaced one which the courts cannot afford to take. Applying these well thought out principles, it can be said that the conclusions drawn by this Court in Swamy Shraddananda (supra) is well founded and can be applied without anything more, at least until as lamented by Justice Fazal Ali the necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal is inducted so that he may undergo such a mental or psychological revolution that he realizes the consequence of playing with human lives. It is also appropriate

where His Lordship observed that in the world of today and particularly in our country, this ideal is yet to be achieved and that it will take a long time to reach that goal.

74. Therefore, in the present juncture, when we take judicial notice of the crime rate in our country, we find that criminals of all types of crimes are on the increase. Be it white collar crimes, vindictive crimes, crimes against children and women, hapless widow, old aged parents, sexual offences, retaliation murder, planned and calculated murder, through paid assassins, gangsters operating in the developed cities indulging in killing for a price, kidnapping and killing for ransom, killing by terrorists and militants, organized crime syndicates, etc., are the order of the day. While on the one side peace loving citizens who are in the majority are solely concerned with their peaceful existence by following the Rule of Law and aspire to thrive in the society anticipating every protection and support from the governance of the State and its administration, it is common knowledge, as days pass on it is a big question mark whether one will be able to lead a normal peaceful life without being hindered at the hands of such unlawful elements, who enjoy in many cases the support of very many highly placed persons. In this context, it will be relevant to note the PRECEPTS OF LAW which are: to live honourably, to injure no other man

and to render everyone his due. There are murders and other serious offences orchestrated for political rivalry, business rivalry, family rivalry, etc., which in the recent times have increased manifold and in this process, the casualty are the common men whose day to day functioning is greatly prejudiced and people in the helm of affairs have no concern for them. Even those who propagate for lessening the gravity of imposition of severe punishment are unmindful of such consequences and are only keen to indulge in propagation of rescuing the convicts from being meted out with appropriate punishments. We are at a loss to understand as to for what reason or purpose such propagation is carried on and what benefit the society at large is going to derive.

44) In the above context, it would also be apt to refer to the following observations of the Supreme Court in **V. Sriharan's** case (supra:

"*88. As far as the argument based on ray of hope is concerned, it must be stated that however much forceful, the contention may be, as was argued by Mr. Dwivedi, the learned Senior Counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent*

it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of hope should prevail and kept intact. For instance, in the case relating to the murder of the former Prime Minister, in whom the people of this country reposed great faith and confidence when he was entrusted with such great responsible office in the fond hope that he will do his best to develop this country in all trusts, all the hope of the entire people of this country was shattered by a planned murder which has been mentioned in detail in the judgment of this Court which we have extracted in paragraph No.147. Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright."

45) From the foregoing analysis of the legal position on the subject, it is clear that in the matter of heinous crimes like terrorist crimes, which has become not less than a menace for our country, the reformative theory of punishment has to take a back seat, at least till such

time the social environment in our country improves and we have the adequate facilities of reformation of the prisoners in place.

46) We are conscious of the fact that the observations quoted hereinbefore in **V. Sriharan's** case have been made by the Supreme Court in the context of powers of a Court to put a certain category of offences beyond the purview of remission but the logic and reasoning behind these observations can be made applicable while testing the validity of a similar Rule framed by the State. In fact, a three Judge Bench of the Supreme Court in the case of **Dadu @Tulsi Dass vs. State of Maharashtra,** (2000) 8 SCC 437, while considering the constitutional validity of Section 32 of the NDPS Act, which provides that no sentence awarded under the said Act shall be suspended, remitted or commuted, struck down the said provision to the extent it takes away the right of the Court to suspend the sentence of a convict under the Act but at the same time the Court upheld the vires of the said provision in so far it takes away the power of

the Executive to suspend, remit or commute the sentence.

47) Para 15 of the aforesaid judgment is relevant to the context and the same is reproduced as under:

> *"15……The distinction of the convicts under the Act and under other statutes, insofar as it relates to the exercise of executive powers under Sections 432 and 433 of the Code is concerned, cannot be termed to be either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending section, insofar as it relates to the executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the section insofar as it takes away the powers of the executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act."*

48) From the analysis of the afore-quoted observations of the Supreme Court, it is clear that that the State is empowered to classify certain types of crimes and put them beyond the purview of executive powers of remission and the same cannot be termed either arbitrary or discriminatory. The three Judge Bench of the Supreme Court in the aforesaid judgment has clearly held that such deprivation of the executive cannot be stretched to hold that right to life of a person has been taken away except in accordance with the procedure established by law. This ratio of larger Bench of the Supreme Court has not been taken note of by it in its later judgments delivered in the cases of **Rajo @Rajwa @Rajendra Mandal**(supra) and **Joseph vs. State of Kerala**(supra), which have been delivered by smaller Benches of two Judges.

49) Even otherwise, in the case of **Joseph Vs. State of Kerala** (supra), the provisions contained in Government Order dated 04.06.2022 issued by the State of Kerala were not the subject matter of challenge before the Supreme Court and the Court, it appears, has tested the

validity of the said order without any party challenging the said order. This is clear from para (27) of the judgment itself. In addition to this, in **Joseph's** case (supra), the order issued by the State of Kerala was an executive order having no statutory flavour whereas, in the present case, the impugned Rules are statutory in nature as the same have been framed by the Government in exercise of its powers under repealed Prisons Act/Prisoners Act and Central Prisons Act.

50) So far as the **Rajo @Rajwa @Rajendra Mandal's** case (supra) is concerned, the same is also a judgment by a two Judge Bench and in that case validity of the policy relating to remission was not under challenge nor was it the matter of discussion before the Supreme Court.

51) In **A. G. Perarivalan's** case (supra), that has been relied upon by the petitioners the conviction of the appellant therein to the extent of offences under the TADA Act had been set aside. It was in these circumstances that the Supreme Court, exercising its special powers under Article 142 of the Constitution,

directed that the appellant therein is deemed to have served the sentence and, accordingly, he was set at liberty. In the instant case, both the petitioners have been convicted of the offences under TADA Act, as such, the facts of the instant case are clearly distinguishable. Thus, the ratio laid down in **A. G. Perarivalan's** case (supra) cannot be made applicable to the instant case.

52) In **Asfaq vs. state of Rajasthan** (supra), the question that fell for determination before the Supreme Court was as to whether the person convicted of offences under TADA Act and who has been awarded life imprisonment can be considered for grant of parole. The High Court of Rajasthan had declined the relief to the convict on the ground that he had committed a heinous crime, as such, was not entitled to parole. The Supreme Court in the circumstances of the said case held that merely because a person has been convicted of a serious crime does not mean that he is not eligible for grant of parole. It was held that whenever a person has suffered incarceration for long time, he can be granted temporary parole irrespective of the nature of offence for which he

has been convicted. In the said case, neither any rule nor any policy of the nature, which is impugned herein, was subject matter of consideration before the Supreme Court and it was not a case relating to grant of remission. Therefore, the ratio laid down by the Supreme Court in the said case would not be applicable to the present case.

53) From the foregoing discussion, we are clearly of the view that the ratio laid down by the Supreme Court in the judgments relied upon and referred to by learned Senior Counsel appearing for the petitioners is not applicable to the present case as the said cases are distinguishable on facts. Even otherwise, in view of the ratio laid down by larger bench of the Supreme Court in **Dadu @Tulsi Dass** (supra) and Constitution Bench of the Supreme Court in **V. Sriharan's** case (supra), it is manifestly clear that it is well within the jurisdiction of the executive to frame a statutory policy to exclude certain types of crimes from the purview of remission, provided it is based upon intelligible differentia having a

reasonable nexus with the object sought to be achieved. In the instant case, as has been already discussed, we find that the respondent State, by putting terrorist crimes outside the purview of remission, having regard to the impact of such types of crimes on the society in this part of the country, has sought to achieve the objective of instilling a degree of fear and deterrence amongst the potential terrorists. By doing so, the respondent State has not violated any provision of the Constitution, much less the provisions contained in Articles 14 and 21 of the Constitution. Therefore, we uphold the validity of the impugned Rules.

54) As an alternative argument, learned Senior Counsel appearing for the petitioners, has contended that even if the vires of the impugned Rules is upheld, still then it cannot be stated that the petitioners in the instant case have committed a terrorist crime. It has been contended that killing of a single person would not amount to a terrorist crime. The learned Senior Counsel has submitted that petitioner Ashiq Hussain Factoo has been convicted for the offence of committing the murder

of Shri H. N. Wanchoo whereas petitioner Nazir Ahmad Sheikh has been convicted of having committed murder of a single person, namely, Dharamvir Sharma. According to the learned Senior Counsel, murder of a single person can, by no stretch of imagination, be termed as a 'terrorist crime'. In this regard, learned Senior Counsel has relied upon the judgment of the Supreme Court in the case of **State vs. Nalini and others,** (1999) 5 SCC 253. It has been submitted that the subject matter of the said case was the murder of former Prime Minister of India, Shri Rajiv Gandhi, which had sent shockwaves throughout the country, still then the Supreme Court, after examining the whole facts and circumstances of the case, came to the conclusion that it was neither a terrorist act nor a disruptive activity within the meaning of Sections 3 and 4 of TADA Act.

55) We are afraid the argument of learned Senior Counsel cannot be accepted for the reason that petitioner Ashiq Hussain Factoo has been convicted by the Supreme Court for offences under Section 3 of the TADA Act. Similarly, petitioner Nazir Ahmad Sheikh,

has also been convicted of Section 3 of the TADA Act. This Court in the present proceedings cannot go into the validity of the conviction of the petitioners Section 3 of the TADA Act. Section 3 of the TADA Act prescribes punishment for committing a terrorist act or any preparatory to any terrorist act, which means that both the petitioners, once having been convicted of offence under Section 3 of the TADA Act, are deemed to have committed a terrorist act. In **Nalini's** case (supra), the Supreme Court acquitted the accused therein of the offences under Section 3 and 4 of the TADA Act after appreciating the evidence on record. In the instant case, since we are not sitting in appeal over the conviction of the petitioners under the provisions of TADA Act, as such, we cannot test the legality of the conviction of the petitioners for charges under Section 3 of the TADA Act in these proceedings. Therefore, we have to proceed on the basis that the petitioners have committed terrorist act which would definitely fall within the meaning of 'terrorist crime' as contained in the impugned Rules.

Thus, the petitioners are not eligible for grant of remission in the face of impugned Rules.

56) There is, however, yet another aspect of the matter which is required to be taken note of. The Constitution of India under Article 72 confers power upon the President to grant pardons and to suspend, remit or commute sentences in certain cases. Similarly, Article 161 of the Constitution vests power with the Governor to grant pardon and to suspend, remit or commute sentences in certain cases.

57) In **Maru Ram's** case (supra), it has been held that Articles 72 and 161 of the Constitution will always remain untouched. It has been held that though statutory power of remission and the constitutional power under Articles 72 and 161 looks similar, yet they are not the same. In the said case, it has been held that Sections 432 and 433 of Cr.P.C are not a manifestation of Articles 72 and 161 of the Constitution but a separate though similar power and Section 433-A, by nullifying wholly or partially, these prior provisions do not violate

or detract from the full operation of the constitutional power to pardon, commute and the like. In **V. Sriharan's** case (supra), the Supreme Court has held that the highest executive power prescribed under the Constitution under Articles 72 and 161 shall always remain untouched and can be exercised without any restriction.

58) From the foregoing analysis of law on the subject, it is clear that even though there is statutory restriction upon the respondents to consider the case of the petitioners for grant of remission in the face of impugned rules, yet it is always open to the constitutional authorities to exercise their higher powers under Articles 72 and 161 of the Constitution which shall remain unfettered by the restrictions imposed in terms of the impugned rules.

(H) Conclusion:

59) For what has been discussed hereinbefore, it is held as under:

(I) The Letters Patent Appeal filed by Ashiq Hussain Factoo against the impugned

judgment dated16.11.2012is without any merit and the same is dismissed accordingly.

(II) The constitutional validity of impugned Rule 54.1 of the J&K Jail Manual (now repealed) and Rule 20.10 of the J&K Prison Manual, 2022, is upheld and the writ petitions are dismissed.

(III) It shall be open to the competent constitutional authorities to consider the cases of the petitioners for grant of remission in exercise of their powers under Articles 72 and 161 of the Constitution of India.

(M. A. CHOWDHARY)
JUDGE

(SANJAY DHAR)
JUDGE

Srinagar,
27.09.2024
"Bhat Altaf-Secy"

Whether the order is reportable: ***Yes/No***