

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A.NO. 20731 of 2023

**Kanchi @ Sanjit Makhal and Another
Vs.
The State of West Bengal and others**

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| For the petitioners | : | Mr. Uday Sankar Chattopadhyay, Mr. Suman Sankar Chatterjee, Ms. Trisha Rakshit, Ms. Rajashree Tah, Ms. Aishwarya Datta |
| For the State | : | Mr. Somnath Ganguli, Mr. Balarko Sen |
| Hearing concluded on | : | 05.10.2023 |
| Judgment on | : | 11.10.2023 |

Sabyasachi Bhattacharyya, J:-

1. Both the petitioners are convicts and are languishing in jail since June 20, 2001, that is more than 22 years.
2. They have been in continuous imprisonment in the Baruipur Central Correctional Home. Intermittently, the petitioners were granted parole. Their conduct during parole was without any complaint from the Authorities. The petitioners have sought remission. One of the co-accused of the petitioners, one Tarun Mondal was released by the Supreme Court with the rider that he cannot enter the jurisdictional police station area.
3. The petitioners' requests for remission, however, were repeatedly

refused.

4. Insofar as the petitioner no.1 is concerned, in a meeting of the State Sentence Review Board (SSRB) dated September 2, 2022, the premature release request was rejected. The same decision was repeated on February 17, 2023. The considerations by the SSRB were preceded by two orders of this Court passed in WPA No. 14583 of 2022 and WPA No. 28437 of 2022.
5. In case of the petitioner no.2, in the meeting dated September 2, 2022, his prayer for premature release was rejected. The said consideration was pursuant to an order also passed in WPA No. 14583 of 2022. The primary premise of the rejections was the serious nature of the offence committed by the petitioners which allegedly affected the society at large, as well as the age, potentiality and social context of the petitioners.
6. Learned counsel for the petitioners argues that the said last rejection was patently contrary to the order dated January 10, 2023 passed in WPA 28437 of 2022 by this Court, which relied on the judgment of the Supreme Court in *Satish @ Sabbe Vs. The State of Uttar Pradesh* and *Zahid Hussein and others Vs. State of West Bengal and another*.
7. The primary criteria regarding the conduct of the petitioners in jail, it is argued, was never considered by the Authorities.
8. It is argued that there is no question of further potentiality remaining in the petitioners to commit the crime for which they were convicted. Hence, the petitioners challenge the refusal to grant premature release to the petitioners.

- 9.** Learned counsel for the State controverts the submissions of the petitioners and argues that the potential of the petitioners to commit similar crime again cannot be ruled out in view of them being in their 40s. As per Section 61(2) of the West Bengal Correctional Services Act, 1992 (hereinafter referred to as, “the 1992 Act”), a prisoner shall be released on certain specific cases. Examples of such cases are, when a prisoner has undergone continuous imprisonment for a period of 14 years including the period of release on parole, when a prisoner is in danger on account of sickness or suffering from complete blindness or infirmity of old age or leprosy or tuberculosis, when the Superintendent recommends to the State early release of such reformed prisoner, etc. In the present case, although the period of incarceration was much more than 14 years, in view of the heinous nature of the crime committed by them, since both of them are convicts in gang rape cases, the authorities are not confident to release the petitioners prematurely, particularly keeping in view the welfare of the society at the effect of the crime on society at large. Further, the age of the petitioners indicate that their potentiality cannot be ruled out to commit similar crimes, if let loose early.
- 10.** Learned counsel further argues that the authorities including the Board considered the socio-economic condition of the petitioners and only thereafter refused the request of the petitioners for early release. It is argued that such discretionary power of the authorities ought not to be interfered with.
- 11.** Heard learned counsel for the parties. It is not in doubt that the

petitioners were guilty of gang rape and as such convicted to life imprisonment.

12. The limited question is whether the discretionary power lying with the SSRB was exercised properly and in due process of law, adhering to the correct principles of law as laid down by the Supreme Court and the appropriate norms of a civilised society.
13. A perusal of the order dated January 10, 2023 in WPA 28437 of 2022 as well as the previous refusal of premature release to the petitioners shows that the grounds are common in the said case and now. Remarkably, the authorities are equally cryptic and still continue to pay lip-service to the considerations of law while passing such refusal order.
14. The mere reference to the heinous nature of the crime committed and the vague remark that the age and potentiality of the convicts are against the grant of premature release are not sufficient from any legal perspective whatsoever.
15. The SSRB has, probably in deference to the previous directions of the Court, have added one or two grounds here and there for such rejection, including the “associations and socio-economic conditions” of the petitioners, whatever that means.
16. The grounds of refusal of the prayer for premature release of the petitioner no.2-Kabu Malik along with thirteen other convicts *vide* the SSRB meeting dated September 2, 2022 are reports from different State authorities, age and potentiality of the life convicts, period of detention undergone, physical and mental condition, conduct during

incarceration and while on parole, potentiality to commit any crime in future, social acceptance, chances of rehabilitation, gravity and nature of the crime and public sensitivity involved with the crime.

- 17.** The ground of rejection in respect of the petitioner no.1 in the same meeting dated September 2, 2022 was followed by a second refusal by the Board on February 17, 2022. Virtually, the same grounds were repeated. The age, physical potentiality, etc., of the petitioner no.1 were considered along with the gravity of the offence of the said petitioner.
- 18.** The SSRB, *vide* its decision dated February 17, 2023, observed that gang rape of two girls, even long years back, has left a deep impact in the society, particularly in the locality. The SSRB also noted that it had considered the age, physical potentiality of the convict and his associations and socio-economic condition. Surprisingly, the Committee stated that in view of the said factors, “a doubt has cropped up in the mind of the committee” that all such factors may instigate him to commit further crime of such nature.
- 19.** First, the mere gut feeling or doubt “in the mind of the committee” cannot be a relevant consideration to jump to the conclusion that it may instigate the petitioners to commit further crime of the same kind, without any material basis for so observing.
- 20.** The heinous nature of the crime is not doubted; but it occurred about two decades back. The petitioners are in incarceration since then. They do not have a life outside prison. It is as vague as possible to say that the crime left “a deep impact in the society, particularly in the

locality". Children who were born at the time of the crime have since attained adulthood and the locality must have evolved in structure much. The "social Impact in the locality" cited by the authorities, if the petitioners are released, has not been explained at all or substantiated.

- 21.** The age of the petitioner no.1 is around 41-42 years. At such age, the petitioner is still capable of being rehabilitated in society, having spent long 22 years behind the bars. Surprisingly, the ages of the petitioners have been cited as reasons for the rejection, but the authorities have not even enumerated their exact age in the refusal. There is no explanation as to why the ages of the petitioners are magic numbers due to which their premature release should be refused.
- 22.** As to the physical potentiality of the petitioners, it is extremely doubtful whether 'physical potentiality' or mental drive sufficient to repeat the same or similar crime would still remain in a prisoner after 22 years of incarceration. In fact, a person who has been behind the bars for so long and knows fully well life in incarceration would probably be much more cautious in future. It is absurd to assume, without any material basis vis-a-vis the conduct of the petitioners in prison or during parole, that he would still have associations and physical potentiality to repeat the crime. The presumption would rather be that a person who after the prolonged period of over two decades behind the bars seeks a remission would be extra careful not to repeat, not only the heinous crime for which he was incarcerated in the first place but any offence for that matter which would make him

go behind the bars again. Thus, blindly citing the nature of the crime, the age and the perceived 'potentiality' of the criminal without an objective assessment would frustrate the entire purpose behind reformation in prisons.

- 23.** Moreover, even something so grave in nature and "heinous" as a gang rape does not justify castigating the convicts after 22 years. If the authorities, who are in charge of reforming the convicts, themselves give up on the latter and sit in judgment over them even after two decades of incarceration in 'correctional homes', God-forsaken are the convicts.
- 24.** What the SSRB meant by "socio-economic condition" of the petitioners is patently suspect. The same was just a parroting of the said yardstick, as contemplated by the courts in various decisions. Rather, in the absence of anything adverse in the socio-economic conditions of the petitioners to apprehend similar crime by the petitioner again, it would be appropriate in the context and in the light of the judgments of the Apex Court rendered time and again, to take a lenient view in favour of the petitioners.
- 25.** It is well-settled that in modern times, the penal law is not retributive but at best a deterrent and definitely reformative. Even the jails have been renamed in common parlance as "correctional homes" which implies the implicit purpose of punishment to be correctional/reformative. At the present age of social reforms and evolution, when various measures are being taken all over the civilised world to take a lenient approach favourable to the rehabilitation in

mainstream society of criminals and ensuring their reformation, it would be harsh to shut out the attempts of a 22 years incarcerated prisoner to go out and live his life anew without giving them a chance to be repatriated in mainstream society.

- 26.** The Supreme Court in *Zahid Hussein (supra)* had observed that the conduct of the prisoners while in jail is an important factor to be considered in ascertaining whether they have lost their potentiality in committing the crime due to long period of detention.
- 27.** The authorities themselves in the present case have observed there is no adverse report against the petitioners during the period under parole or to reveal anything adverse in the behaviour of the petitioners inside the correctional home. The authorities have observed that the petitioner no.1's behaviour in prison was good. The behaviour or conduct of the petitioner no.2 has not been considered at all by the SSRB while refusing his prayer for release.
- 28.** In *Satish @ Sabbe (supra)*, the Supreme Court was also considering a two-decade old incarceration and observed that a balance between individual and societal welfare can be struck by granting the petitioner conditional premature release subject to their continuing good conduct which would ensure that liberty of the petitioners is not curtailed nor there is any increased threat to society.
- 29.** In such context, age, *per se*, cannot be an adverse consideration for refusing the petitioners premature release. In fact, it was observed categorically in the order dated January 10, 2023 in WPA 28437 of 2022 that age *ipso facto* cannot be a consideration for refusing

premature release and that the factum of the petitioner no.1 being aged about 41 years does not itself operate against the petitioners' premature release but rather is a factor for consideration in favour of his release. The petitioner, it was held, is not too elderly till now. Hence, there is still scope of reintegration of the petitioner in society by engaging himself in an appropriate occupation. Brazen refusal of such opportunity in a blanket fashion would ensure that the convict would fail to appreciate the rectification component of penalty.

- 30.** Seen from such perspective, the refusal by the respondent-authorities to grant premature release to the petitioners is palpably bad in law.
- 31.** It is required to be mentioned here that it is observed that the SSRB and the respondent-authorities have been repeatedly dealing with prayers of individual prisoners for premature release in a cryptic manner. Although administrative exigencies require that detailed reasons akin to a Civil Court's judgments need not be passed in respect of each of the convicts, it would be only appropriate if instead of clubbing numerous cases of premature release in the same meeting and passing cryptic orders, the SSRB would hold consecutive sessions periodically and regularly and take up for decision a comparatively small number of individual cases of premature release of convicts in each such session. Such an approach would ensure that the SSRB can advert to the relevant factors as underlined by the High Courts and the Supreme Court repeatedly regarding such premature release of convicts by devoting more time to each of the convicts.
- 32.** The manner in which the yardsticks such as age, physical potentiality,

etc. have merely been stated in a cryptic fashion, without even spelling out as to the particulars of such yardstick, such as the actual age of the victim, the actual reasons backing up the findings as to physical potentiality, association of the convicts, socio-economic condition of the convicts, etc, and enumerating specifically as to why such factor went either in favour of or against the premature release of the petitioners, cannot be sanctioned. Taking a cue from the above observations, the SSRB ought to be more cautious and hold more frequent sessions/meetings, taking up less number of individual cases in each such meeting but holding consecutive sessions over a period of days at a time if necessary and advert to the particulars of each of the yardsticks in respect of each of the convicts and give specific reasons for accepting or refusing the request of each prisoner by dealing with the particular factors involved in such case.

33. Insofar as the present petitioners are concerned, the only reason why their cases are being remanded back to the SSRB despite the SSRB having performed very poorly on the last few occasions on the above count is that this Court does not want to usurp the administrative discretion of the SSRB and interdict due process of law. However, in the event such exercises are repeated, appropriate orders would be passed in future.

34. In the light of the above observations, WPA No. 20731 of 2023 is disposed of by directing the respondent no.1 to ensure that the prayer of the present petitioners for premature release is considered afresh in the light of the above observations within November 30, 2023.

Immediately thereafter, necessary consequential steps shall be taken by the respondent-authorities pursuant thereto. Whatever may be the outcome, the same shall be intimated not only to the petitioners but to each of the convicts whose cases have been considered in the SSRB meeting within a week thereafter. Such procedure should be followed not as a one-time measure but on every such occasion for all prisoners.

35. There will be no order as to costs.
36. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)