A.G. PERARIVALAN

v.

STATE, THROUGH SUPERINTENDENT OF POLICE CBI/SIT/ MMDA, CHENNAI, TAMIL NADU AND ANR.

(Criminal Appeal Nos. 833-834 of 2022)

MAY 18, 2022

[L. NAGESWARA RAO, B. R. GAVAI AND A. S. BOPANNA, JJ.]

Constitution of India: Art. 161 – Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases – Appellant, one of the accused in assassination of the former Prime Minister of India-Shri Rajeev Gandhi – Convicted and sentenced to death – Death sentence commuted to life imprisonment – As regards, remission of the sentence of the appellant, reference made by the Governor to the President of India on 25.01.2021, without taking a decision on the recommendation made by the State Cabinet on remission of the sentence of the appellant – Correctness of – Held: The advice of the State Cabinet is binding on the Governor in matters relating to commutation / remission of sentences u/Art.161 – Non-exercise of the power u/Art. 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to judicial review, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Governor to this effect – No provision under the Constitution pointed out nor any source of the Governor's power to refer a recommendation made by the State Cabinet to the President of India showed – In the instant case, the Governor ought not to have sent the recommendation made by the State Cabinet to the President of India – Such action is contrary to the constitutional scheme – Recommendation made by the State Cabinet remained pending before the Governor for almost two and a half years without a decision being taken – Only when this Court started enquiring about the reason for the decision being delayed, the Governor forwarded the recommendation made by the State Government for remission of the appellant's sentence to the President of India – Furthermore, having regard to the appellant's incarceration for 32 years, no complaint relating to his conduct in jail, his chronic ailments from his medical records, his educational qualifications acquired during

incarceration and the pendency of his petition u/Art. 161 for two and a half years after the recommendation of the State Cabinet, it is not fit to remand the matter for the Governor's consideration – In exercise of power u/Art. 142, the appellant is deemed to have served the sentence – Appellant is set at liberty forthwith – Penal Code, 1860 – Arms Act, 1951 – Explosive Substances Act, 1908 – Passport Act,1967 – Foreigners Act,1946 – Wireless Telegraphy Act,1933 – Terrorist and Disruptive Activities (Prevention) Act, 1987.

Disposing of the appeals, the Court

HELD: 1.1 The advice of the State Cabinet is binding on the Governor in matters relating to commutation / remission of sentences under Article 161. No provision under the Constitution has been pointed out nor any satisfactory response tendered as to the source of the Governor's power to refer a recommendation made by the State Cabinet to the President of India. In the instant case, the Governor ought not to have sent the recommendation made by the State Cabinet to the President of India. Such action is contrary to the constitutional scheme elaborated above. It is relevant to point out that the recommendation made by the State Cabinet was on 09.09.2018, which remained pending before the Governor for almost two and a half years without a decision being taken. It was only when this Court started enquiring about the reason for the decision being delayed, the Governor forwarded the recommendation made by the State Government for remission of the Appellant's sentence to the President of India. [Para 19][1059-E-G]

1.2 This Court is conscious of the immunity of the Governor under the Constitution with respect to the exercise and performance of the powers and duties of his office or for any act done or purported to be done by him in the exercise and performance of such powers and duties. This Court has the power of judicial review of orders of the Governor under Article 161, which can be impugned on certain grounds. Non-exercise of the power under Article 161 is not immune from judicial review. Given petitions under Article 161 pertain to the liberty of individuals, inexplicable delay not on account of the prisoners is inexcusable as it contributes to adverse physical conditions and mental distress faced by a prisoner, especially when the State Cabinet

has taken a decision to release the prisoner by granting him the benefit of remission / commutation of his sentence. [Para 20][1060-A-C]

1.3 The Appellant was 19 years of age at the time of his arrest and has been incarcerated for 32 years, out of which he has spent 16 years on the death row and 29 years in solitary confinement. There has been no complaint relating to his conduct in jail. On the two occasions that the Appellant had been released on parole, there had been no complaint regarding his conduct or breach of any condition of release. Medical records, filed on behalf of the Appellant, show that he is suffering from chronic ailments. Apart from his good behaviour in jail, the Appellant has also educated himself and successfully completed his +2 exams, an undergraduate degree, a postgraduate degree, a diploma and eight certification courses. Given that his petition under Article 161 remained pending for two and a half years following the recommendation of the State Cabinet for remission of his sentence and continues to remain pending for over a year since the reference by the Governor, it is not appropriate to remand the matter for the Governor's consideration. In the absence of any other disqualification and in the exceptional facts and circumstances of this case, in exercise of the power under Article 142 of the Constitution, the appellant is deemed to have served the sentence in connection with Crime No. 329 of 1991. The appellant, who is on bail, is set at liberty forthwith. [Para 28][1065-B-E]

1.4. The advice of the State Cabinet is binding on the Governor in the exercise of his powers under Article 161 of the Constitution. Non-exercise of the power under Article 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to judicial review by this Court, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Governor to this effect. The reference of the recommendation of the Tamil Nadu Cabinet by the Governor to the President of India two and a half years after such recommendation had been made is without any constitutional backing and is inimical to the scheme of our Constitution, whereby "the Governor is but a shorthand

expression for the State Government". Neither has any attempt been made to make out a case of apparent bias of the State Cabinet or the State Cabinet having based its decision on irrelevant considerations, which formed the fulcrum of the said judgment. The understanding sought to be attributed to the judgment of this Court in Sriharan's case with respect to the Union Government having the power to remit / commute sentences imposed under Section 302, IPC is incorrect, as no express executive power has been conferred on the Centre either under the Constitution or law made by the Parliament in relation to Section 302. In the absence of such specific conferment, it is the executive power of the State that extends with respect to Section 302, assuming that the subject-matter of Section 302 is covered by Entry 1 of List III. Taking into account the appellant's prolonged period of incarceration, his satisfactory conduct in jail as well as during parole, chronic ailments from his medical records, his educational qualifications acquired during incarceration and the pendency of his petition under Article 161 for two and a half years after the recommendation of the State Cabinet, it is not considered fit to remand the matter for the Governor's consideration. In exercise of power under Article 142 of the Constitution, the appellant is deemed to have served the sentence in connection with Crime No. 329 of 1991. The appellant, who is already on bail, is set at liberty forthwith. [Para 29][1065-F-H; 1066-A-G]

M.P. Special Police Establishment v. State of M.P. **(2004) 8 SCC 788 : [2004] (5) Suppl. SCR 1020 - distinguished.**

Union of India v. Sriharan **(2016) 7 SCC 1 : [2015] (14) SCR 613;** *Rai Sahib Ram Jawaya Kapur v. State of Punjab* **(1955) 2 SCR 225;** *Samsher Singh v. State of Punjab* **(1974) 2 SCC 831 : [1975] (1) SCR 814;** *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly* **(2016) 8 SCC 1 : [2016] (6) SCR 1;** *Maru Ram v. Union of India* **(1981) 1 SCC 161;** *Samsher Singh v. State of Punjab* **(1974) 2 SCC 831 : [1975] (1) SCR 814;** *Epuru Sudhakar v. Govt. of A.P.* **(2006) 8 SCC 161 : [2006] (7)** Suppl. SCR 81 - **referred to.**

Case Law Reference

[2015] (14) SCR 613	**referred to**	**Para 3**
[2004] (5) Suppl. SCR 1020	**distinguished**	**Para 22**
[1955] 2 SCR 225	**referred to**	**Para 14**
[1975] (1) SCR 814	**referred to**	**Para 15**
[2016] (6) SCR 1	**referred to**	**Para 16**
(1981) 1 SCC 161	**referred to**	**Para 17**
[1975] (1) SCR 814	**referred to**	**Para 18**
[2006] (7) Suppl. SCR 81	**referred to**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 833-834 of 2022.

From the judgment and order dated 06.03.2015 of the High Court of Judicature at Madras in Crl. O.P.S.R. No. 4084/2015 and Crl. O.P. No. 5073/2015.

With

Criminal Appeal No. 835 of 2022

Gopal Sankaranarayanan, Sr. Adv., Prabu Ramasubramanian, K. Paari Vendhan, Raghunatha Sethupathy.B., Vishnu Unnikrishnan, Ms. Shivani Vij, Ms. Priya R., Advs. for the Appellant.

Tushar Mehta, SG, K M Natraj, ASG, V. Krishnamurthy, Amit Anand Tiwari, AAGs, Rakesh Dwivedi, Sr. Adv., Ms. Rekha Pandey, T.A. Khan, Ashok Panigarhi, Ms. Vanshaja Shukla, Kanu Agrawal, Ms. Kirti Dua, Arvind Kumar Sharma, Dr. Joseph Aristotle S., Eklavya Dwivedi, Ms. Mary Mitzy, Ms. Devyani Gupta, Ms. Tanvi Anand, Ms. Nupur Sharma, Shobhit Dwivedi, Sanjeev Kumar Mahara, Ms. Jessica Bhardwaj, B.V. Balaram Das, G. Ananda Selvem, S. Muthukrishnan, T. Thirumurugan, P. Soma Sundaram, Advs. for the Respondents.

The Judgment of the Court was delivered by

L. NAGESWARA RAO, J.

Leave granted.

1. Appellant is accused No.18 in Crime No. 329 of 1991 registered at Sriperumbudur Police Station for assassination of Shri Rajeev Gandhi, former Prime Minister of India, on 21.05.1991. The Appellant was

convicted for offences under the Indian Penal Code, 1860 (for short, 'IPC'), the Arms Act, 1951, the Explosive Substances Act, 1908, the Passport Act, 1967, the Foreigners Act, 1946, the Indian Wireless Telegraphy Act, 1933 and the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, 'TADA'). He was sentenced to death by the designated TADA Court. This Court, by a judgment dated 11.05.1999, upheld the conviction and sentence imposed on the Appellant. However, the conviction and sentence under the TADA were set aside. The review petition filed by the Appellant was dismissed by an order dated 08.10.1999. The Appellant, along with three others, filed mercy petitions before the Governor of Tamil Nadu under Article 161 of the Constitution of India, which were rejected on 27.10.1999. The mercy petition of the Appellant was reconsidered by the Governor, pursuant to an order passed by the High Court of Tamil Nadu, and was rejected again on 25.04.2000. The Appellant filed a mercy petition before the President of India under Article 72 of the Constitution, which was also rejected on 12.08.2011. Aggrieved thereby, a writ petition was filed in the High Court of Madras. The said writ petition filed by the Appellant before the High Court of Madras was transferred to this Court by an order dated 01.05.2012. Thereafter, the death sentence of the Appellant was commuted to imprisonment for life by this Court on 18.02.2014. **2.** In view of the Appellant having undergone a sentence of 23 years, the State of Tamil Nadu proposed remission of the sentence of life imprisonment imposed on the Appellant to the Government of India, requesting its views within three days. The said proposal was made in view of Section 435 of the Criminal Procedure Code, 1973 (for short, 'CrPC'), according to which the Central Government was required to be consulted, as the case had been investigated by the Central Bureau of Investigation (CBI). The Union of India immediately filed criminal miscellaneous petitions in the cases disposed of by this Court on 18.02.2014, commuting the sentence imposed on the Appellant to life imprisonment. In these petitions, the Central Government sought a direction to the State of Tamil Nadu not to release the Appellant. An order of *status quo* was passed by this Court in the said criminal miscellaneous petitions on 20.02.2014. The Review Petitions filed by the Union of India against the judgment dated 18.02.2014 commuting the sentence of the Appellant, were dismissed.

3. On 24.02.2014, the Union of India filed a writ petition for quashing the communication from the State of Tamil Nadu dated

19.02.2014 and its decision to consider commutation / remission of the sentence imposed on the Appellant and some others. The writ petition was referred to a Constitution Bench of this Court by order dated 25.04.2014, after formulating seven questions for consideration. By a judgment dated 02.12.2015, this Court answered the questions that were framed for consideration in ***Union of India v. Sriharan***[1].

4. On 30.12.2015, the Appellant filed a petition under Article 161 of the Constitution for remission of his sentence. The writ petition filed by the Union of India for quashing the proposal of the State Government to grant remission to the Appellant was disposed of by this Court on 06.09.2018, by taking note of the fact that a petition had been filed by the Appellant under Article 161 of the Constitution and giving liberty to the authority concerned to dispose of the said petition as deemed fit. A resolution was passed by the Tamil Nadu Cabinet on 09.09.2018, recommending the release of the Appellant, which was sent to the Governor.

5. In the meanwhile, the Appellant filed a criminal miscellaneous petition before the designated TADA Court, Chennai praying for effective monitoring of the pending investigation of the assassination. The said petition was dismissed by the TADA Court on 10.12.2013, against which the Appellant approached the High Court under Section 482, CrPC, by filing a criminal original petition. Another criminal original petition was filed seeking direction to the CBI to complete the pending investigation expeditiously and to file a status report before the High Court once every two months. The High Court dismissed both the petitions by separate orders on 06.03.2015, being of the opinion that the Appellant should have approached the Supreme Court. These Appeals have been filed against the said orders passed by the High Court on 06.03.2015. Notice was issued by this Court in Crl. M.P. No. 118421 of 2017 filed by the Appellant seeking suspension of sentence.

6. During the pendency of these Appeals, this Court was informed that no decision has been taken by the Governor on the resolution passed by the Tamil Nadu Cabinet on 09.09.2018, recommending release of the Appellant. On 11.02.2020, this Court directed the Additional Advocate General for the State of Tamil Nadu to get instructions on the status of the recommendation of the Council of Ministers to the Governor. During

[1] (2016) 7 SCC 1

the course of hearing of applications filed for parole, the High Court was informed that the Governor has not taken a decision on the recommendation made by the State Cabinet pertaining to the remission of the Appellant's sentence, as the final report of the Multi-Disciplinary Monitoring Agency (for short, 'MDMA') was awaited. The CBI filed an affidavit in these Appeals on 20.11.2020 informing this Court that no request had been made by the Governor seeking report of the MDMA and that the petition filed under Article 161 can be decided on its own merits.

7. The learned Solicitor General of India appeared on 21.01.2021 to inform this Court that a decision would be taken by the Governor on the petition filed under Article 161 without any further delay. Thereafter, on 04.02.2021, an affidavit was filed by the Deputy Secretary, Ministry of Home Affairs, stating that the Governor had, by order dated 25.01.2021, determined the President of India to be the appropriate authority to decide the petition filed by the Appellant under Article 161 and had forwarded the same, along with the recommendation made by the Tamil Nadu cabinet, to the President of India.

8. By an order dated 09.03.2022, this Court released the Appellant on bail, taking into account the fact that the Appellant had spent more than 31 years in jail, that his conduct in jail was good, he had acquired several educational qualifications and was suffering from ill health.

9. On behalf of the Appellant, Mr. Gopal Sankaranarayanan, learned Senior Counsel, submitted that the recommendation made by the State Cabinet to grant remission to the Appellant should have been decided by the Governor. The Governor does not have power to refer the recommendation of the State Cabinet to the President of India. He contended that the recommendation made by the State Cabinet is binding on the Governor and he cannot exercise independent discretion. At the most, the Governor could have requested the State Cabinet to reconsider its decision but he lacked the jurisdiction or power to refer the recommendation made by the State Cabinet to the President of India, as under Article 161 the Governor exercised power on the aid and advice of the Council of Ministers. It was further submitted that if the argument of the competent authority being the President of India is accepted, then every pardon / suspension granted by the Governor till date under Article 161 would be unconstitutional.

10. Mr. Rakesh Dwivedi, learned Senior Counsel appearing for the State of Tamil Nadu, supported the stand of the Appellant by arguing

A that the scope of Articles 161 to 163 has been explained by more than one Constitution Bench of this Court, according to which, unless expressly provided by the Constitution, the Governor is bound by the decision of the Cabinet of Ministers. If a decision made by the Governor on the advice of the Council of Ministers is found to be beyond the jurisdiction of the State Government, it can always be challenged before constitutional B courts. However, the Governor is not constitutionally empowered to sit in judgment of the recommendation of the Council of Ministers. He further urged that there is no provision in the Constitution which enables the Governor to refer the recommendation of the State Cabinet for the decision of the President of India. Such actions of the Governor would C be in violation of the federal structure of this country, which is a basic feature of our Constitution.

11. Mr. K. M. Natraj, learned Additional Solicitor General of India, submitted that the appropriate Government in the matter of remission / commutation in the present case is the Union of India. He sought support D from certain passages of the judgment of this Court in ***Sriharan*** (supra) and argued that the Governor rightly referred the recommendation made by the State Cabinet, as it is only the President of India who can take a decision on the remission / commutation of the sentence of the Appellant. He further contended that the Governor was not always bound by the advice of the Council of Ministers and there were recognised exceptions E to the said rule where the Governor is required to act in his own discretion. For the said proposition, he relied upon a judgment of this Court in ***M.P. Special Police Establishment v. State of M.P.***[2], wherein it was held that on those occasions where on facts the bias of the Council of Ministers became apparent and / or the decision of the Council of Ministers is F shown to be irrational and based on non-consideration of relevant factors, the Governor would be right, on the facts of that case, to act in his own discretion and grant sanction. He made an attempt to convince this Court that the point canvassed by the Appellant pertaining to the reference of the recommendations of the State Cabinet to the President of India is beyond the scope of the writ petition and, therefore, should not be G entertained.

12. The only point that requires to be considered in these Appeals is the correctness of the reference made by the Governor to the President of India on 25.01.2021, without taking a decision on the recommendation

H [2] (2004) 8 SCC 788

made by the State Cabinet on remission of the sentence of the Appellant. We do not accept the preliminary objection of the learned Additional Solicitor General that this point is not within the scope of this appeal. From the facts mentioned above, it is clear that these Appeals are filed against orders passed by the High Court refusing to entertain petitions filed by the Appellant, one of which was against a judgment of the designated TADA Court rejecting the request for effective monitoring of the investigation into the remaining aspects of this case. This Court had issued notice in Cri. M.P. No. 118421 of 2017 filed by the Appellant seeking suspension of sentence, wherein it was stated that despite the State Government having already proposed premature release, the Central Government had not taken any decision on the fate of the Appellant till 2017, as required pursuant to the judgment in ***Sriharan*** (supra). Further, during the pendency of these Appeals, the petition preferred by the Appellant for remission was favourably considered by the State Cabinet on 09.09.2018 but the Governor did not take any decision on the said recommendation. Ultimately, the Governor without taking a decision on the recommendation made by the State Cabinet, referred the matter to the President of India. In view of the importance of the issue that arises for consideration of this Court, we refuse to entertain the objection of the learned Additional Solicitor General and proceed to determine the point that is raised by the Appellant.

13. The power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of an offence against any law related to which the executive power of the State extends is vested in the Governor under Article 161 of the Constitution. Article 162 makes it clear that the executive power of the State shall extend to matters with respect to which the Legislature of the State has power to make laws. Article163 of the Constitution provides that there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

14. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the

British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The Governor occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part".[3]

15. Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360, the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the constitutional sense under the Cabinet system of Government. It is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions.[4]

16. Even though the Governor may be authorised to exercise some functions, under different provisions of the Constitution, the same are required to be exercised only on the basis of the aid and advice tendered to him under Article 163, unless the Governor has been expressly authorised, by or under a constitutional provision, to discharge the function concerned, in his own discretion.[5]

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[3] Rai Sahib Ram Jawaya Kapur v. State of Punjab (1955) 2 SCR 225

[4] Samsher Singh v. State of Punjab (1974) 2 SCC 831

[5] Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly (2016) 8 SCC 1

17. A Constitution Bench of this Court in ***Maru Ram v. Union of India***[6] authoritatively summed up the position with respect to Article 161, as reproduced hereinafter: "*...the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advice and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release*".

18. By following the dictum in ***Samsher Singh v. State of Punjab***[7], this Court in ***Maru Ram*** (supra) further held that in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government.

19. The law laid down by this Court, as detailed above, is clear and explicit. The advice of the State Cabinet is binding on the Governor in matters relating to commutation / remission of sentences under Article 161. No provision under the Constitution has been pointed out to us nor any satisfactory response tendered as to the source of the Governor's power to refer a recommendation made by the State Cabinet to the President of India. In the instant case, the Governor ought not to have sent the recommendation made by the State Cabinet to the President of India. Such action is contrary to the constitutional scheme elaborated above. It is relevant to point out that the recommendation made by the State Cabinet was on 09.09.2018, which remained pending before the Governor for almost two and a half years without a decision being taken. It was only when this Court started enquiring about the reason for the decision being delayed, the Governor forwarded the recommendation made by the State Government for remission of the Appellant's sentence to the President of India.

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[6] (1981) 1 SCC 161
[7] (1974) 2 SCC 831

A 20. We are fully conscious of the immunity of the Governor under the Constitution with respect to the exercise and performance of the powers and duties of his office or for any act done or purported to be done by him in the exercise and performance of such powers and duties. However, as held by this Court in numerous decisions, this Court has the power of judicial review of orders of the Governor under Article 161, which can be impugned on certain grounds. Non-exercise of the power under Article 161 is not immune from judicial review, as held by this Court in ***Epuru Sudhakar v. Govt. of A.P.***[8]. Given petitions under Article 161 pertain to the liberty of individuals, inexplicable delay not on account of the prisoners is inexcusable as it contributes to adverse physical conditions and mental distress faced by a prisoner, especially when the State Cabinet has taken a decision to release the prisoner by granting him the benefit of remission / commutation of his sentence.

21. The learned Additional Solicitor General, on the basis of the judgment of this Court in ***M.P. Special Police Establishment*** (supra), argued that an irrational decision of the Cabinet can be examined by the Governor in his discretion to come to a different conclusion. Grant of sanction for prosecution under Section 197, CrPC against two Ministers of the Government of Madhya Pradesh was the subject matter of the said case. On the basis of a complaint made to the Lokayukta for illegal release of lands, the Lokayukta investigated and submitted a report stating that there were sufficient grounds for prosecuting the two Ministers under the Prevention of Corruption Act, 1988. The Council of Ministers took a decision no material was available against both the Ministers for grant of sanction. However, the Governor was of the opinion that a *prima facie* case for prosecution was made out and granted sanction. Writ petitions were filed under Article 226 of the Constitution by the aggrieved Ministers on the ground that the Governor could not have acted in his discretion within the meaning of Article 163 of the Constitution. A single Judge of the High Court of Madhya Pradesh allowed the writ petitions of the Ministers by concluding that granting sanction for prosecuting the Ministers was not a function which could be exercised by the Governor 'in his discretion' and the Governor could not have acted contrary to the aid and advice of the Council of Ministers. This decision was upheld by the Division Bench of the High Court, aggrieved by which appeals were filed before this Court. This Court reversed the

[8] (2006) 8 SCC 161

judgment of the High Court and held that while the matter of sanction for prosecution is on the aid and advice of the Council of Ministers and not at the discretion of the Governor in normal circumstances, an exception may arise on the grant of sanction to prosecute either a Chief Minister or a Minister where as a matter of propriety the Governor may have to act in his own discretion. It was noted by this Court that a relevant consideration such as the report of the Lokayukta was absent in the mind of the Council of Ministers while refusing to grant sanction and such refusal to take into consideration a relevant fact or orders passed on the basis of irrelevant and extraneous factors not germane to the purpose of arriving at the conclusion would vitiate an administrative order. In such cases, this Court was of the opinion that the Governor can act in his own discretion, or else, there would be a complete breakdown of the rule of law.

22. We are afraid that the judgment of this Court in ***M.P. Special Police Establishment*** (supra) is not applicable to the facts of the present case. No arguments have been put forth to make out a case of non-consideration of relevant factors by the State Cabinet or of the State Cabinet having based its recommendation on extraneous considerations. Moreover, in the said case, the Governor had taken a decision which was subsequently challenged, unlike the present case, where the Governor has merely forwarded the recommendation made by the State Cabinet to the President of India.

23. Strong reliance was placed by Mr. Natraj on the judgment of this Court in ***Sriharan*** (supra) to contend that it is only the President of India who has the power to pardon or grant remission or commutation of sentence, when a sentence is imposed under any of the provisions of the IPC and that the Governor has no power to grant pardon in exercise of his power under Article 161 of the Constitution. One of the points that was framed for consideration by the Constitution Bench in ***Sriharan*** (supra) pertained to the determination of the "appropriate Government" for exercise of powers under Sections 432 and 433, CrPC. In the opinion of Ibrahim Kalifulla, J. (speaking for himself, Dattu, C.J. and Ghose, J.), the response was given in the following terms:

"***Questions 52.3, 52.4 and 52.5:***

52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes

A ***the Executive Power of the State where the power of the Union is coextensive?***

52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission?

B ***52.5 Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?***

Answer

C ***180.*** *The status of appropriate Government whether the Union Government or the State Government will depend upon the order of sentence passed by the criminal court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of*

D *Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in G.V.*

E *Ramanaiah [G.V. Ramanaiah v. Supt. of Central Jail, (1974) 3 SCC 531 : 1974 SCC (Cri) 6 : AIR 1974 SC 31] should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union*

F *Government the primacy with the status of appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the State concerned, the State Government would be the*

G *appropriate Government*."

24. Lalit, J., in a concurring opinion (speaking for himself and Sapre, J.), answered the question as under –

"***219.*** *We are, however, concerned in the present case with offence under Section 302 IPC simpliciter. The respondent*

H *convicts stand acquitted insofar as offences under the TADA*

are concerned. We find force in the submissions of Mr Rakesh Dwivedi, learned Senior Advocate that the offence under Section 302 IPC is directly related to "public order" under Schedule VII List II Entry 1 to the Constitution and is in the exclusive domain of the State Government. In our view the offence in question is within the exclusive domain of the State Government and it is the Executive Power of the State which must extend to such offence. Even if it is accepted for the sake of argument that the offence under Section 302 IPC is referable to Entry 1 of List III, in accordance with the principles as discussed hereinabove, it is the Executive Power of the State Government alone which must extend, in the absence of any specific provision in the Constitution or in the law made by Parliament. Consequently, the State Government is the appropriate Government in respect of the offence in question in the present matter. It may be relevant to note that right from K.M. Nanavati v. State of Bombay [K.M. Nanavati v. State of Bombay, AIR 1961 SC 112 : (1961) 1 Cri LJ 173 : (1961) 1 SCR 497 at p. 516] in matters concerning offences under Section 302 IPC it is the Governor under Article 161 or the State Government as appropriate Government under the CrPC who have been exercising appropriate powers."

25. Section 432(7), CrPC is reproduced below.

432. Power to suspend or remit sentences.

...

(7) In this section and in section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

To ascertain the extent of the executive power of the Union, this Court looked into and rendered a detailed analysis of Articles 72, 73, 161

and 162. The focal point of discussion in the judgment relates to the proviso to Article 73 of the Constitution. Article 73(1) reads as below:

> ***Article 73. Extent of executive power of the Union.-*** *(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend —*
>
> *(a) to the matters with respect to which Parliament has power to make laws; and*
>
> *(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:*
>
> *Provided that the executive power referred to in subclause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.*
>
> ...

26. After an exhaustive discussion, including reference to the Constituent Assembly Debates on draft Article 60 which corresponds to Article 73, it was held by this Court that where the State Legislature was *also* empowered to make laws on the same subject, determination of whether the executive power of the Union Government would extend to the State Government or not has to be decided by taking into account the fact of whether executive power has been expressly conferred on the Centre, either by the Constitution or under the law made by the Parliament. Therefore, to assess whether the executive power of the Union extended to a subject-matter in List III of the Seventh Schedule of the Constitution, it has to be examined whether executive power had been expressly conferred on the Union under the Constitution or the law made by the Parliament, failing which the executive power of the State remained intact. To our minds, it is clear from the said judgment that insofar as offences under Section 302, IPC are concerned, in the absence of any specific provision under the Constitution or under law made by the Parliament expressly conferring executive power on the Union, the executive power of the State would extend, irrespective of whether the subject-matter of Section 302 is considered to be covered by an Entry in List II or an Entry in List III of the Seventh Schedule.

27. Mr. Sankaranarayanan has submitted a list of cases wherein this Court, in the specific facts and circumstances of those cases, has

directed release of the prisoner convicted under Section 302 simpliciter or along with other offences, taking note of the prolonged period of incarceration, educational qualifications obtained during the period of incarceration, conduct in jail as well as the futility of subjecting the prisoners to another round of litigation.

28. The Appellant was 19 years of age at the time of his arrest and has been incarcerated for 32 years, out of which he has spent 16 years on the death row and 29 years in solitary confinement. There has been no complaint relating to his conduct in jail. On the two occasions that the Appellant had been released on parole, there had been no complaint regarding his conduct or breach of any condition of release. Medical records, filed on behalf of the Appellant, show that he is suffering from chronic ailments. Apart from his good behaviour in jail, the Appellant has also educated himself and successfully completed his +2 exams, an undergraduate degree, a postgraduate degree, a diploma and eight certification courses. Given that his petition under Article 161 remained pending for two and a half years following the recommendation of the State Cabinet for remission of his sentence and continues to remain pending for over a year since the reference by the Governor, we do not consider it appropriate to remand the matter for the Governor's consideration. In the absence of any other disqualification and in the exceptional facts and circumstances of this case, in exercise of our power under Article 142 of the Constitution, we direct that the Appellant is deemed to have served the sentence in connection with Crime No. 329 of 1991. The Appellant, who is on bail, is set at liberty forthwith.

29. In conclusion, we have summarised our findings below:

(a) The law laid down by a catena of judgments of this Court is well-settled that the advice of the State Cabinet is binding on the Governor in the exercise of his powers under Article 161 of the Constitution.

(b) Non-exercise of the power under Article 161 or inexplicable delay in exercise of such power not attributable to the prisoner is subject to judicial review by this Court, especially when the State Cabinet has taken a decision to release the prisoner and made recommendations to the Governor to this effect.

(c) The reference of the recommendation of the Tamil Nadu Cabinet by the Governor to the President of India two and a half years after such recommendation had been made is

A without any constitutional backing and is inimical to the scheme of our Constitution, whereby "*the Governor is but a shorthand expression for the State Government*" as observed by this Court[9].

(d) The judgment of this Court in ***M.P. Special Police Establishment*** (supra) has no applicability to the facts of this case and neither has any attempt been made to make out a case of apparent bias of the State Cabinet or the State Cabinet having based its decision on irrelevant considerations, which formed the fulcrum of the said judgment.

C (e) The understanding sought to be attributed to the judgment of this Court in ***Sriharan*** (supra) with respect to the Union Government having the power to remit / commute sentences imposed under Section 302, IPC is incorrect, as no express executive power has been conferred on the Centre either under the Constitution or law made by the Parliament in relation to Section 302. In the absence of such specific conferment, it is the executive power of the State that extends with respect to Section 302, assuming that the subject-matter of Section 302 is covered by Entry 1 of List III.

E (f) Taking into account the Appellant's prolonged period of incarceration, his satisfactory conduct in jail as well as during parole, chronic ailments from his medical records, his educational qualifications acquired during incarceration and the pendency of his petition under Article 161 for two and a half years after the recommendation of the State Cabinet, we do not consider it fit to remand the matter for the Governor's consideration. In exercise of our power under Article 142 of the Constitution, we direct that the Appellant is deemed to have served the sentence in connection with Crime No. 329 of 1991. The Appellant, who is already on bail, is set at liberty forthwith. His bail bonds are cancelled.

G 30. The Appeals are disposed of accordingly.

Nidhi Jain Appeals disposed of.
(Assisted by : Tamana, LCRA)

[9] Maru Ram v. Union of India (supra)