* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 21st August, 2019*
Judgment Delivered on: 3rd July, 2020

\+ **W.P.(CRL.) 2049/2019**

SANJAY KUMAR VALMIKI ..... Petitioner
Represented by: Ms.Manika Tripathy and Mr.Ashutosh Kaushik, Advocates

versus

STATE ..... Respondent
Represented by: Mr.Rahul Mehra, Standing counsel for the State with Mr.Jamal Akhtar, Mr.Chaitanya Gosain and Mr.Amanpreet Singh, Advocates

\+ **W.P.(CRL.) 682/2019**

CHANDRA KANT JHA ..... Petitioner
Represented by: Ms.Neha Kapoor, Adv. with Mr.Mohit Bhadu, Adv.

versus

STATE OF NCT OF DELHI ..... Respondent
Represented by: Mr.Rahul Mehra, Standing counsel and Mr.Rajesh Mahajan, Addl.Standing Counsel for the State with Mr.Jamal Akhtar, Mr.Chaitanya Gosain and Mr.Amanpreet Singh, Advocates

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Petitioner Sanjay Kumar Valmiki was convicted for offences punishable under Section 302/376(2)(f)/363/201 IPC and sentenced to rigorous imprisonment for life with stipulation of a minimum period of 25

years of incarceration without remission. This Court in appeal though held that the learned Trial Court could not have awarded such a sentence, in terms of the decision of the Constitution Bench reported as (2016) 7 SCC 1 *Union of India vs. V.Sriharan*, however, awarded the same sentence.

2. Petitioner Chandra Kant Jha was convicted in three different FIRs for offence punishable under Section 302 IPC and in two of the FIRs, he was awarded sentence of death by the learned Trial Court, subject to confirmation by this Court. The two appeals filed by Chandra Kant Jha and the Reference by the State, were disposed of by this Court vide judgment dated 27th January, 2016 returning the findings as under:-

> "*118. In light of the aforesaid factum and balancing out of the aggravating and mitigating circumstances, we feel that the present case would fall in the category wherein the extreme sentence of death by capital punishment would not be justified and at the same time possibility of award of remission and release of Chandra Kant Jha on completion of sentence of 14 years or even thereafter, would be inadequate and parlous. The heinous and outrageous crime involving inhumane behaviour and torture, must be emphatically and adequately punished. This case falls in the third category, beyond application of remission.*
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> *119. In light of the above, whilst not confirming the death sentence proposed by the trial court, we award punishment of life imprisonment with a direction that Chandra Kant Jha would not be released on remission for remainder of his natural life. This direction would not affect the power under Articles 72 and 161 of the Constitution of India. This we fell would be appropriate and the proportionate sentence in the present case. The appeal and the death reference are accordingly disposed of."*

3. In W.P.(CRL) 2049/2012 Sanjay Kumar Valmiki sought furlough from the respondent which was declined, hence he filed the writ petition.

From the nominal roll of the petitioner it was evident that the petitioner was convicted for offences punishable under Sections 302/376(2)(g)/363/201 IPC and was awarded rigorous imprisonment for life with the condition that no remission would be granted for a period of 25 years. All the sentences were to run concurrently. The issue thus arose whether a convict who has been awarded imprisonment for life with direction that no remissions will be granted for a period of 25 years can be granted furlough. In W.P.(CRL) 682/2019 Chandra Kant Jha had sought parole from the GNCTD which was declined vide the communication dated 25th January, 2019. Hence he filed the writ petition challenging the said order seeking parole. From the nominal roll of Chandra Kant Jha it was evident that he was awarded sentence of death by the learned Additional Sessions Judge, however the same was not confirmed by this Court in the Reference and instead this Court awarded sentence of rigorous imprisonment for life with the direction that the convict shall not be released on remission for remainder of his natural life except for the exercise of power under Articles 72 and 161 of the Constitution of India. Though this Court granted parole to the petitioner Chandra Kant Jha, however, in view of the legal issue required to be decided, this Court vide order dated 1st April, 2019 directed the Director General (Prisons) to indicate as to how a convict who has been sentenced to life imprisonment with the stipulation that he would not be released on remission for the remainder of his natural life, could be granted furlough. As per the nominal roll, Chandra Kant Jha was granted four furloughs in the year 2017 and three in the year 2018. Affidavit and written submissions were thus filed by the respondent and written submissions by learned counsels for the petitioners. Since a common question of law arose in the

two petitions, the same were heard together.

4. The issue which thus arises for consideration in the two petitions is whether a convict who has been awarded sentence for imprisonment for life with the stipulation that no remission would be granted for a particular period or for the remainder of the life is entitled to furlough during the said period while undergoing the sentence.

5. When in custody a prisoner is entitled to reprieve by three different remedies i.e. bail during trial or during the pendency of appeal and by parole and furlough after the conviction and sentence are passed and upheld in appeal. Supreme Court in (2017) 15 SCC 55 *Asfaq Vs. State of Rajasthan* noting the distinction between the parole and furlough held :-

> *"10. In the first instance, it would be necessary to understand the meaning and purpose of grant of parole. It would be better understood when considered in contrast with furlough. These terms have been legally defined and judicially explained by the Courts from time to time.*
>
> *11. There is a subtle distinction between parole and furlough. A parole can be defined as conditional release of prisoners i.e. an early release of a prisoner, conditional on good behaviour and regular reporting to the authorities for a set period of time. It can also be defined as a form of conditional pardon by which the convict is released before the expiration of his term. Thus, the parole is granted for good behaviour on the condition that parolee regularly reports to a supervising officer for a specified period. Such a release of the prisoner on parole can also be temporarily on some basic grounds. In that eventuality, it is to be treated as mere suspension of the sentence for time being, keeping the quantum of sentence intact. Release on parole is designed to afford some relief to the prisoners in certain specified exigencies. Such paroles are normally granted in certain situations some of which may be as follows:*

(i) a member of the prisoner's family has died or is seriously ill or the prisoner himself is seriously ill; or
(ii) the marriage of the prisoner himself, his son, daughter, grandson, grand daughter, brother, sister, sister's son or daughter is to be celebrated; or
(iii) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation of his land or his father's undivided land actually in possession of the prisoner; or
(iv) it is desirable to do so for any other sufficient cause;
(v) parole can be granted only after a portion of sentence is already served;
(vi) if conditions of parole are not abided by the parolee he may be returned to serve his sentence in prison, such conditions may be such as those of committing a new offence; and
(vii) parole may also be granted on the basis of aspects related to health of convict himself.

12. Many State Governments have formulated guidelines on parole in order to bring out objectivity in the decision making and to decide as to whether parole needs to be granted in a particular case or not. Such a decision in those cases is taken in accordance with the guidelines framed. Guidelines of some of the States stipulate two kinds of paroles, namely, custody parole and regular parole. 'Custody parole' is generally granted in emergent circumstances like:

(i) death of a family member;
(ii) marriage of a family member;
(iii) serious illness of a family member; or
(iv) any other emergent circumstances.

13. As far as 'regular parole' is concerned, it may be given in the following cases:

(i) serious illness of a family member;
(ii) critical conditions in the family on account of accident or death of a family member;

(iii) marriage of any member of the family of the convict;
(iv) delivery of a child by the wife of the convict if there is no other family member to take care of the spouse at home;
(v) serious damage to life or property of the family of the convict including damage caused by natural calamities;
(vi) to maintain family and social ties;
(vii) to pursue the filing of a special leave petition before this Court against a judgment delivered by the High Court convicting or upholding the conviction, as the case may be.

14. Furlough, on the other hand, is a brief release from the prison. It is conditional and is given in case of long term imprisonment. The period of sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct remission.

15. A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.

16. This Court, through various pronouncements, has laid down the differences between parole and furlough, few of which are as under:
(i) Both parole and furlough are conditional release.
(ii) Parole can be granted in case of short term imprisonment whereas in furlough it is granted in case of long term imprisonment.
(iii) Duration of parole extends to one month whereas in the case of furlough it extends to fourteen days maximum.
(iv) Parole is granted by Divisional Commissioner and furlough is granted by the Deputy Inspector General of Prisons.

(v) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.
(vi) The term of imprisonment is not included in the computation of the term of parole, whereas it is vice versa in furlough.
(vii) Parole can be granted number of times whereas there is limitation in the case of furlough.
(viii) Since furlough is not granted for any particular reason, it can be denied in the interest of the society."

(Emphasis supplied)

7. In the decision reported as 2016 (7) SCC 1 *Union of India vs. V. Sriharan @ Murugan & Ors.* the Constitution Bench noting the distinction between the constitutional power of clemency under Articles 72 and 161 of the Constitution of India and Section 432 Cr.P.C. which is a statutory power of remission held that the constitutional jurisdiction of grant of remission as provided under Articles 72 and 161 of the Constitution will always remain untouched even if a sentence of imprisonment for life is awarded to the convict without providing scope for grant of any remission by way of statutory executive action however, the said plenary jurisdiction will not be available to the exercise of statutory jurisdiction of grant of remission under Section 432 Cr.P.C. Supreme Court further noted that though not an attempt to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It was thus held that when by way of a judicial decision, after a detailed analysis, having regard to the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment, that is, for the end of his life or for a

specific period of 20 years or 30 years or 40 years such a conclusion should survive without any interruption. Referring to Section 433A Cr.P.C. the majority decision noted that when the minimum imprisonment is prescribed under the Statute, there will be every justification and authority for the Court which considers the nature of offence for which conviction is imposed on the offender, for which offence, the extent of punishment provided for is either death or life imprisonment, to ensure the interest of the public at large and the society, such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission.

8. Supreme Court in *Union of India vs. V. Sriharan @ Murugan & Ors.* (supra) also noted that remissions were of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant Rules based on his/her good behavior or such other stipulations prescribed therein and the other remission being one granted by the appropriate government in exercise of its power under Section 432 Cr.P.C. Though the view expressed in paras 224 and 226 of the report held that the first category of remission being under relevant Jail Manual which depends upon the good conduct or behavior of the convict while undergoing sentence awarded to him and generally referred as "earned remissions" are not referable to the second category, that is, remission of sentence under Section 432 Cr.P.C. which requires specific assessment in an individual matter and is case specific, however, in para 62 of the report it was clarified that therefore, in the latter case when a remission of a substantive sentence is granted under Section 432 Cr.P.C, then and then only giving credit to the earned remission can take place and not otherwise. It was further held that in a case of life imprisonment, meaning thereby the entirety of one's life,

unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission.

9. Since this Court is considering the grant of remission and consequently grant of furlough under the Delhi Prison Rules, 2018, it would be appropriate to note the relevant provisions of the Delhi Prisons Act, 2000 and Delhi Prison Rules 2018, as under:

(i). "Furlough" is defined under Rule 2(17) of Delhi Prison Rules,2018 as under:

Rule 2(17)- FURLOUGH means leave as reward granted to a convicted prisoner who has been sentenced to rigorous imprisonment for five years or more and has undergone three years thereof.

(ii) Under Rule 1199 meaning of furlough is further explained as under:

Rule 1199- Furlough means release of a prisoner for a short period of time after a gap of certain qualified number of years of incarceration by way of motivation for maintaining good conduct and to remain disciplined in the prison. This is purely an incentive for good conduct in the prison. Therefore the period spent by the prisoner outside the prison on furlough shall be counted towards his sentence.

(iii) In order to be eligible for grant of furlough, a convict must necessarily fulfil inter alia the following criteria laid down in the Rule 1223:

Rule 1223- In order to be eligible to obtain furlough, the prisoner must fulfil the following criteria:-

I. Good conduct in the prison and should have earned rewards in last 3 Annual good conduct report and continues to maintain good conduct.

II. The prisoner should not be a habitual offender

III. The prisoner should be a citizen of India.

(iv) Annual Good Conduct Remission

Rule 1178. Any prisoner, eligible for ordinary remission, who for a period of one year from the date of his

sentence, or the date on which he was last punished (except by way of warning) for a prison offence, has not committed any prison offence, should be awarded 30 days annual good conduct remission by the Superintendent of the Prison in addition to any other remission.

(v) "Remission" is explained under Rule 1170 Delhi Prison Rules, 2018 as under:

Rule 1170- Remission is a concession, which can be granted by the Authorities as provided in these rules. The appropriate Government reserves the right to debar/ withdraw any prisoner, or category of prisoners from the concession of remission. The remissions may be withdrawn or forfeited if the prisoner commits specified jail offences or conditions prescribed in the relevant order of remitting the sentence.

(vi) Rule 1171. Remission should be granted on the basis of an inmate's overall good behaviour during the stay in the Jail, willingness to take work while in custody, cooperation and help to the prison administration in prison management and general response to various institutional activities.

Note:- If any statute or the court in its order of sentence has denied the remission to the prisoner and thereby not specified the kind of remission to be denied then all kinds of remission will be denied.

(vii) Rule 1172. In the context of this chapter:

I. 'Prisoner' means a convict and/or includes a person committed to prison in default of furnishing security for maintaining peace or good behavior and also includes persons convicted by a Military Court.

II. 'Sentence' means a sentence as finally fixed on appeal or revision or otherwise, and includes an aggregate of more sentences than one and an order of imprisonment in default of furnishing security for maintaining peace or good behaviour.

(viii) *Rule 1173. Remission will be of the following types:*

A) Ordinary Remission
B) Annual Good Conduct Remission
C) Special Remission
D) Remission by Government

(ix) *Rule 1174. Authority to grant ordinary remission: The Superintendent of Prison or officer nominated by the Superintendent on his behalf, who shall not be below the rank of Additional Superintendent/Deputy Superintendent-I, is authorized to grant ordinary remission.*

(x) *Rule 1175. Eligibility: The following types of convicted prisoners shall be eligible for ordinary remission:*

I. Prisoners having substantive sentences of two months and more,

II. Prisoners, sentences to simple imprisonment for two months or more, who volunteer to work,

III. Prisoners employed on prison maintenance services requiring them to work on Sundays and Holidays, e.g. sweeping, cooking etc. irrespective of the length & nature of their sentence i.e, simple or rigorous imprisonment.

IV. Prisoners undergoing imprisonment in lieu of fine which immediately follows and is in continuation of the substantive sentence of not less than three months.

Note: It will be the responsibility of the prison administration to provide work to all eligible prisoners. If for any reason the prison administration fails to do so the prisoners, who are otherwise eligible for remission for work, should be granted it as per their normal entitlement under the orders of the Inspector General of Prisons.

10. Therefore, ordinary remission is defined under Rule 1174 and eligibility therefore is spelt out in Rule 1175. A reading of these Rules in conjunction reveals that once a prisoner is not eligible for grant of ordinary

remissions, when so ordered by a Court, he would not eligible for grant of Annual Good Conduct Remission (in short AGLR) as in terms of Rule 1178, for getting AGCR, a prisoner should be first eligible for grant of ordinary remissions. Consequently, a prisoner awarded fixed term sentence would not be entitled to Annual Good Conduct Report, which, as explained above, is an eligibility criteria for grant of furlough.

11. The note appended to Rule 1171 of the Delhi Prison Rules, 2018 clarifies that if any statute or the court in its order of sentence has denied the remission to the prisoner and thereby not specified the kind of remission to be denied then all kinds of remission will be denied. Therefore, unless the sentencing Court while stipulating the condition of no remission specifies debarment of any particular kind of remission, all kinds of remissions shall be barred to a prisoner. Consequently, as the sentences awarded to the petitioners bar consideration for remission for fixed number of years in the case of Sanjay Kumar Valmiki and for the remainder life in case of Chandra Kant Jha, the petitioners cannot be said to be eligible for grant of remission and consequently furlough.

12. As laid by the Supreme Court in its various decisions parole is an exercise of discretion whereas furlough is a salutary right of the convict to be considered for release which the convict can claim if he satisfies the requirement of the Act and the Rules. Parole is granted to meet certain emergencies whereas furlough accrues to the petitioner on compliance of the conditions prescribed. From Rules 1171 to 1178 and Rule 1223 of the Delhi Prison Rules, 2018 it is evident that a prisoner is entitled to furlough only if he has earned three Annual Good Conduct reports and consequently three Annual Good Conduct Remission. Where the sentence of the convict

bars grant of remission, the pre-requisite of attaining three Annual Good Conduct Remission is not satisfied and hence the threshold required to qualify for grant of furlough is not met. Hence a prisoner who is not entitled to any remission for a particular period or as in the case of Chandra Kant Jha for the remainder of his life, would not be entitled to furlough as he does not qualify for the threshold requirement.

13. Learned counsel for the petitioner relies upon the decision in *Aman Kumar Rastogi*, however, the said decision stands distinguished by a Co-ordinate Bench of this Court in *Vikas Yadav Vs. State of NCTD* in W.P.(CRL) 2901/2017 decided on 9th July, 2018. The decision dated 9th July, 2018 was challenged by the petitioner therein by filling a Letters Patent Appeal which was also dismissed on 7th September, 2018 reiterating the legal position that a prisoner is entitled to furlough if he has to his credit three Annual Good Conduct Remissions and continues to maintain good conduct and since the order of sentence passed in the said case awarded 25 years imprisonment with a condition that he shall not be granted any remission during the aforesaid period, it was held that the petitioner therein could not be granted furlough. In *Aman Kumar Rastogi* this Court did not deal with the issue of grant of furlough in the light of the provisions of the Delhi Prisons Act and Rules and noting that in view of the decision of the Supreme Court in *Maru Ram (supra*) a convict had a right to be considered for parole, which was not affected even if his sentence was without remission, granted furlough to Aman Kumar Rastogi. There is a difference between furlough and parole as noted in the decision of the Supreme Court as above. Though the grant of parole which is to meet the exigencies is not affected by the sentence awarded, however furlough is affected if the

sentence awarded prescribes that no remission will be granted for the reason three Annual Good Conduct Remissions are a pre-requisite for grant of furlough.

14. Learned counsel for the petitioner in W.P.(CRL) 2049/2019 has relied upon the decision of the Supreme Court in *Ashfaq Vs. State of Rajasthan & Ors*. (2017) 15 SCC 55 to contend that even if a person has committed a serious offence for which he is convicted and at the same time it is found that the said offence was the only crime he committed, he cannot be categorized as a hardened criminal and there should be consideration as to whether he is showing the sign to reform himself and becoming a good citizen, or there are circumstances which would indicate that he has a tendency to commit the crime again or that he would be a threat to the society and mere nature of the offence committed by him should not be a factor to deny him parole outright.

15. In the two petitions this Court is not dealing with the grant of parole and as noted above this Court has already granted parole to Chandra Kant Jha. The issue before this Court is whether the petitioners in view of the sentence awarded to them which stipulates no remission for 25 years in the case of Sanjay Kumar Valmiki and remainder of his life in the case of Chandra Kant Jha can be released on furlough. As held by the Supreme Court, parole is a discretionary remedy whereas furlough is a salutary right and can be granted if the conditions prescribed therein are fulfilled. The petitioners have neither challenged the validity of the provisions of the Delhi Prisons Act and Delhi Prison Rules, 2018 nor have brought out that the Rule 1171 creating a distinction, in respect of a class of cases, where the courts adopt the third category of sentence i.e. more than 14 years

imprisonment without remission, is an arbitrary exercise of power. Therefore, this Court is not delving into the issue whether the rules framed are valid or not, however as long as the Rules remain and a prisoner/convict does not qualify the pre-requisites for grant of furlough, he/she cannot be granted furlough. Even in *Ashfaq* (supra), Supreme Court held that furlough is granted as a good conduct remission and the period of sentence spent on furlough by the prisoner need not be undergone by him as is done in the case of parole. As the period on furlough is counted towards the sentence undergone as provided under Rule 1199, grant of furlough to a convict who cannot be granted remission for a particular period would amount to granting the relief as forbidden by the order on sentence. It is trite law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. (See *Nazir Ahmad vs. Emperor*, AIR 1936 PC 253).

16. Considering the gravity of offence, Section 32A NDPS Act prohibits the grant of remission to a convict for an offence under NDPS Act except under Section 27 of the Act. Even though judgment of the Court cannot be a bar to exercise of the power by the executive under Section 432 Cr.P.C., as held by the Supreme Court in *V.Sriharan* (supra), the executive action should give due weight and respect to the judicial decision arrived at by taking into consideration all essential factors including the seriousness of the offence. Further, Section 432(2) Cr.P.C. also provides for taking the opinion of the presiding officer who convicted, as to whether the application under Section 432 Cr.P.C. should be granted or refused.

17. After this Court had reserved the judgment on the issue as above, learned counsel for Chandra Kant Jha brought to the notice of this Court

decision of a Coordinate Bench of this Court dated 20th December, 2019 in W.P.(CRL) 2428/2018 *Ravinder Singh Vs. State* wherein this Court was dealing with the issue as to whether an application for consideration of furlough was proscribed in case the order on sentence directs that there shall be no clemency by the State before the convict spends at least 20 years in jail. In this decision, this Court followed the law laid down by the Supreme Court in *State of Haryana and Ors. Vs. Jagdish and Harpal* (2010) 4 SCC 216 where a three Judge Bench of the Supreme Court held that the clemency power of the Executive is absolute and remains unfettered for the reasons that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Section 432, 433 and 433-A Cr.P.C. In *Ravinder Singh*, this Court was dealing with the stipulation of clemency as can be granted by the executive exercising jurisdiction under Article 72 and 161 of the Constitution and not grant of remission under Section 432 Cr.P.C. or the Prison Rules. This Court in *Ravinder Singh* clarified that it was not deciding the issue whether a blanket prohibition for grant of remission of any kind would also include furlough, as the said issue did not arise in the said case.

18. As held in *Union of India vs. V.Sriharan* (supra), a prisoner is entitled to three kinds of remissions , firstly, under Articles 72 and 161 of the Constitution to be exercisable by the President and Governor of the State. This power of the President and Governor being plenary can be exercised to suspend, remit and commute the sentences in certain cases including where death sentence is awarded and confirmed. This power under Articles 72 and 161 of the Constitution, as held in *Maru Ram vs. Union of India* and subsequently followed in the latter decisions, is unaffected by provisions of

any statute or even by a judgment of a Court prescribing sentence of life without remission. The two other kinds of remissions available to a prisoner are one under Section 432 Cr.P.C. and the other earned by a prisoner under the Prison Rules, based on his/her good behaviour and/or such other stipulations prescribed in the Prison Rules. Though the sources of these two remissions are different statutes, however, grant of remission earned by a prisoner under the Prison Rules, whether for good behaviour or for complying other conditions has bearing on remission of the substantive sentence granted under Section 432 Cr.P.C., as while considering grant of remission under Section 432 Cr.P.C., the earlier remission granted are taken into consideration. This is evident from Rule 1189 of the Delhi Prison Rules, 2018, which reads as under:-

> *"1189. Life sentence shall be taken as imprisonment for twenty years for the purpose of calculation of remission (as per the logic given in Section 57 of the Indian Penal Code, 1860). In the case of a prisoner serving more than one life sentence, twenty years shall be treated as the total of all his sentences for calculating remission. Grant of remission to a life convict shall not mean actual remission in his sentence. When his case will be examined by the Review Board for pre-mature release, the remission to his credit will be one of the factors on the basis of which the review of his sentence will be considered."*

19. Learned counsels for the petitioners have emhasised on the reformative approach required to be followed to ensure that a prisoner reforms himself into a good meaningful citizen, moves away from crime and thus state that furlough and parole are part of this reformative scheme. Though in the present decision this Court is not dealing with the issue of grant of parole, however, it would be appropriate to note that as per the

Delhi Prison Rules, a convict can be considered for parole for one month after six months have elapsed from the first parole. Thus a convict can be considered for roughly two paroles in an year to meet to exigency including to re-establish social ties. The availability of parole to re-establish social ties and family links is a reformative approach. Merely because a category of convicts with specific stipulation in the order on sentence being not entitled to three furloughs in an year totaling to seven weeks cannot be said to be a non-reformative approach as the remedy of parole is still available to them including to re-establish family ties.

20. Section 302 IPC prescribes two kinds of punishment i.e. with death or imprisonment for life. The sentencing courts are often faced with a dilemma when the offence does not fall in the category of rarest of rare case or considering the other mitigating circumstances sentence of death is too excessive and sentence of imprisonment of life which would be fourteen years actual imprisonment in terms of Section 433A Cr.P.C. too inadequate, the courts resort to the third category, as laid down in the decision reported as (2008) 13 SCC 767 *Swamy Shraddhananda (2) vs State of Karnataka*. Hon'ble Supreme Court discussing the issue as to the proper course of action where for the offences committed, incarceration of 14 years was inadequate and the death sentence was excessive held:-

> *"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the*

death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology."

21. Constitution Bench of the Hon'ble Supreme Court in *Union of India vs. V. Sriharan* (supra) by majority upheld this third category of punishment as laid down in *Swamy Shraddanand* (supra) clarifying the conflict whether life sentence for more than 14 years actual and less than death sentence could be passed and held as under:-

"104. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this

Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court."

22. By awarding the sentence to the petitioners in the third category the courts have already adopted a reformative approach. Further, as noted above, petitioners would be entitled to seek parole even for re-establishing social and family ties. Hence, the contention of learned counsels for the petitioners that in case furlough is not granted, the petitioners will be denied consideration of their case from a reformative angle is incorrect.

23. Consequently, the issue raised in the two petitions that whether a convict who has been awarded sentence for a particular period or for life with the stipulation that no remission will be granted to him in that period is entitled to furlough or not, is answered in the negative. The petitioners are

thus not entitled to grant of furlough.

24. Petitions are accordingly disposed of.

25. Registry is directed to send a copy of this judgment through e-mail to Superintendent, Central Jail, Tihar for intimation of the petitioners.

26. Judgment be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

JULY 03, 2020
ga/vn