IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CRIMINAL APPEAL NOs.15-16 OF 2010.
(From the judgment and order dated 29.10.2007 & 30.10.2007 passed by the High Court Division in Death Reference No.127 of 2003 with Criminal Appeal No.3895 of 2003 and Jail Appeal No.739 of 2003.)

Ataur Mridha @ Ataur: Appellant.
(In Crl.A.No.15 of 2010)

Md. Anwar Hossain: Appellant.
(In Crl.A.No.16 of 2010)

=Versus=

The State: Respondent.
(In both the appeals)

For the Appellants: (In both the appeals) — Mr. Khondaker Mahbub Hossain, Senior Advocate,(with Mr. Mansurul Huq Chowdhury, Senior Advocate), instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For the Respondents: (In both the appeals) — Mr. Mahbubey Alam, Attorney General, (with Mr. Bashir Ahmed A.A.G) instructed by Mrs. Sufia Khatun, Advocate-on-Record.

Date of hearing: 14th February, 2017.

Date of Judgment: 14th February, 2017.

J U D G M E N T

Surendra Kumar Sinha,CJ.: These appeals by leave are directed from a judgment of the High Court Division maintaining the death sentence of convict appellants Ataur Mridha @ Ataur and Md. Anwar

Hossain. It also maintained the death sentence of Kamrul, non-appearing accused.

Victim Jamal was done to death on 16.12.2001 at about 8.30 pm while he was gossiping with Aftab Uddin (P.W.2), Md. Abdul Barek (P.W.4), Md. Yeamin (P.W.5) beside the road adjacent to Charabag Madrasha infront of the shop of Oliullah. According to the prosecution story, these three accused indiscriminately fired at the deceased causing his death instantaneously. The prosecution in support of its case has examined 15 witnesses, of them, P.Ws.2, 4 and 5 are eye witnesses. There is no inconsistency in their evidence as regards the time, the place and the manner of indiscriminate firing by the accused. The tribunal rightly found the appellants and another guilty of the charge under sections 302/34 of the Penal Code.

If the evidence of P.Ws.2, 3 and 5 is taken into consideration with the autopsy report of the victim, there is no doubt that their acts attract clause

'Firstly' of section 300 of the Penal Code, that is to say, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death'. An intention to kill a person brings the matter so clearly within the general principle of *means rea* is evident from the acts. Their acts were voluntary – they knew what they were doing and that they knew the consequence of their acts of indiscriminate firing. Once the intention to kill a human being is proved, the offence is murder unless one of the exceptions attract the case, in which case, the offence is reduced to culpable homicide not amounting to murder. It is true that intention is a question of fact but where intention is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the necessary guilty intention is or is not present. When a person has caused an injury on a vital organ of the victim the intent of killing can certainly be attributed to him. A

person's intention can be gathered from his act, the nature of weapon and the manner of using the weapon. The court on assessment of the evidence comes to the conclusion that the offenders intent the natural consequence of their acts. The presumption that can be arrived at as regards the intention of the offender on consideration of the injury caused, the motive of the offender, the nature of the instrument used, the time and place of attack, the position and condition of the victim, the number of injuries, the causation of the act on the organ of the victim etc.

On the question of sentence, it is now established that the imposition of sentence to be commensurate to the nature of the offence committed and in that process no injustice is caused either to the accused and the victim. The trial court on scrutiny of the evidence was satisfied that the sentence of death is the appropriate sentence and the High Court Division agreed with the above view. Under the prevailing sentencing procedure, a death sentence

is the rule and the sentence of imprisonment for life is an exception, but under the Indian provision, the death sentence is awarded in 'the rarest of rare case' or in 'extreme case'. There is no denial of the fact that in the absence of sentencing rules, this court noticed inconsistency in awarding sentence, be it minor or graver one. The inability of criminal justice system to deal with all serious crimes like murder equally, effectively and for want of uniformity in the sentencing process lead to a marked imbalance in the end result. When it is found from the evidence that the death was intentional, the accused used deadly weapon, the incident of murder is gruesome, barbaric and motivated, and there is no extenuating circumstance to award the minimum sentence, the court is bound to award capital sentence. Besides, in the present incident nobody had the opportunity ever to remotely imagine the amount of such ghastly incident.

On realizing the quality of evidence adduced by the prosecution, Mr. Khondaker Mahaboob Hossain, learned counsel appearing for the appellants at the outset submits that he does not intend to press the appeal on merit, but seeks the commutation of sentence. He adds that in considering of the period the appellants have suffered in the condemned cell and of their young age, he left the matter at mercy of the court.

The philosophy of plea bargaining process has not developed in this country, but in developed countries it is one of the most effective process in the administration of criminal justice. In this process whereby an offender and the prosecutor reach a mutually satisfactory disposition of a criminal case subject to the approval of the court. When it is successful the process results in a plea agreement between the prosecutor and the offender and in the agreement the offender agrees to plead guilty without a trial. In consequence thereon the prosecutor agrees

to relinquish certain charges or make favourable recommendation of sentence to the court. Generally a court will authorize a plea bargaining if the offender makes a knowing and voluntary waiver of his right to a trial, and if he understands the charge and the maximum sentence he will receive – the court may award him the minimum sentence. But in all such cases the court may not accept the plea bargaining and may decline to accept the guilty plea if the charges have no factual basis.

This system is advantageous for both the prosecutor and the offender and the court as well. It saves valuable court's time for high priority cases. Plea bargaining in this context is considered the offender's reward for confession. Plea bargain results in a conviction because an offender pleads guilty as part of his agreement. Section 265E has been substituted for section 271 of the Code of Criminal Procedure. It provides that if the accused pleads guilty, the court shall record plea and may,

in its discretion, convict him. But in a charge of murder, it is the practice being followed for a long time that no such plea be accepted without examining the accused in order to find out whether he knows exactly what he is pleading to and it is desirable that sufficient evidence is recorded by the court so that the court may have something before it from which it can ascertain whether the plea is genuine and whether any extraneous circumstances exist.(Emperor V. Abdul Kader, 48 Crl. L.J. (SB) 329).

Huge number of cases like the one are pending trial all over the country for years together. The trial of those cases cannot be concluded for various reasons. Primary and main reason is lack of co-ordination between the prosecutor and the investigating agency. The prosecution fails to produce witnesses in time particularly the public witnesses. The second reason is the transfer of the officer after the lapse of time and the new officer

who takes charge of the case has to take time in grasping the facts. The substitution of a new officer in the court also takes time due to administrative barrier. The net result is that the principal offenders have to languish in hajot for a long time if not enlarged on bail. If the accused pleads guilty at the initial stage the court may take lenient view on the question of sentence but if he does not plea guilty, his ultimate sufferings entail both hajot and sentence.

Section 367 of the Code of Criminal Procedure provides the language and contents of judgment, the offence of which and the section of the Penal Code and other law under which the accused is convicted and if there is doubt under which of two sections of Penal Code the offence falls, the procedure to be followed have been provided therefor. Sub-section (5) of section 367 has been substituted by Ordinance No.LIX of 1978. Under the present provision, if the accused is convicted for an offence punishable with

death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the court shall in its judgment state the reasons for the sentence awarded. The language of the provision clearly suggests that the sentence of death is the normal penalty and a lesser sentence can be passed when there is any extenuating circumstance. Section 302 of the Penal Code provides two sentences, 'death' or 'imprisonment for life'.

In India section 354 has been substituted for section 367 and the corresponding sub-section (5) of section 367 is sub-section (3) of section 354. It provides that 'when the conviction is for an offence punishable with death or in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence'. The words 'in case of sentence of death, the special reasons for such sentence' have been added and

thereby it is clear from a reading of the provision that a sentence of life imprisonment is the rule and the sentence of death is an exception. To make the point more clear, while the court finds an accused guilty of an offence of murder, it shall award a sentence of life and if it finds that the incident is one of horrific, motivated, intentional and barbarous in nature, the court may award death sentence by assigning special reasons for such sentence. Under our provision, it is that the court shall assign special reasons if it decides to award a sentence of imprisonment for life.

There is debate over the true meaning of the words 'imprisonment for life'. The lawyers, the courts and the jail authority are confused about the exact period of 'life imprisonment'. To say more clearly, how long a convict may suffer in jail if he is sentenced to imprisonment for life. Learned counsel submits that section 57 clearly says that the imprisonment for life means thirty years rigorous

imprisonment as the language of the law clearly says as such.

In Rokeya Begum V. State, 4 CLR(AD)147, this held that "Sentence of 'imprisonment for life' as used in Bangladesh is utterly a misnomer; indeed it appears to be an erroneous interpretation. The way it has been interpreted, the word 'life' does not bear its normal linguistic meaning.' Although section 45 of the Penal Code defines 'Life' as the life of a human being unless the contrary appears from the context. The given interpretation has been arrived at with the aid of section 57 of the Penal Code, which provides that in calculating fraction of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for 30 (thirty) years. This last mentioned section read with relevant provision of the Jail Code effectively means that a person sentenced to imprisonment for life will be released after spending a maximum of 21/22 years in prison. Under section 35A of the Code of Criminal

Procedure the period of time spent by the accused in custody during pendency of the trial would be deducted from his total sentence.

The expression 'imprisonment for life' is not a misnomer as observed by this court in Rokeya Begum (supra), but in true sense it is rigorous imprisonment for life. It has given an interpretation of section 57 without looking at section 53 read with 45 of the Penal Code and the views taken by this court, the Indian Supreme Court and the Privy Council held that a person sentenced to imprisonment for life will be released after spending maximum period of twenty two years in prison. The above views are not correct views and accordingly it is taken to be not in conformity with law. It has also wrongly considered section 35A of the Code of Criminal Procedure.

The submission of the learned counsel does not carry any basis because of the language used in section 57. In determining the point in controversy

section 57 has nothing to do in this regard. There is no doubt about the actual period of sentence to be suffered by a life convict. The Chief Justice has faced the same question when he has visited different jails. Life convicts complain to the Chief Justice about the exact period to be undergone by them. It is under this juncture the law is required to be settled by this court.

In 1836, 'transportation' was a common sentence in England for felony and one reason for thinking that section 58 of the Penal Code which provided the procedure for dealing with a sentence of transportation for life. It provided "In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment." This provision has been omitted by Ordinance No.XLI of 1985.

The English Act, (24 Geo. IV, Ch.84) is the basis following by which our Penal Code has been consolidated relating to transportation which contained in very similar provision. This Act provided that this sentence should always be one of transportation or banishment beyond the seas; that places on land or vessels in the river (commonly called the hulks) should be appointed for the confinement of prisoners until they could be placed on a convict ship and that until they could be removed to such places they were to be kept to hard labour in the common jail or house of correction and the time spent there was to be counted towards their sentence.

Matters of penology has changed from time to time in all communities, and none doubts the competency of the legislature in adopting and providing for new and enlightened methods in the treatment of prisoners. In England transportation beyond the seas ceased as a punishment in 1854. In

this subcontinent since the Penal Code has effected a radical change in the law, a sentence of transportation no longer necessarily involves prisoners being sent overseas or even beyond the provinces wherein they were convicted. The word 'imprisonment' has been substituted for the word 'transportation' by Ordinance No.XLI of 1985. When framing the Penal Code, the draftsmen undoubtly intended this sentence to remain as one whereby those on whom it was passed should be sent over seas. This can be inferred if the history of the sentence is examined that when the first enacted, 'transportation' means transportation beyond seas, although in India it has been substituted in 1955.

Section 45 defines the word 'life' means 'the life of a human being unless the contrary appears from the context'. So if no contrary appears from the context 'life' means the life of a human being. The meaning of the words 'year' and 'month' have been defined in section 49, which means 'the year or the

month is to be reckoned according to this British calendar'. Here the expression 'reckoned' is used which will be very significant for resolving the issue, and in calculating the period of sentence, a 'year' means its length i.e. about 365 days, 5 hours, 48 minutes and 51.6 seconds. To do away with the odd hours, the new style of calendar has adopted the average length is about 365 days and every fourth year of 366 days (24 Geo.11.c25). A sentence for one calendar month does not imply imprisonment for a fixed number of days. It may vary according to the month in which the sentence is passed. If the imprisonment began on the 30th of a month it will expire at midnight of the 29th of the following month, if the following month is not February, in which case it will expire on its last day whatever be the total number of days served by the prisoner.

Section 53 of the Penal Code sets out five different punishments to which offenders are liable to suffer under the provisions of the Penal Code. The

first sentence is death; the second is imprisonment for life; the third was omitted by the criminal law (Extinction of Discriminatory Privileges) Act, 1949; the fourth is imprisonment of rigorous or simple, the fifth is forfeiture of property and the sixth is fine. In the explanation it is provided that in the punishment of 'imprisonment for life' the 'imprisonment shall be rigorous'. So all imprisonment for life shall be rigorous imprisonment whether it is mentioned in the judgment or not. Reading sections 45 and 53 conjointly there is no doubt that a sentence of life imprisonment means a sentence of rigorous imprisonment for the whole of the remaining period of the convicted person's natural life.

Government has power to commute the sentence of death imposed to a prisoner under section 54 of the Penal Code. It provides "In every case in which sentence of death shall have been passed, the Government may, without consent of the offender, commute the punishment for other punishment provided

by this Code.' In case of a life sentence offender, the government reserves the right to 'commute the punishment for imprisonment of either description for a term not exceeding twenty years' (S.55). The word 'twenty' has been substituted for the word 'fourteen' by Ordinance No.XLI of 1985. So, under this provision if an offender is sentenced to imprisonment for life, the government may without the consent of the offender commute the sentence of imprisonment of either description for a term not exceeding twenty years. After the Adaptation of Indian Laws Order, 1937, in case of a convict sentenced to transportation for life, the prisoner cannot be deemed to have commuted his sentence by the government and the prisoner was not entitled to be released after a term, which aggregated with the period of remission earned, amounts to fourteen years although that was the maximum term of rigorous imprisonment permitted by law. It is only if the period of sentence is not commuted by the appropriate

authority under the provisions of Penal Code or the Code of Criminal Procedure, a prisoner of life sentence is bound to serve the life term.

In the absence of any order of commutation of sentence either under the provisions of the Penal Code or the Code of Criminal Procedure, a prisoner sentenced to imprisonment for life is bound in law to serve the life term in jail. The Rules framed in exercise of the Prisons Act, 1894 enable a prisoner to earn remissions both ordinary or special and the said remissions are given credit towards the term of imprisonment. If we look at the history of penology it is evident that the sentence of transportation for life or the life imprisonment is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predict the time of his death that prompted the government to promulgate Rules providing procedure to enable the government to remit the sentence under section 401 of the Code of Criminal Procedure on consideration of

the relevant factors including the period of remissions earned. The question of remissions is exclusively within the province of the government.

Section 368 of the Code of Criminal Procedure provides the mode of sentence of death and imprisonment for life has to be implemented. In respect of death sentence, the court shall direct that the convict 'be hanged by the neck till he is dead.' A life sentence prisoner may be sent to any jail according to the convenience of the jail authority. Previously he was transported to overseas.

Section 401 of the Code of Criminal Procedure confers a power upon the government to suspend or remit a sentence. It is not unconditional and the government after remitting a sentence can restore it. Different considerations would arise in cases of fraud or mistake. It cannot be said that an order of remission is never open to recall. It may be in certain circumstances, fraud or mistake, for example, might justify such action. This section clearly

provides both for remission and of suspension of sentence with or without condition. Where a sentence is suspended without any condition, it does not amount to remission. In a case of murder, the court may report any extenuating circumstances calling for a mitigation of the punishment to the government and the government may thereupon take such step under this provision as it thinks fit. Say for example, in a case accused committed murder without any apparent motive, and was suffering from mental derailment or some sort of mental disorder. The court may hold that the accused is not entitled to be acquitted under section 84 of the Penal Code and recommend to the government under this section to deal with in such manner as it thought fit. The courts have ample power to exercise this power under this section to make such recommendation but normally the courts are not exercising this power.

Even if a convict’s sentence of imprisonment for life is conditionally remitted in exercise of the

powers under this section, and the convict is released, such convict must be deemed to be under sentence of imprisonment for life in spite of the fact that he is not actually undergoing the sentence. If he commits any offence of murder and the court finds him guilty during the period of his remission, he will be liable to face sentence under section 303 of the Penal Code. There are some conflicting decisions on this point. The Supreme Court of India set the point at rest. It held that if a person is sentenced to imprisonment for life he may be detained in prison for life. The court cannot interfere on the ground of earning the remission. (Sambhaji V. State, (1974) 1 SCC 196).

The government may also commute any sentence of death, imprisonment for life or rigorous imprisonment to any period under section 402 without the consent of the prisoner. It can be done as a matter of grace and it being the executives prerogative, judicial review against such decision is not normally

available. So the government reserves the power of remission as well as commutation of sentence of a convict. A remission of sentence is given credit towards the terms of punishment of a prisoner but there is no criteria in determining the duration of life of a prisoner. The period of thirty years mentioned in section 57 is for the purpose of working out the criteria and also for the purpose of working out the remissions, the sentence of imprisonment for life is ordinarily equated with a definite period but we are unable to collect any Rules in Bangladesh. Even then, there is no doubt that it is only for that particular purpose. To say more clearly it is used in the sense of using it as a unit, as the sentence of imprisonment for life is one of indefinite duration, the remission earned by a prisoner do not in practice help such a convict, as it is not possible to predicate the date of his death. That is why, a provision is provided in section 401 (6) to frame Rules of procedure enabling the appropriate

government to remit the sentence on consideration of relevant factors, including the period of remissions earned. The question of remission is exclusively within the province of the government. The convict cannot acquire a right of remission and release from the incarceration. (Gopal Vinayak Godse V. State, AIR 1961 S.C.600).

Apart from the above there are some provisions in the Jail Code for remission of sentence. Remission is the reduction of the term of a prison sentence usually due to good behaviour or conduct. It refers to a structured system with criteria for prisoners to meet in order to encourage good behaviour, rehabilitation and self-improvement, with the ultimate benefit being the release of the prisoner. There is distinction between the word 'commute' used in section 55 of the Penal Code and 'remission' under section 401 of the Code of Criminal Procedure - where an accused's sentence is commuted under section 55 to twenty years, he cannot be regarded upon his release

as being under the sentence of life imprisonment for the purpose of section 303, but where his sentence is remitted under section 401 of the Code of Criminal Procedure, he must be regarded as still being under the sentence of imprisonment for life.

The Jail Code provides some Rules regarding remission of sentence of the prisoners in Chapter XXI. In rule 751 (f), a definition of 'life-convict' is given as under:

(i) a class I or class II prisoner whose sentence amounts to twenty five years imprisonment, or

(ii) a class III prisoner whose sentence amounts to 'twenty years' imprisonment. (This classification of prisoners have been described in paragraphs (a) to (d) of rule 751.

A note has been inserted under the rule stating that the above classification of sentence was made by the Superintendent and the said notes should not be

regarded as part of the statutory rule. It is pointed out that all prisoners who have been sentenced to more than fourteen years including a life sentence, when the term of imprisonment undergone by a prisoner together with any remission earned under the Rules amounted to fourteen years be submitted for order of the local government (now government) in accordance with the instructions of the Home Department Resolution No.159-67 (jails) dated 6th September, 1905 which shall then to decide whether the prisoner shall be released at the expiry of fourteen years including remission earned. The procedure for calculating the period of remission is provided in rule 769. The procedure for release of life convicts is provided in rules 770 for consideration by the government after remission. Though it is provided in rule 771 subject to rule 770, when a prisoner has earned remission that entitles him release, the superintendent shall release him. This provision is in conflict with section 401 of the Code of Criminal

Procedure and this court fails to understand as to how the superintendent shall release him before expiry of the term of sentence after deducting remission.

Remission under the Jail Code is classified in to two types, such as, (1) Ordinary Remission (rules 756, 757, 759) and (2) Special Remission (rule 756). Under rule 756, 2(two) days ordinary remission per month shall be awarded for – (a) thoroughly good conduct and scrupulous attention to all prison regulations (b) two days per month for industry and the due performance of the daily task imposed. Remission of 8 days may also be allowed per month if a convict performs as night guard seven days per month. Remission is calculated from the first day of the calendar month next following to the date of the prisoner's sentence.

In lieu of the remission allowed under rule 756, the prisoners shall receive ordinary remission

on the following scale depending on the nature of their various works in the jail:

(a) Convict warders: 8 days per month

(b) Convict night guards: 7 days per month

(c) Convict night watchman: 5 days per month

(d) Convict overseers: 6 days per month

This remission shall be calculated from the first day of the next calendar month following the appointment of the prisoner as mentioned above in accordance with rule 758. In addition to above, other remissions may be enjoyed by a prisoner if he is employed on prison service, such as cooks and sweepers, who works for weekly and other holidays may be awarded 3 (three) days ordinary remission per quarter in accordance with rule 759. Special remission may be earned by a prisoner if he fulfills the conditions set out in paragraphs (1) to (6) of rule 765.

If a prisoner is convicted of an offence committed after admission to jail under sections 147,

148, 152, 224, 304, 304A, 306, 307, 308, 323, 324, 325, 326, 332, 333, 352, 353 or 377 of the Penal Code; or if a prisoner is convicted for assault committed after admission to jail on a warder or other officer, the remission of whatever kind earned by him up to the date of the said conviction, may with the sanction of the Inspector-General of Prisons, be cancelled. (rule 754).

Ordinary remission shall be awarded by: (a) The Superintendent or, (b) the Deputy Superintendent (subject to the control and supervision of the Superintendent) or, (c) Jailer (subject to the control and supervision of the Superintendent) or, (d) Deputy Jailer (subject to the control and supervision of the Superintendent) or, (e) Any other officer specially empowered in that behalf by the Superintendent (rule 761). Before awarding remission the officer shall consult the prisoner's history ticket in which every offence proved against the prisoner is recorded. If a prisoner has not been

punished during the quarter(otherwise than by a formal warning) he shall be awarded full ordinary remission for that quarter, and if a prisoner has been punished during the quarter (otherwise than by a formal warning), the case shall be placed before the Superintendent. Then he shall decide what amount of remission shall be granted, considering the punishments awarded. (rules 762 and 763).

Special remission may be given to any prisoner (whether entitled to ordinary remission or not) for special services, for example: (a) Assisting in detecting or preventing breaches of prison discipline or regulations; (b) Success in teaching handicrafts (c) Special excellence in, or greatly increased outturn of, work of food quality; (d) Protecting an officer of the prison from attack; (e) Assisting an officer of the prison in the case of outbreak, fire, or similar emergency; (f) Economy in wearing clothes (rule 765). Special remission may be awarded (a) by the Superintendent to a period not exceeding 30 days

in one year; (b) by the Inspector-General or the Government to a period not exceeding sixty days in one year. (rule 766).

The total remission awarded to a prisoner under all rules shall not, without the special sanction of the government, exceed one fourth part of his sentence. (rule 768). In calculating the date of release of a prisoner the number of days of remission earned shall be converted into months and days, that is to say, according to the English calendar month. (rule 769). When a life convict who is either (a) a class 1 prisoner, or (b) a class II or a Class III prisoner, with more than one sentence, or (c) a prisoner in whose case the government has passed an order forbidding his release without reference to it has earned such remission as would entitle him to release, the Superintendent shall report to the government in order that his case may be considered with reference to section 401 of the Code of Criminal Procedure.

We find no basis or sanction of law to come to such conclusion. This conversion of life sentence into one of fixed term by the Jail Authority is apparently without jurisdiction and we are afraid as no provision of law was brought on record or cited to sanction such a course of remission. From the above notes it is seen that the life convicts are granted remissions and released from the custody on completing fourteen year term, if it is so, without any legal basis. It is reported from the jail authority that unless a prisoner who has been sentenced to imprisonment of life is recommended to the government after serving out twenty years in jail, no such recommendation for release is made. If this information is true, there will be no violation of law.

This power of commutation cannot be exercised by the government in all cases. As regards the term or tenure to be suffered by a prisoner of life imprisonment, this court noticed

inconsistent opinions of the concerned Ministries. The Ministry of Home Affairs under memo dated 23.12.1987 sought an opinion from the Ministry of Law and Justice regarding the procedure for counting the period of imprisonment to be suffered by a life sentence prisoner convicted under section 302 of the Penal Code. From the reference we noticed that the Ministry has sought an explanation as to whether such prisoner would serve 'twenty' or 'thirty' years sentence. This is apparent from the subject under reference. It is mentioned thus: 'বিষয়ঃ বাংলাদেশ দন্ডবিধি আইনের ৩০২ ধারায় যাবজ্জজীবন সাজাপ্রাপ্ত আসামীদের সাজার পরিমান ২০ বছরের স্থলে ৩০ বছরের গননা সংক্রান্ত।' The above subject matter clearly suggests that the Ministry of Home Affairs presumed that a life sentence prisoner had suffered twenty years rigorous imprisonment and after amendment, they have to suffer thirty

years. The said Ministry was not properly advised from before as to the true meaning and purport of section 57 of the Penal Code and, that is why, it presumed that the life imprisonment prisoner had suffered twenty years previously and after the amendment his sentence has been fixed as thirty years rigorous imprisonment.

The Ministry of Law and Justice Affairs by letter under memo dated 3.1.1988 in paragraph 3 correctly opined that there had no reason to presume that life imprisonment be treated as twenty years or thirty years period of sentence and that the life imprisonment shall be deemed to be for life. This opinion is correct and there is no doubt about it. But on the other breath, way of explanation, it mentioned in sub-paragraph (Ka) that in section 57 of the Penal Code it was mentioned that in the process of calculating the period, the life imprisonment shall be deemed to

be thirty years. It is stated 'শাস্তির মেয়াদের অংশ নিরুপনের ক্ষেত্রে যাবাজ্জজীবন কারাদন্ড ৩০ বছর মেয়াদী হিসেবে গণ্য হইবে।' There, the Ministry committed the error. Section 57 does not say that life imprisonment shall be for thirty years. In sub-paragraph (Kha), it again committed another error in pointing out that ৫৭ ধারার imprisonment for 30 years 'বা (৩০ বছরের কারাবাস) কথাগুলি ১৯৮৫ সনের ৪১ নম্বর অধ্যাদেশ দ্বারা পূর্বেকার 'transportation for 20 years' কথাগুলি স্তরে প্রতিষ্ঠিত হয়। যেহেতু উক্ত অধ্যাদেশ উহার গেজেট বিজ্ঞপ্তির তারিখ ৫ আগষ্ট ১৯৮৫ হইতে কার্যকর হইয়াছে, উক্ত তারিখের পূর্বে প্রদত্ত শাস্তির 'imprisonment for life' বলিতে ২০ বছরের এবং উক্ত তারিখ হইতে পরিবর্তীকালে প্রদত্ত সকল শাস্তির ক্ষেত্রে 'imprisonment for life' বলিতে ৩০ বছর মেয়াদী কারাবাস বুঝাইবে।'

This explanation and or/opinion is totally contrary to law and also self-contradictory to paragraph 3 because by this amendment, for the figure 'twenty', the figure 'thirty' has been substituted which does not make any difference. In no case life imprisonment shall be either

'twenty' years or 'thirty' years before or after amendment. The concerned officers have totally ignored section 53 read with section 45 of the Penal Code.

As per direction of this court an officer has collected an order under memo dated 14.01.1991 from the Ministry of Home Affairs which reads as follows:

যেহেতু অস্হায়ী রাষ্ট্রপতি বিভিন্ন কারাগারে অবস্হানরত কয়েক শ্রেণীর সাজা ভোগরত কয়েদীদের সাধারণ ক্ষমা প্রদর্শনের সিদ্ধান্ড় গ্রহণ করিয়াছেন। সেহেতু ফৌজদারী কার্যবিধি ১০১(১) ধারা মোতাবেক অস্হায়ী রাষ্ট্রপতি নিম্নলিখিত আদেশ প্রদান করিয়াছেন।

(১) গত ৬.১২.১৯৯০ ইং তারিখ পর্যন্ড় সময়ে যে সকল সাজাপ্রাপ্ত কয়েদী প্রচলিত রেয়াতসহ মোট সাজার $\frac{১}{২}$ অংশ (অর্দ্ধাংশ) খাটিয়াছেন তাহাদের অবিলম্বে মুক্তিদান।

(২) ৬.১২.১৯৯০ ইং তারিখ পর্যন্ড় সময়ে যে সকল সাজাপ্রাপ্ত কয়েদী প্রচলিত রেয়াতসহ মোট সাজার $\frac{১}{২}$ অংশ (অর্দ্ধাংশ) খাটে নাই তাহারা মোট সাজার $\frac{১}{২}$ অংশ (অর্দ্ধাংশ) খাটার পর মুক্তি পাইবে।

(৩) ৬.১২.১৯৯০ ইং তারিখ পর্যন্ড় সময়ে যাবজ্জীবন দন্ডের মেয়াদ ২০ (বিশ) বৎসর বলিয়া গন্য করা হইবে।

(৪) ৬.১২.১৯৯০ ইং তারিখ পর্যন্ড় সময়ে যে সকল কয়েদীদের মেয়াদ ২ (দুই) বৎসর বা তাহার কম তাহারা অবিলম্বে মুক্তি পাইবে।

(৫) ৬.১২.১৯৯০ ইং তারিখ পর্যন্ড় সময়ে যে সকল কয়েদীর বয়স ১৬ বৎসর কিংবা তাহার কম তাহারা অবিলম্বে মুক্তি পাইবে।

(৬) যে সকল কয়েদীর বয়স ৬০ বৎসর কিংবা তাহার অধিক হইয়াছে এবং জেলা প্রশাসক, সিভিল সার্জন, উপ-মহাকারা পরিদর্শক, জেলা কারা তত্তাবধায়ক সমন্বয়ে গঠিত কমিটি কর্তৃক চিরস্হায়ীভাবে পংগু বা অথর্ব হিসাবে বিবেচনা করা হইবে তারা মুক্তি পাইবে।

(৭) যে সকল সাজাপ্রাপ্ত কয়েদী উপরোক্ত ক্ষমা ও বিশেষ রেয়াতের আওতাভুক্ত আহতদের মধ্যে যদি কেহ দন্ডাদেশের বিরুদ্ধে উচ্চতর আদালতে আপীল করিয়া থাকে তাহাদের ক্ষেত্রেও এই ক্ষমা ও বিশেষ রেয়াত প্রযোজ্য হইবে।

(৮) বাংলাদেশ আর্মী এ্যাক্ট/রেগুরেলশনের অধীনে সাজাপ্রাপ্ত প্রাক্তন সামরিক বাহিনীর সদস্যরা উপরোক্ত ক্ষমা ও বিশেষ রেয়াতের বহির্ভূত থাকিবে।

It was pointed out that the Acting President decided to give clemency to the prisoners of different jails. Then it said in exercise of

powers under section 101(1)((sic) 401), he passed the order. In sub-para (1) it was stated that the prisoners who had suffered half term till 6.12.1990 be released forthwith and those who have not suffered half term of the sentence would be released after undergoing half period of sentence. In sub-para (3), it was pointed out that till 6.12.1990 the prisoners who were sentenced to imprisonment for life shall be treated as twenty years in prison and from that date all prisoners who had suffered two (twenty) years or less would be released forthwith. It was also directed that the prisoners who were sixteen years old on that date would be released and the prisoners who were sixty years or more would be released as per recommendation of the Superintendent of Jail.

On a close reading of this order it appears that a general clemency has been granted by the

Acting President of all prisoners but we noticed that the order of clemency was passed by the Acting President and not by the government. Section 401 of the Code of Criminal Procedure empowers the government to remit whole or any part of the punishment of any prisoner. This power can be exercised by the government on the application of any prisoner. No general order of clemency can be given suomoto by the government. On the other hand, the President has power to grant pardon or remit or suspend or commute any sentence passed by any court or tribunal. This power of pardon ought to have been granted under article 49 of the constitution. The President can exercise wider power of elemency than a remission of sentence by the government.

Pardon and remission stand on different footings and give rise to different circumstances. A pardon affects both the

punishment prescribes for the offence and the guilt of the offender, that is to say, a full pardon may blot out the guilt itself, but in case of remission, the guilt of the offender is not affected nor is the sentence of the court affected in the sense that the offender concerned does not suffer incarceration for the entire period of the sentence. He is relieved from serving out a part of the sentence (K.M. Nanavati V. State of Maharashtra, AIR 1961 SC 112). The power to be exercised under section 401 of the Code of Criminal Procedure is the executive power vested in the government and by reducing the sentence the authority modifies the judicial sentence. This section confines the power of the government as to the suspension of the execution of the sentence or remission of the whole or any part of the punishment. A remission of sentence

does not mean acquittal of the accused (Ramdeo Chauhan V. State of Asam, AIR 2001 SC 2231).

Article 49 of the constitution provides that the President shall have power to grant pardon, reprieves and respites and to remit, suspend or commute any sentence passed by any court, tribunal or other authority. This power is independent of the power given by sections 401, 402 and 402A of the Code of Criminal Procedure. In respect of suspension and remission of sentence and commutation of punishment (State V. Eliadah McCord, (1997) 2BLC(AD)1), where the law prescribes a minimum sentence the court cannot reduce it say, section 25B of the Special Power's Act. But the President can do so under article 49 since the power comes from the constitution. It cannot be modified, abridged or diminished by Parliament (Panjab V. Jogindarsingh, AIR 1990 SC 1396).

However, in the parliamentary form of government, the President has to exercise this power on the advice of the Prime Minister (Kehar Singh V. India, AIR 1989 SC 653). Even then our constitution embodies generally the parliamentary and cabinet system of government of British Model and that the position of the President corresponds to that of the sovereign in the UK who is the formal head of government and must act on the advice of the Council of Ministers. The Parliament predominant position in legislation which the British House of Commons secured for itself by the Parliament Act, 1911. Since the President is taken as the head of the State and sovereign, the prerogative power exercises by the President under article 49 of the constitution is taken to be constitutional power and though this court exercises both judicial as well as constitutional power, the power exercises by the

President is higher than those of this court. Therefore, the President can grant clemency to a prisoner even after confirmation of death sentence confirmed by this court.

The power of pardon includes the power of granting general amnesty (Schwartz-Constitutional Law, 1979, P-198). Marshall, the Chief Justice of US held that a pardon is a private act of the grantor analogous to transfer of property or commercial transaction and acceptance by the guarantee is essential to its validity (US V. Wilson (1833) 7 Pet 150). In a case the defendant refused to answer the question before a Federal Grant Jury on the ground of self incrimination, the President offered him a full unconditional pardon but the defendant refused to accept the pardon. He was proceeded against in contempt on the ground that there was no possibility of his being prosecuted. The American Supreme Court

reversed the conviction for contempt holding on the basis of Marshall reasoning that the pardon offered had no validity for non-acceptance by the defendant (Bardick V. US, (1915) 236 US 79).

In another case the defendant was convicted of murder and sentenced to death. The President commuted the sentence to life imprisonment. The defendant challenged the legality of the order pleading that he did not accept the commutation. The Supreme Court did not overrule Burdick (Ibid) but rejected the contention of the defendant holding that Burdick's reasoning was not applicable in the case of commutation (Biddle V. Perovich, (1927) 274 US 480). In A.G. of Trinidad and Tobago V. Phillip, (1995) 1 AC 396, the Judicial Committee of the Privy Council was of the view that pardon is an executive act of the State and should not be treated as being analogous to a contract and is not dependent upon

the acceptance subject of the pardon. A pardon would only relate to offences already committed and do not extent to offences not yet committed.

In Bangladesh V. Kazi Shaziruddin, (2007) 15 BLT (AD) 95, the accused was convicted for misconduct under Act II of 1947 and sentenced to imprisonment with fine and confiscation of his house. His wife prayed for pardon and the President remitted the unexpired portion of the sentence conditionally. After release the accused prayed for return of his house upon payment of taka fifty lac which having been refused, moved the High Court Division. The High Court Division declared that the condition attached by the government at the time of remission of sentence that he would not be entitled to claim his house was illegal and declared that he was entitled to get back his house. This court set aside the judgment holding that (a) a pardon may be

conditional or unconditional, (b) the power exercised by the President is not justiceable and (c) the exercise of power under article 49 is not subject to any constitutional or judicial restraints except that the power cannot be exercised to enhance the sentence.

In the order made by the Acting President on 14.1.1991, similar mistake was committed by the government pointing out in sub-paragraph (3) of paragraph 1 that up to 6.12.1990, the life imprisonment prisoners shall be taken as twenty years. Nowhere in the Penal Code there is any provision that the life imprisonment shall be taken as twenty years imprisonment.

Lord Macaulay, in the introduction to the Penal Code pointed out that a sentence of transportation is one 'likely to be regarded with particular terror by Hindoos (Hindus), largely because of their dread of crossing 'the black water', the loss of caste which a

journey overseas entails and of the uncertainty whether they will ever see their homes again.' Therefore, there is no doubt that the sentence has been preserved for its deterrent effect and because in certain cases it may be both useful and desirable to send convicts to the islands. After the partition a convict sent to penal servitude serve his sentence in local prison.

In determining the point in issue the first provision to notice in this regard is section 368(2) of the Code of Criminal Procedure, which provides "(2) No sentence of transportation/ (imprisonment) shall specify the place to which the persons sentenced is to be transported." The government may send any prisoner who is sentenced to life imprisonment in the District Jail in which distinct he is convicted or to any other central jail as it deems fit for its convenience. The next law for our consideration is the Prisoners Act, 1900 as amended in 1903. Section 29 provides as under:

"1 The Government may by general or special order, provide for the removal of any person confined in a prison –

(a) under sentence of death, or

(b) under, or in lieu of, a sentence of imprisonment or transportation, or

(c) in default of payment of fine, or

(d) in default of giving security for keeping the peace or for maintaining good behaviour, to any other prison in Bangladesh.

2(a) subject to the orders, and under the control of the Government the Inspector-General of Prisons may, in like manner, provide for the removal of any prisoner confined as aforesaid in a prison in Bangladesh'. So both the government and the Inspector General have power to remove a prisoner from one prison to another. So, it is not necessary that a person sentenced to imprisonment for life must always be sent to Andamans. He may be kept to local jails under section 368 read with the Jail Code. Now the

next question is whether section 57 of the Penal Code prescribes a period of thirty years in calculating the period of a life sentence prisoner. This section reads as under:

> "In calculating fractions of terms of punishment imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for thirty years."

A plain reading of this provision does not show that life imprisonment shall be for thirty years. It says, in calculating the fractions of terms of punishment, that is, it is limited to calculating the fractions of terms of imprisonment and while calculating fractions, life imprisonment is to be reckoned as equivalent to imprisonment for thirty years. It does not say that life imprisonment means imprisonment for thirty years for all purposes. It cannot be held or meant to make life imprisonment is equivalent to imprisonment for thirty years for all purposes. This section is limited in its scope as

above. Therefore, under no stretch of imagination it can be said that life imprisonment means thirty years in total period in prison to be served by a prisoner. It means a sentence of imprisonment for whole of the remaining period of the convicted persons natural life.

Section 57 of the Penal Code is only for calculating fractions of terms of punishment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for thirty years for the specific purpose mentioned therein. (Kartar Singh V. State of Haryana, 1983 SC (CR) R.150) and Ratan Singh). Similar views have been taken in Dalbir Singh V. State of Panjab, (1979) 3 SCC 745, Subash Chander V. Krishan Lal, (2001) 4 SCC 458, Rajendra Prasad V. State of U.P., (1979) 3SCC 646, State of M.P. V. Ratan Singh, (1976)3 SCC 470, Gopal Vinayak Godse (Supra). In Shri Bhagwan V. State of Rajasthan, (2001) 6 SCC 296, it was observed that the rules framed under the Prisons Act or under the Jail Manual

do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. It approved the earlier view that the question of remissions of the entire sentence or a part of it lies within the exclusive domain of the appropriate government under section 401 of the Code of Criminal Procedure and neither section 57 of the Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Penal Code.

The words 'imprisonment for life' have been substituted for the words 'transportation for life' in 1985. The 'transportation' in the context used 'transportation for life' or 'transportation' for a term only, that is, transportation for life or transportation for a shorter period. So by mere substitution of the word 'transportation' would not change the period of punishment. As a form of

punishment imprisonment for life shall remain distinct from simple imprisonment. Except the meaning of the word 'life' no definition of 'imprisonment for life' is used in section 53 of the Penal Code. Penal Code is totally silent regarding the duration of 'transportation for life'. This ambiguity has been clarified by insertion of section 53A in the Penal Code by Ordinance No.XLI of 1985. Section 53A reads thus:

(1) Subject to the provisions of sub-section (2), any reference to "transportation for life" in any other law for the time being in force shall be construed as a reference to "imprisonment for life".

(2) Any reference to transportation for a term or to transportation for a shorter term (by whatever name called) in any other law for the time being in force shall be deemed to have been omitted.

(3) Any reference to "transportation" in any other law for the time being in force shall –

(a) if the expression means transportation for life, be construed as a reference to imprisonment for life;

(b) if the expression means transportation for any shorter term, be deemed to have been omitted.

We cannot gather the intention of the Legislature since no preamble is mentioned in the Ordinance and secondly, by this Ordinance a significant change has been made without obtaining any opinion of the Law Commission or if there be any opinion, it has not been published anywhere. But it is seen that this section has been couched in verbatim language of section 53A of the Indian Penal Code added by Act XXVI of 1955. But the insertion of section 53A makes it clear that the expression is

used to be presumed that it is 'imprisonment for cessation of the natural life' of the prisoner.

Now the question is whether a prisoner sentenced to imprisonment for life can be released after suffering a period of thirty years in prison in view of section 57 of the Penal Code. The point in controversy is no longer *res-integra* and it has been answered by the Judicial Committee of the Privy Council and the views have been approved by the Supreme Court of India. In Kishori Lal V. Emperor, AIR 1945 PC 64 the Privy Council expressed the tenor and meaning of section 57 as under:

> "So, in India, a prisoner sentenced to transportation may be sent to the Andamans or may be kept in one of the jails in India appointed for transportation prisoners where he will be dealt with in the same manner as a prisoner sentenced to rigorous imprisonment. The appellant was lawfully sentenced to transportation for life; at the

> time when he made his application to Monroe,J. He was confined in a prison which had been appointed as a place to which prisoners so sentenced might be sent. Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application and it was therefore rightly dismissed but, in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years or that the convict is necessarily entitled to remission." (emphasis supplied).

The above view have fully been endorsed by a constitutional Bench of the Supreme Court in Gopal Vinayak Godse V. State of Maharashtra, AIR 1961 SC 600. The question in that case was whether the

prisoner sentenced to life imprisonment was entitled to set at liberty on the ground that he had earned remissions of 2963 days, the aggregate would exceed twenty years, and even if only the State remission was added to it, it would exceed fifteen years. The State took the plea that the remissions earned did not entitle him to be released and that his release would be considered after he completed fifteen years actual imprisonment. The Court observed:

> 'As the sentence of transportation for life or its equivalent, the life imprisonment, is one of indefinite duration, the remission so earned do not in practice help a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable the appropriate government to remit the sentence under S.401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned.

> The question of remission is exclusively within the province of the appropriate government...'

Thereafter in Jagmohan Singh V. State of U.P., (1973) 1 SCC 20, the court observed:

> 'In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.'

In that case the accused Jagmohan questioned the sentence of death which has been confirmed by the High Court on the ground that the sentence of death is violative to article 21 of the constitution. The court while holding the view that 'death sentence imposed after trial in accordance with the procedure established by law is not unconstitutional' and that 'the court is primarily concerned with the facts and

circumstances, whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance with the provisions of the Indian Evidence Act in a trial regulated by the Cr.P.C.'

In pursuance of the above observations the government added section 433A of the Code of Criminal Procedure which reads as under:

> '433A - Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.'

This section restricts on the power of remissions or commutation in certain cases. After the introduction of this provision, no life sentence prisoner can be released from prison unless he had served out at least fourteen years. There is no corresponding law similar to section 433A in our Code of Criminal Procedure. Therefore, the executives exercised its power on the question of remission of sentence in respect of a life convict prisoners whimsically without any sanction of law.

The Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer, but merely amount to administrative instructions regarding various remissions to be given to a prisoner from time to time in accordance with the Rules. The question of remissions of the entire sentence or a part of it lies within the exclusive domain of the government under section 401 of the Code of Criminal Procedure and neither section 57 of the Penal Code nor Rules

can stultify the effect of the sentence of life imprisonment given by the court. As it is not possible to fix a particular period of the prisoner's death so any remission given under the Rules could not be regarded as a substitute for a sentence of life. In India it was observed that the prisoner would not be entitled to be released as of right on completing the terms of twenty years including the remissions. (State of Madhya Pradesh V. Ratan Singh, AIR 1976 S.C. 1552). In Ratan Singh the court concluded its opinion approving earlier view observing that 'this court has clearly held that a sentence for life would ensure till the lifetime of the accused...'

A sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death and remissions given under the Rules could not be regarded as a substitute for a sentence of transportation for life. It was clearly observed that

"though under the relevant rules a sentence for imprisonment for life is equated with the definite period of twenty years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period." We find no reason to depart from the same because the above views were taken with approval of the views taken in Pandit Kishori Lal (supra).

A pertinent question may arise, if the contour of the meaning of imprisonment for life is as such, what is the object and purpose of mentioning the words 'as equivalent to rigorous imprisonment for thirty years' in section 57 of the Penal Code. The object and purpose of this section is for working out the fractions of indefinite imprisonment term fixed for the principal offence. Say, sections 65, 116, 119, 120, 511 and some other about forty plus

sections of the Penal Code which fix the term of imprisonment thereunder as a fraction of the maximum fixed for the principal offence (Akhok Kumar V. India, (1991) 3 SCC 498 and Swami Shraddananda (supra)).

Now the question is whether if prisoner's sentence of imprisonment for life is till the expiry of the natural life, the State has power to remit the sentence after the expiry of twenty years in prison in view of section 55 of the Penal Code. This question has been resolved in Subash Chander V. Krishanlal (2001) 4 SCC 458; Shri Bahgwan V. State of Rajasthan, (2001) 6 SCC 296; Prakash Dhawal Khaimar V. State of Maharashtra, (2002) 2 SCC 35; Ram Anup Singh V. State of Bihar (2002) 6 SCC 686; Mohd. Munna V. Union of India, (2005) 7 SCC 417; Nazir Khan V. State of Delhi, 2003) 8 SCC 461. In some cases directions were given that the convicts must not be released from the prison for the rest of his life or before actually serving out the term of twenty years,

as the case may be, mainly on two reasons. One is that an imprisonment for life, in terms of section 53 read with section 45 of the Penal Code meant imprisonment for the rest of life of the prisoner. Secondly, a convict undergoing life imprisonment has no right to claim remission. In those cases reliance was placed upon the views taken in Gopal Vinayak Godse V. State of Maharashtra, AIR 1961 S.C.66; and Mohd. Munna V. Union of India, (2005) 7 SCC 417.

In Subash Chander V. Krishan Lal, (2001) 4 SCC 458, the court after consideration of the case of Privy Council and other decisions observed as under:

> “Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for

> twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

It also noticed the case of State of M.P. V. Ratan Singh, (1976)3 SCC 470, wherein it was observed that "A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under section 401 of the Code of Criminal Procedure."

In Jayawant Dattatraya Suryarao V. State of Maharashtra, (2001) 10 SCC 109, the Supreme Court

while maintaining the conviction of accused Subhashsingh Shobhnathsingh Thakur modified the sentence of death to imprisonment for life till 'rest of life'. It noticed the case of Subash Chander V. Krishan Lal, (2001) 4 SCC 458, wherein it was observed that 'a sentence of imprisonment for life does not automatically expire at the end of twenty years including the remissions'.

In Mulla V. State of UP, (2010) 2 SCR 633, similar views have been taken. The question in that case was whether a remission earned by an accused in respect of a sentence of imprisonment for life can be reduced to fourteen years under section 433A of the Code of Criminal Procedure. In that case the High Court commuted the sentence of death. The court relying the case of Ramraj V. State of Chhattisgarh, 2009 (14) SCALE 533 approved the view that a minimum sentence of 14 years under section 433A could not be acceded to observing that 'we are incomplete agreement with the above dictum of this court. It is

open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will be suffice the offence committed." Thereafter, considering the mitigating circumstances the court commuted the sentence of death to life sentence in paragraph 60 with a note that 'the punishment of life sentence in the case must extend to their full life subject to any remission by the Government for good reasons.'

In Union of India v. Sree Horan, (2016) 7 SCC 1, a five member constitutional Bench was constituted to consider seven points of them the point no. (i) and (ii) are directly in issue in this appeal. The point No.(i) is 'whether imprisonment for life meant imprisonment for rest of the life of the prisoner and the point No.(ii) is 'whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond

grant of remission'. In that case the writ petitioner has challenged an order of Tamil Nadu State Government proposing to remit the sentence of life imprisonment of the seven accused who were convicted in Rajib Gandhi assassination case. The first three accused were sentenced to death but the Supreme Court commuted the sentence. Immediately after the remission of the sentence was issued the impugned letter was issued by the State Government against which, the writ petition was filed challenging the said order of remission of sentence. '....imprisonment for life in terms of section 53 read with section 45 of the Penal Code only means imprisonment for the rest of the life of the convict', the court observed. 'no suomoto power of remission is exercisable under section 432(1) of the Code of Criminal Procedure and that a special category of sentence, instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that

category beyond application of remission is well founded and we answer the said question in affirmative. It can only be initiated based on an application of the person can be convicted ……..”

In that case the court had to consider catena of decisions namely Swamy Shraddanada V. State of Karnataka, (2008) 13 SCC 767; Gopal Vinayak Godse V. State of Maharashtra (Ibid); Maru Ram V. Union of India, (1981) 1 SCC 107; Sree Sambha Ji Krishan Ji V. State of Maharashtra, (1974) 1 SCC 196; State of M.P. V. Ratan Singh, (1976) 3 SCC 470; State of M.P. V. Ratan Singh, (1976) 3 SCC 477; Ranjit Singh V. UT of Chandigarh, (1984) 1 SCC 31; Ashok Kumar V. Union of India, (1991) 3 SCC 498; Bhagirath V. Delhi Admn., (1985) 2 SCC 580; Subash Chander V. Krishan Lal, (2001) 4 SCC 458; Kishori Lal V. King Emperor (Ibid); Zahid Hussein V. State of W.B., (2001) 3 SCC 750 holding the above views. It was further held that when an accused convict has been sentenced to death penalty and his sentence is substituted to

imprisonment for life, such offender is not entitled to remission and in that connection, it has approved the views taken in Swamy Shraddananda (supra). A prisoner sentenced to imprisonment for life can claim remission under article 72 which provided that the President shall have the power to grant pardons, reprieves, respites or remission of punishment etc. corresponding to article 49 of our constitution.

In the above decisions the court observed that the question of remission of the entire sentence or a part of it lies within the exclusive domain of appropriate government under section 401 of the Code of Criminal Procedure. The remission rules are special laws but section 433A of the Code of Criminal Procedure (India) is specific, explicit, definite provision dealing with a particular situation or a narrow class of cases, as distinguished from the general rule of cases covered by section 432 of the said Code.

Section 432 corresponds sections 401 and 403(3) of our Code of Criminal Procedure. It was further held that remissions in pursuance of the Rules framed under Prisons Act or Jail Manual do not affect the total period which the prisoner has to undergo, inasmuch as, such Rules merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the Rules.

A prisoner sentenced to imprisonment for life has no right to claim remissions, inasmuch as, the remissions are available to a prisoner in the nature of privilege. After conviction a prisoner cannot claim any right of remission other than a right of appeal and in the appeal he can claim acquittal or the alteration of the conviction or sentence which is permissible by law. In case of murder if the convict’s case covers any of the exceptions enumerated in section 300, his

conviction may be converted to part I or part II of section 304 or he may be acquitted. Except in those three circumstances, a convict undergoing life sentence cannot claim any other right.

Section 53 of the Penal Code does not in any way limit the sentence of imprisonment for life. Similarly section 57 also does not in any way limit the sentence of imprisonment for life to a term of thirty years. In Shriharan (supra) on consideration of Prisons Acts and Rules vis-a-vis relevant provisions of the Code of Criminal Procedure and the Penal Code the Supreme Court held that the days of remissions earned by a prisoner are added to the period of his actual imprisonment to make up the term of sentence awarded by the court. It being the position, in a case of life convict if no order or premature release is passed there can be no release by the mere lapse of time since a life sentence is for

the rest of the life. It further held that the life convicts are granted remissions and release from the prison on completing fourteen years time without any sound legal basis. The remissions are allowed to life convicts in the most mechanical manner without any sociological and psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society.

When an accused comes to the court carrying a death sentence awarded by the trial court and confirmed by the High Court, the court may find 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 emphasized 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. These are the substance of observations of the court.

With the above findings the court was of the view 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. The formalization 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 the rare cases …….there is a good and strong basis for the court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be', the court concluded its opinion.

In this case the court has considered the ethical question to the effect that when court found that in a rarest of the rare cases a death sentence is awarded and upon scrutiny of the materials on record if the sentence is commuted to life imprisonment, fourteen years imprisonment as inserted by section 433A is grossly disproportionate and inadequate. It undermined the courts power in exercising its discretionary power of awarding the sentence and that cannot be countenanced, and therefore, the convict cannot be released after suffering fourteen or some more years in jail and in those cases, the convict must suffer in prison till the rest of his life.

In Sriharan (supra) the court exhaustively dealt with the issue. The court was conscious on the question as to whether if it upholds the views in Sharaddananda, would it violate the statutory provisions prescribing the extent of

punishment provided in the Penal Code. In concurring with the above view, it observed that the courts while 'ordering the punishment prescribed in the Penal Code only seek to ensure that the imposition of punishment is commensurate to the nature of the crime committed and in that process no injustice is caused either to the victim or the accused who having committed the crime is bound to undergo the required punishment (Para 92). In that respect the court expressed its opinion that 'the ratio laid down in Swami Sharaddananda that a special category of sentence beyond the application of remission is well founded and we answer the said question in the affirmative'. (para 106)

Now the question is whether the government can commute the sentence of a prisoner who is sentenced life imprisonment under section 401 of the Code of Criminal Procedure. In prescribing

punishment in respect of any offence is the function of the legislature and not of the courts. There is no doubt about it. However, the court has jurisdiction to interfere when the punishment prescribes is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency (Bikrom Singh V. Union of India, (2015) 9 SCC 502 = AIR 2000 SC 3577). Similar views have been expressed by this court in Bangladesh Legal Aid and Services Trust V. Bangladesh, 67 DLR(AD)185.

This court held that the court has given wide discretionary power in awarding sentence. The object of giving such discretionary power to the court is obvious, that is to say, if a grievous hurt is caused with a sharp cutting weapon which caused fracture on a finger, though the offence is grievous in nature, the court will not give

the same sentence in respect of a case in which a grievous hurt like gouging of eyes of a victim is caused or any grievous hurt is caused on other vital organ of the victim with a sharp weapon causing permanent impairing of the powers of any member joint. It further held that the Legislature cannot make relevant circumstances irrelevant, deprive the court of its legitimate jurisdiction to exercise its discretion not to impose death sentence in appropriate cases. Determination of the appropriate measures of punishment is judicial and not executive function. The court will enumerate the relevant facts and weight to be given to them having regard to the situation of the case. It further held that under the prevailing criminal justice system when the legislature has defined an offence with sufficient clarity and prescribed the maximum punishment, a wide discretion in the

matter of fixing degree of punishment should be allowed to the court.

The policy of the law is giving a very wide discretion in the matter of punishment to the court. It has further held that a provision of law which deprive the court to use its beneficial discretion in a matter of life or death, without regard to the circumstance in which the offence was committed, and therefore, without regard to the gravity of the offence cannot but be regarded as harsh, unfair and oppressive. "Determination of appropriate measures of punishment is judicial and not executive functions. The court will enunciate the relevant facts to be considered and weight to be given to them having regard to the situation of the case" this court observed.

This court takes judicial notice that the pardon granted to life convicts by the government in the most mechanical manner without any

sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. The government exercise the power of remission is executive power while the court gives punishment to an accused is a judicial power and this executive power shall not prevail over the judicial power. This is evident from the provisions of the Code of Criminal Procedure and the Penal Code.

There is no doubt that the Code of Criminal Procedure is a procedural law and the Penal Code is a substantive law because it affects the right of a person. Under the procedural law the court after awarding a sentence of death submit the record of the proceeding to the High Court Division for confirmation. The High Court Division may confirm the sentence or pass any other sentence warranted by law. It may also

annul the conviction or may acquit the accused under section 376. If a death sentence is confirmed or a sentence of life imprisonment is imposed by the High Court Division, the accused has a right of appeal in this court under article 103(2)(b) of the constitution. This court exercises the constitutional power in that case. Therefore, a sentence of death cannot be confirmed under section 376 of the Code of Criminal Procedure unless it is reconfirmed by this court under article 103(2) of the constitution. Previously the High Court Division had power to confirm the sentence, but after the amendment of article 103 the word 'confirm' used in sections 374 and 376 *protanto* repealed by article 103(2)(b) of the constitution.

To make the point more clear, the executive and the judiciary exercise distinct powers and play distinctive roles. The executive exercises

power by the State is in a nature of subordinate role, while a judicial decision is given by a court after analysis having regard to the proportionality of the crime committed. If it decides that the offender deserves to be punished with a sentence of death or in exceptional case his sentence of death be commuted to life imprisonment, this power cannot be exercised by the executive. This power is exercised by the court under the constitution, Code of Criminal Procedure and the Penal Code. It is, therefore, expected from the society that this judicial power exercised by the court should not be interfered with by the executive government in exercise of its power of remission under section 401 of the Code of Criminal Procedure.

Similarly the court of sessions within the meaning of section 6(1) of the Code of Criminal Procedure authorises to award a sentence of death

or imprisonment for life in respect of an offence punishable under section 120B read with section 302 of the Penal Code. There are other corresponding provisions in the special laws empowering different tribunals to award capital sentence and imprisonment for life. The High Court Division has exercised the power under the general as well as substantive law.

This court while commuting the sentence of death in criminal appeal Nos.39-40 of 2013 directed that the accused shall suffer imprisonment till the rest of life. In the latter case, this court while commuting the sentence observed that the sentence of imprisonment for rest of life would be 'proportionate to the gravity of the crimes' committed by him. Though this court did not mention sections 45 and 53, it made the above direction keeping those provisions in consideration.

Section 35A of the Code of Criminal Procedure is not applicable in case of an offence punishable with death or imprisonment for life. An accused person cannot claim the deduction of the period in custody prior to the conviction as of right. It is a discretionary power of the court. It cannot be applicable in respect of an offence which is punishable with death. Though the word ‘only’ is used in section 35A, the legislature without considering section 401 of the Code of Criminal Procedure and section 53 of the Penal Code has inserted the word ‘only’ but the use of word ‘only’ will not make any difference since under the scheme of the prevailing laws any remission/reduction of sentence has been reserved to the government only.

More so, as observed above, if the sentence of imprisonment for life is treated as imprisonment for the whole of the remaining period of the convicted person’s natural life, how the court will deduct from the sentence of imprisonment, the total period the

accused has suffered in custody before trial. This section 35A is almost similar to section 428 of the Indian Code of Criminal Procedure. The Supreme Court held that the benefit of set-off under section 428 is not available to life convicts. (Katar Singh V. State of Haryana, AIR 1982 S.C. 1439). We would like to observe here that the draftsmen or the Legislature without understanding the correct meaning and/or the tenor of sections 45, 53 and 57 of the Penal Code substituted the words 'rigorous imprisonment for thirty years' for the words 'rigorous imprisonment for twenty years' in section 57 by Ordinance No.XLI of 1985 presuming that the period of life sentence was twenty years, and increased it to 'thirty years'. The Legislature should keep in mind that the Law Commission of British India took 36 years in finalising the Penal Code. It should not amend any provision without consultation with the experts dealing with the subject lest ends of justice is not defeated.

From the above discussions this court hold that the court while exercising the power in awarding punishment prescribed in the Penal Code under legal obligation see that the imposition of punishment is commensurate to the nature of the crime committed by the offender and in that process no injustice is caused either to the victim or to the accused who has committed the crime. This exercise of power by the court is a judicial power. However, the executive power to be exercised by the President under article 49 pardoning an offender even after confirmation of death sentence or confirmation of life imprisonment can be exercised in appropriate case. This judicial power cannot be curtailed and/or interfered with by an action of the executive by exercising executive power either under the provisions of the Jail Code or under section 401 of the Code of Criminal Procedure. If

on consideration of the nature of offence committed by the offender and taking consideration of the interest of the victim and the accused, commutes the sentence of death till life by this court or the High Court Division with findings that such imposition of punishment is commensurate to the nature of the crime committed and in that process no injustice is caused to the victim and that the sentence of twenty or thirty years would be grossly inadequate and disproportionate, this category of cases would be beyond application of remission, because while imposing a modified punishment providing for any specific term of incarceration or till the end of convicts life as the alternative to death sentence can only be exercised by the High Court Division and this court and not by any other inferior tribunal or

the executive. Accordingly, we conclude our opinion as under:-

1) A sentence of death awarded to an offender under section 302 of the Penal Code is the rule and life imprisonment is an exception. The court may commute death sentence to life imprisonment of a prisoner on extenuating circumstances and in that case it must assign reasons therefor.

2) Life imprisonment within the meaning of section 53 read with section 45 of the Penal Code means imprisonment for rest of the life of the convict.

3) If the High Court Division or this court commutes a sentence of death to imprisonment for life and direct that the prisoner shall have to suffer rest of his natural life, such type of

cases would be beyond the application of remission.

4) Section 57 of the Penal Code is only for the purpose of working out the fractions of the maximum sentence fixed for the principal offence, that is to say, if such provision is not made, it would have been impossible to work out the fractions of an indefinite term.

5) Remission contained in Chapter XXI of the Bengal Jail Code, volume 1(Part I) are administrative instructions regarding various remissions.

6) If an offender pleads guilty at the initial stage of the trial of the case in respect of an offence punishable with death or imprisonment for life, the court/tribunal shall take lenient

view on the question of awarding sentence, but in such cases, the court shall ascertain as to whether the offender pleading guilty upon understanding the offence charged with against him before accepting such plea. Provided however that the court is not bound to accept all pleas of guilty and award the minimum sentence.

7) In exercise of power under article 49 of the constitution the President has power to grant pardon, reprieves and respite and to remit, suspend or commute any sentence even after the commutation of sentence by this court or the High Court Division.

The appeal, is therefore, dismissed with commutation of the sentence of the appellants to imprisonment for rest of the life. Let a copy of this

judgment be communicated to the Secretary, Ministry of Home Affairs and the Inspector General of Prisons for information and taking steps in respect of life sentence prisoners.

CJ.

J.

J.

J.

***The* 14th February, 2017**.

Md Mahbub Hossain

APPROVED FOR REPORTING