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STATE OF RAJASTHAN

v.

MOHAMMAD MUSLIM TAGALA  
(Criminal Appeal No. 2184 of 2014)

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OCTOBER 13, 2014

[**RANJANA PRAKASH DESAI AND N.V. RAMANA, JJ.**]

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*Code of Criminal Procedure, 1973: s.433 – Power of appropriate government to commute sentence – Conviction by trial court u/ss.363, 366A, 376 – Respondent-convict's case not argued on merits in High Court – Only plea on behalf of convict that the concerned authorities be directed to give benefit of s.433 – Public Prosecutor did not oppose the said prayer – High Court directed concerned authorities to give benefit of s.433 to the convict and dispose of the appeal – Challenged on the ground that the offence committed by the convict was grave and therefore, High Court erred in giving a direction to the authorities to give benefit of s.433 to the convict – Held: When the appropriate Government commutes the sentence, it does so in exercise of its sovereign powers – The court cannot direct the appropriate Government to exercise its sovereign powers – Court can merely give a direction to the appropriate Government to consider the case for commutation of sentence and nothing more – In the instant case, the benefit of s.433 was not given and the convict was released from jail after serving the sentence imposed on him – Since no steps were taken by the concerned authorities to give the respondent benefit u/s.433, the appeal has actually become infructuous – The casual manner in which Public Prosecutor made concession in High Court condemned – Judicial deprecation.*

**Disposing of the appeal as infructuous, the Court**

**HELD: 1. The High Court erred in giving a direction**

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to the State Government to commute the sentence of the respondent. It could have only directed the State Government to consider the respondent's case for commutation of sentence. Unfortunately, the High Court merely noted the request made by the counsel for the respondent and concession made by the State counsel. If the High Court felt that the prosecution case was extremely weak and the respondent deserved to be acquitted, it should have discussed the evidence and acquitted him. But, it could not have adopted such a course. The manner in which the Public Prosecutor made a concession in the High Court is condemned. Firstly, the offence is grave and in such grave offence, the Public Prosecutor ought not to have made a concession that the court should direct the Government to commute the sentence. Besides, the Public Prosecutor made a concession without examining the legal position. The Public Prosecutor plays a very important role in a criminal case. It is distressing that in such a serious case, the Public Prosecutor showed such a casual approach. [Paras 12, 13] [908-D-H; 909-A-B]

*Delhi Administration (now NCT of Delhi) v. Manohar Lal* (2002) 7 SCC 222; 2002 (2) Suppl. SCR 1; *State of Punjab v. Kesar Singh* (1996) 5 SCC 495; 1996 (3) Suppl. SCR 787; *State (Govt. of NCT of Delhi) v. Prem Raj* (2003) 7 SCC 121; 2003 (2) Suppl. SCR 235 – relied on.

**Case Law Reference:**

2002 (2) Suppl. SCR 1	relied on	Para 10
1996 (3) Suppl. SCR 787	relied on	Para 10
2003 (2) Suppl. SCR 235	relied on	Para 11

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal  
No. 2184 of 2014.

A From the Judgment and Order dated 18.07.2013 in SBCRA No. 639 of 2008 of the High Court of Rajasthan at Jaipur.

Milind Kumar for the Appellant.

B John Mathew (a.c.) for the Respondent.

The Judgment of the Court was delivered by

C (SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

D 2. The respondent was tried along with two others viz. Sabena and Mohd. Daud by the Additional District & Sessions Judge (Fast Track), Sikkar, Rajasthan in Sessions Case No.24 of 2007 for offences punishable under Sections 363, 366, 376, 307 read with Section 109 of the Indian Penal Code (“the IPC”). Learned Sessions Judge, Sikkar by judgment and order dated 11/6/2008 acquitted Sabena and Mohd. Daud, of all the charges. The respondent was convicted for offence punishable under Section 363 of the IPC and sentenced to undergo RI for three years and to pay fine of Rs.1,000/-, in default, to undergo SI for six months. He was also convicted under Section 366A of the IPC and sentenced to suffer RI for five years and to pay a fine of Rs.2,000/-, in default, to undergo SI for six months. He was also convicted for offence punishable under Section 376 of the IPC and sentenced to undergo RI for seven years and to pay fine of Rs.5,000/-, in default, to undergo SI for six months. The substantive sentences were ordered to run concurrently.

G 3. Being aggrieved by the said judgment and order, the respondent filed appeal in the Rajasthan High Court. It is noticed from the impugned order that in the High Court, counsel for the respondent did not argue the case on merits. He only requested the Court that the concerned authorities may be directed to give benefit of Section 433 of the Criminal H Procedure Code (“the Code”) to the respondent. Learned

Public Prosecutor appearing for the State of Rajasthan did not oppose the said prayer and this fact was recorded by the High Court in the impugned order. The High Court then gave a direction to the concerned authorities to give the appellant benefit of Section 433 of the Code and disposed of the appeal. The relevant portion of the order could be quoted:

*"Having heard the learned counsel for the parties and carefully perused the relevant material made available to me including the impugned judgment, the concerned authorities are directed to give the benefit of Section 433 Cr.P.C. to the accused appellant in accordance with law."*

4. Being aggrieved by this order, the State of Rajasthan has filed the present appeal.

5. On 8/5/2014, this Court asked learned counsel for the State of Rajasthan whether the Public Prosecutor has really not opposed the request made by the respondent's counsel that the concerned authorities be directed to give the benefit of Section 433 of the Code to the respondent. Counsel made a statement that the Public Prosecutor had not made such a statement in the High Court. We, therefore, directed that an affidavit to that effect be filed. The concerned Public Prosecutor has, however, not filed any affidavit.

6. As directed by this Court, the respondent has been served through ASI Prem Singh, P.O. Kotwali, Sikkar, Rajasthan. ASI Prem Singh has filed an affidavit to that effect. Proof of service of notice is annexed to the said affidavit. Despite service, the respondent has chosen not to appear in person or through a pleader. Hence, on 17/9/2014, this Court directed the Registry of this Court to appoint a lawyer for the respondent. Accordingly, Mr. John Mathew, Advocate, has been appointed by the Registry of this Court and he has ably assisted us today.

A 7. The appellant-State has challenged the impugned order  
on the ground that the offence committed by the respondent was  
grave and, therefore, the High Court erred in giving a direction  
to the authorities to give benefit of Section 433 of the Code to  
B the respondent. It is, however, not stated in the appeal memo  
that the Public Prosecutor did not concede in the High Court.  
This statement was made only in this Court. It must also be  
noted, at the outset, that the respondent has undergone seven  
years' imprisonment and has been released from custody. This  
statement has been made by counsel for the appellant-State  
C and, in support of his submission, he has tendered in this Court  
a letter addressed by the Superintendent of Bikaner Central Jail  
to the Additional Superintendent of Police, Sikkar. Counsel  
submitted that though the High Court gave a direction to the  
concerned authorities to give the respondent benefit of  
D commutation of sentence under Section 433 of the Code, the  
said benefit was not given. Since the respondent has been  
released from jail after serving the sentence imposed on him  
and no steps were taken by the concerned authorities pursuant  
to the direction given by the High Court, to give the respondent  
E benefit under Section 433 of the Code, the present appeal has  
actually become infructuous. However, it is necessary to make  
certain observations before disposing of this appeal as  
infructuous.

F 8. Section 433 of the Code pertains to power of the  
appropriate Government to commute the sentence without the  
consent of the person sentenced. It reads thus:

G *"433. Power to commute sentence. - The  
appropriate Government may, without the consent of the  
person sentenced, commute-*

*(a) a sentence of death, for any other punishment  
provided by the Indian Penal Code (45 of 1860);*

H *(b) a sentence of imprisonment for life, for*

*imprisonment for a term not exceeding fourteen years or for fine;* A

*(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;* B

*(d) a sentence of simple imprisonment, for fine.”*

9. When the appropriate Government commutes the sentence, it does so in exercise of its sovereign powers. The court cannot direct the appropriate Government to exercise its sovereign powers. The Court can merely give a direction to the appropriate Government to consider the case for commutation of sentence and nothing more. This legal position is no more *res integra*. C

10. In *Delhi Administration (now NCT of Delhi) v. Manohar Lal*<sup>1</sup>, this Court stated that the exercise of power under Section 433 of the Code was an executive discretion. In *State of Punjab v. Kesar Singh*<sup>2</sup>, this Court clarified the position as under: D

*“The mandate of Section 433 CrPC enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts. ... That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High* E F G

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1. (2002) 7 SCC 222.

2. (1996) 5 SCC 495.

A *Court cannot, therefore, be sustained and is hereby set aside."*

B 11. In *State (Govt. of NCT of Delhi) v. Prem Raj*<sup>3</sup>, this Court referred to relevant portion of 41st Report of the Law Commission and observed that the powers of commutation exclusively vest with the appropriate Government. At the same time, these powers have to be exercised by the Government reasonably and rationally keeping in view the reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest.

D 12. The upshot of this discussion is that the High Court erred in giving a direction to the State Government to commute the sentence of the respondent. It could have only directed the State Government to consider the respondent's case for commutation of sentence. In any case, assuming the High Court could have given such a direction, since it was dealing with a conviction under Section 376 of the IPC, it should have noted the extra-ordinary circumstances, if any, which persuaded it to give such a direction. Unfortunately, the High Court merely noted the request made by the counsel for the respondent and concession made by the State counsel. If the High Court felt that the prosecution case was extremely weak and the respondent deserved to be acquitted, it should have discussed the evidence and acquitted him. But, it could not have adopted such a course.

G 13. Before closing, we must express our extreme displeasure about the manner in which the Public Prosecutor made a concession in the High Court. Firstly, the offence is grave and in such grave offence, the Public Prosecutor ought not to have made a concession that the court should direct the Government to commute the sentence. Besides, the Public

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 3. (2003) 7 SCC 121.

STATE OF RAJASTHAN v. MOHAMMAD MUSLIM 909  
TAGALA [RANJANA PRAKASH DESAI, J.]

Prosecutor made a concession without examining the legal A  
position. The Public Prosecutor plays a very important role in  
a criminal case. It is distressing to note that in such a serious  
case, the Public Prosecutor should have shown such a casual  
approach. Since the appeal has become infructuous, we do not  
want to precipitate the matter further. We only hope that these B  
observations of ours are taken note of by all concerned. The  
appeal is disposed of as infructuous.

Devika Gujral

Appeal disposed of.