

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction
(Appellate Side)

WPA 7252 of 2018

With

WPA 4510 of 1997

With

WPA 5440 of 2020

IA No. CAN/1/2020

(Old No. CAN 3147 of 2020)

With

WPA 8573 of 2018

The Court in its own motion:
In re: Overcrowding in prisons

Before: The Hon'ble The Chief Justice Thottathil B. Radhakrishnan
&
The Hon'ble Justice Arijit Banerjee

For the petitioner : Mr. Indrajeet Dey, Adv.
In WPA 5440 of 2020 : Mr. Kushal Das, Adv.
: Mr. Sandipan Das, Adv.

For the High Court : Mr. Saikat Banerjee, Adv.
Administration

For the APDR/Intervenor : Mr. Raghunath Chakraborty, Adv.

For the SLSA : Mr. Kallol Mondal

For the State : Mr. Kishore Dutta, Ld. AG.
: Mr. Raja Saha, Adv.
: Mr. Debasish Ghosh, Adv.
: Mr. Sayan Sinha, Adv.

Heard On : 11.06.2020, 24.06.2020, 29.06.2020,
24.07.2020, 31.07.2020, 12.08.2020,

13.08.2020, 24.08.2020, 28.08.2020,
08.09.2020, 15.09.2020, 18.09.2020,
25.09.2020, 13.10.2020, 20.10.2020,
25.11.2020, 01.12.2020, 04.12.2020,
07.12.2020, 08.12.2020, 23.12.2020.

Judgment On : 08.01.2021

The Court:

1. In this Public Interest Litigation initiated by this Court on its own motion, we are seized with an issue of crucial importance and grave concern touching the human rights of inmates of correctional homes across the State. While the larger issue is one of overcrowding in prisons, the immediate issue that is to be addressed is the manner in which Terminally Ill Prisoners (in short, 'TIPs') are required to be dealt with.

2. While the State may be within its rights to keep under trials and convicts incarcerated in view of the provisions of the IPC, Cr.P.C. and other legislations touching criminal law, it is now well accepted all over the world that even prisoners are entitled to be treated in a humane manner. They cannot be treated as inhuman objects and certain basic facilities must be made available to them. Diverse international conventions including the Geneva Conventions form the core of international humanitarian law regulating the treatment that ought to be meted out to prisoners.

3. The issue that gains vital importance particularly in these Covid-19 days is the management of TIPs by the State administration. Pursuant to our earlier orders, an affidavit affirmed on 9 October, 2020 by the ADJ & IG

of Correctional Services, West Bengal, has been filed in Court which relates to the medical treatment that is being extended to the terminally ill inmates of the Correctional Homes across West Bengal. TIPs have been identified by the administration and have been named in the affidavit along with the particulars of the various correctional homes where they are housed. The details of the medical treatment that is being administered to them are also delineated in the said affidavit. However, it has been submitted before us by Learned Advocate appearing for the intervenors that the medical treatment that is being received by the TIPs is inadequate and leaves a lot to be desired.

4. With the evolution of the law relating to human rights and global recognition of certain basic rights of a person, who may even be a prisoner, there can be no dispute that a prisoner suffering from an ailment is entitled to receive due and appropriate medical attention. In this connection, Mr. Sabyasachi Chatterjee, Learned *amicus curiae*, has brought to our attention a Circular being No. V-17014/5/2010-PR dated 13 August, 2010 addressed by the Government of India, Ministry of Home Affairs to the Chief Secretary, Principal Secretary (Prisons) / Principal Secretary (Home-in charge of Prisons) of all State Governments and UT Administrations. The said Circular is an advisory on the policy for the treatment of TIPs. Certain portions of the said Circular are extracted below:

“II. All patients with terminal illness have special medical needs relating to their disease. Such patients also need special psychological counselling and spiritual support

since they face the prospect and trauma of impending death. Such needs are further intensified in the isolated environment of a prison, where the medical and intensified in the isolated environment of a prison, where the medical and psychological care could be often lacking for TIPs. All such special medical needs of each TIP must also be identified in consultation with the District/State Medical Board. State Governments and UT Administrations are responsible for making available/providing reasonable Medical Centre, as would be available to a free person outside the prison. All TIPs should be, as far as possible, shifted to a prison in a place where maximum/best medical care facilities could be made available to them.

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d. Provisions for non-custodial measures and alternatives to imprisonment could also be pleaded before the Court for TIPs in case they do not pose any risk to the society. Alternatively, such TIPs could be shifted to the open jails as far as possible under a court order.

e. To enable TIPs to receive the support of family and friends during the extremely distressing period prior to death, the State Governments and UT Administrations

may consider amendments in their Prison Acts/Rules/Manuals to make special provisions on compassionate grounds for more frequent visits by their family members and friends, their release on parole or other similar provisions for the remaining period of the sentence.

f. The State Government/UT Administrations may also consider release of such prisoners as a part of general amnesty. Provision of special leave may be made applicable to TIPs, as is prescribed in Prison Manuals of the respective States.

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i. The correctional needs of such prisoners are also different as it is not the social reintegration which is relevant, but there is a need for psycho-spiritual support and adequate human contact to help them maintain their mental balance. TIPs should, therefore, be placed as close to their homes as possible to enable regular visits from their family members and friends.

V. Foreigner TIPs should be identified separately under each of the categories of judicial custody, undertrials and convicts so as to deal with their cases in a focused and expeditious manner as indicated below:

a) While all facilities available to Indian TIPs would also be available to Foreigner TIPs, the State Government and UT Administrations must immediately take up the cases of the convicted foreign TIPs with the Government of India for repatriation to their respective countries as per the provisions of the Repatriation of Prisoners Act, 2003 and Repatriation of Prisoners Rule, 2004. Under the Repatriation of Prisoners Act, 2003, bilateral agreements have been signed by Government of India with a number of countries for the repatriation of sentenced persons from India to that country or vice versa and efforts are also being made to sign similar agreements with other countries.

b) Even if no bilateral agreement exists with a foreign country, the repatriation of a convicted foreign TIP must be taken up immediately by the State Government / UT Administration concerned through the Ministry of Home Affairs and Ministry of External Affairs, Government of India through diplomatic channels on humanitarian grounds.

c) *The cases of foreign TIPs, who are under judicial custody / undertrials, should also be taken with the respective trial courts on priority on the lines suggested for the similarly placed Indian TIPs. Their cases should be submitted expeditiously to the Hon'ble Courts for judicial review and the Hon'ble Courts may like to dispose of such cases as deemed fit.*

VI. *The State Governments/UT Administrations are, therefore, advised to amend legislation/rules and make policies and procedures to provide for community sanctions and measures for TIPs, at all stages of the criminal justice process, to **enable them to receive the medical care they need and to die in dignity, surrounded by their family members and friends rather than in the desolate environment of prisons.** Such amendment in legislation/rules/policies/procedures should as a minimum, include clear criteria and procedures relating to:*

- a) *Identification and certification of TIPs by a competent authority;*
- b) *Segregation of such terminally ill prisoners/inmates (TIPs), and assessment of*

their special medical, psychological, legal and social needs and

- c) Making reasonable and adequate provisions for such special needs, including special health care facilities within the legal administrative and financial constraints of the State;*
- d) Transfer of TIPs to prisoners with better medical care facilities, Government/civilian hospitals, open jails, etc. on need basis;*
- e) Free legal assistance to TIPs in judicial custody/undertrials;*
- f) Facilitating /enabling cooperation of community health care services, NGOs and civil society to ensure proper care in the prisons and continuity of care following release of TIPs.”*

5. The said Circular clarifies at the end that the measures mentioned therein are only indicative and the State Governments/UT Administrations may take additional measures for the TIPs.

6. As mentioned in the aforesaid Circular, ‘terminal illness’ is a medical term to describe an active and progressive illness that cannot be cured by being treated and that is reasonably expected to result in the death of the

patient. It also described as a malignant disease for which there is no cure and the prognosis is fatal. The American Cancer Society has defined 'terminal illness' as "an irreversible illness that, without life support procedures, will result in death in the near future or a state of permanent unconsciousness from which recovery is unlikely." We are of the view that a prisoner suffering from terminal illness should be treated with sympathy and should be permitted to breathe his last in the comforting company of his family and friends, if, and to the extent, possible. For this purpose, in an appropriate case, the Government may shift a TIP to his home with a direction that he will be kept confined there. The jurisdictional police will keep a vigil that the concerned person does not step out of his home. The prison authorities may also require the next of kin of the TIP to execute personal bonds guaranteeing that the concerned TIP shall not leave his home. That way, the concerned TIP will receive the love and affection from his near and dear ones and will end his earthly mission with relatively more peace in mind.

7. Our attention has also been drawn to Rule 591(5) of West Bengal Jail Code, which reads as follows:

“(5) When a convicted prisoner is in danger of death from sickness, not due to infectious disease, and the Medical Officer of the Jail certifies that there is no hope of recovery within or without the jail, and it is considered desirable to allow such prisoner the comfort of dying a free man at home, the Superintendent of the Jail shall forthwith report

the facts with his recommendation to the Magistrate of the district or in the case of a prisoner confined in the Presidency Jail, to the Chief Presidency Magistrate, Calcutta.”

This Rule has been formulated by the State Administration and should be kept in mind by the concerned Authorities while dealing with TIPs.

8. It may be kept in mind that the word ‘imprisonment’ has not been defined either in the Indian Penal Code or in the Criminal Procedure Code or in any other criminal law statute. The whole idea of imprisoning a person is to deprive him of the liberty to move freely. This could be either punitive, that is to say, to suffer a punishment imposed upon him under the penal laws; or as a preventive action, if he is considered to be a danger to the members of the society at large. We are of the view that imprisonment need not, always necessarily be in a jail or a prison as we conventionally understand. In extremely special cases a person can be kept imprisoned in his own home. In very exceptional circumstances, subject to the satisfaction of the competent judicial authority and the State Executive on humanitarian and compassionate grounds, an under-trial prisoner or a convict who is serving his sentence in prison and who is staring at death from very close quarters, and counting his days in this world, could be handed over to his next of kins for keeping him confined within the four walls of his home. Obviously, this will be under the surveillance of the appropriate State Authority in the police department, prison department, or otherwise as may

be found appropriate in every given case. That way a TIP may die a relatively peaceful and dignified death surrounded by his family and friends. It needs to be emphasised, here and now that this view that we have expressed would take care of only very exceptional cases where such management of a TIP will be inexcusably conducive for that human being in the given set of facts and circumstances; and not otherwise.

9. In the light of the above discussion, we direct the State Government to follow and give due effect to the aforesaid Circular dated 13 August, 2010 insofar as TIPs are concerned. We are sure that the concerned officers in the State Administration will take a humane view of the issue in hand and do the needful.

10. However, insofar as the TIPs who have been identified and named in the State's affidavit dated 09 October, 2020, are concerned, they should be handed over to their next of kins in terms of this order immediately and in any event within a week from date so that they can be nursed and extended due comfort at their respective homes. Needless to say, the said TIPs shall be kept confined in their respective homes and the respective jurisdictional police shall ensure that they do not move out of their homes except for visiting hospitals/clinics/medical centres for treatment. The Authorities may obtain bonds or such other guarantee (non-financial) from the next of kins of the TIPs as the administration may deem necessary. However, given that the whole object is to give some level of comfort to the TIPs before they depart from this world, it is expected that the administration shall take a sympathetic and lenient view of the matter.

11. Learned Advocate General appearing for the State has expressed an apprehension, which is relevant and reasonable, that the families of some of the TIPs may not be prepared or in a position, for financial reasons or otherwise, to accommodate them at their respective homes. If such a situation arises, the State will have to continue to keep such TIPs in the Correctional Homes but arrangements should be made so that they are extended due care and they receive requisite medical attention and are treated in a humane manner. In appropriate cases, to be decided by the competent authority, a TIP may be sent to hospitals / medical care centres / welfare homes where he would be properly looked after and cared for. Needless to say, this would be at State expense. If a TIP has been deserted by his family and friends, the Government of our State, which professes to be a welfare State, must rise to the occasion and assume the role of the caretaker of that person.

12. This order should be implemented immediately. It may take a while for the prison manuals/jail codes to be amended for incorporating the suggestions mentioned in the Central Ministry's Circular dated 13 August, 2010. However, the measures in relation to TIPs, as discussed in this order, should be taken immediately, since if the State waits till such amendment takes place, many or all of the TIPs may die in jail in desolate and very unhappy conditions without the minimum human dignity.

13. Registry will immediately communicate this order to all the Correctional Homes in the State of West Bengal.

(Thottathil B. Radhakrishnan, CJ.)

(Arijit Banerjee, J.)