

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL W.P. NO. 4575 OF 2017**

Atmaram Arjun Bhekare]
Age 51 years, C-601,]
Yerawada Open Dist. Prison]
Class-I, Pune -06].. Petitioner

Vs.

The State of Maharashtra].. Respondent

....

Ms. Rohini Dandekar Advocate appointed for Petitioner
Mr. Arfan Sait A.P.P. for the State

....

**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J.
AND M.S.SONAK, J.**

DATED : JUNE 29, 2018

ORAL JUDGMENT [PER SMT. V.K.TAHILRAMANI, ACJ.]:

1 Heard both sides.

2 The petitioner is praying for premature release. We may also state that the Superintendent of Yerawada Open Prison, Pune by his communications addressed to this Court dated 15.6.2018 and 27.3.2018, sought opinion / appraisal of this Court in relation to petitioner's case for premature release.

Digitally signed
by Ravindra
Mohan
Amberkar
Date:
2018.08.07
18:04:14
+0530

Ravindra
Mohan
Amberkar

3 In relation to the above, it would be necessary to state a few facts:

The petitioner along with two others was arrested in C.R. No. 79 of 1991 of Guhagar Police Station. The allegation against the petitioner and other two accused was that they had suspicion that Yashwant (deceased) was practising witchcraft on their family. The petitioner was accused no.2 in the said case. Original accused no.1 was the father of the petitioner and original accused no.2 was the brother of the petitioner. On account of the suspicion entertained by the petitioner, his father and brother on 25.12.1999 at about 7.30 p.m., they assaulted Yashwant which resulted in his death. After investigation, the charge sheet came to be filed against the said three accused i.e. including the petitioner.

4 Charge came to be framed by the learned Sessions Judge, Ratnagiri against the petitioner and other two accused under Sections 302, 504 and 506 read with Section 34 of IPC. By judgment and order dated 6.11.1992 passed by the learned Sessions Judge, Ratnagiri in Sessions Case No. 48 of 1992, the

petitioner who was original accused no.2 in the said case, was acquitted along with the other two accused of the offences under Sections 302, 504 and 506 read with Section 34 of IPC.

5 Being aggrieved by the said acquittal of the petitioner and the other two accused, the State preferred an appeal against the said judgment and order of the trial Court. The said appeal was numbered as Criminal Appeal No. 40 of 1993. By judgment and order dated 6.8.2004 passed in the said appeal, this Court set aside acquittal of the petitioner and the other two accused under Section 302 read with Section 34 of IPC and convicted all the three accused including the petitioner for the offence under Section 302 read with Section 34 of IPC and sentenced them to imprisonment for life. The acquittal of all accused under Sections 504 and 506 of IPC was maintained.

6 As the petitioner was undergoing life imprisonment and had completed 12 years of actual imprisonment, his case was referred to the State Government for considering his case for premature release. The State Government directed the Superintendent of Yerawada Open Prison where the petitioner

was lodged to obtain opinion of the Court which convicted the petitioner. Pursuant thereto opinion was sought in relation to the premature release of the petitioner from the Sessions Court by the Superintendent of the Prison where the petitioner was lodged. However, as per usual practice in case of life convicts the communication was addressed to the Sessions Court and the fact that the conviction was not by the Sessions Court, seems to have missed the attention of the Superintendent of the Prison. The Sessions Court by communication dated 28.6.2016 replied that as the petitioner was convicted by the High Court, the Sessions Court cannot give any opinion. This communication is also challenged by the petitioner. Thereafter the Jail Superintendent by letters dated 27.3.2018 and 15.6.2018 has sought opinion / appraisal of this Court.

7 We may state that the Superintendent of Prison as well as the Advisory Committee opined that the case of the petitioner fell in category 3(b) of the 2008 Guidelines framed by the Government for premature release. As stated earlier the petitioner has sought premature release and the Jail Superintendent has also sought opinion / appraisal of this Court

regarding the category the petitioner would fall under, so that they can decide when the petitioner can be prematurely released.

8 We have perused both the judgments of the Sessions Court and this Court and the other record pertaining to this case. On account of the assault by the petitioner and other accused, Yashwant died on the spot. Yashwant had sustained 14 injuries most of which were contused lacerated wounds. There were multiple fractures, so also, there was internal haematoma below the left temporal area and brain matter was found congested. In the opinion of the Doctor, the death was caused due to shock, due to severe hemorrhage and due to multiple fracture of the mandible. According to the Doctor, injury nos. 7, 8, 9 and 14 were sufficient in the ordinary course to cause death. Injury nos. 7, 8, 9 and 14 are as under:

- (7) Contusion with laceration over lower jaw mandible 2" x 1" x 1".
- (8) Contusion with laceration on face, Erin, compound fracture mandible lower jaw 1" x 1" x 1".
- (9) Contusion with laceration face right mandible lower jaw compound fracture 2" x 1" x 1".

(14) Contusion on face, bridge nose ½" x ½".

The deceased was assaulted by all the accused with wooden ribs. This Court in para 25 of its judgment dated 6.8.2004 about the weapons of assault has observed thus:

"We have seen the wooden ribs. They are deadly weapons with which very severe injuries can be caused and they are clearly in the nature of dangerous weapons."

9 The Supreme Court in paragraph 77.7 of the decision in the case of **Sangeet and Anr. Vs. State of Haryana** reported in **2013 (2) SCC 452**, has observed as under:

"Before actually exercising the power of remission under Section 432 Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the Presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner."

10 As stated earlier the case of the petitioner was referred on behalf of the Government to the Sessions Court at Ratnagiri for obtaining opinion regarding the case of the

petitioner for premature release. This was in view of the above observations of the Supreme Court in **Sangeet (supra)**. We have already observed above that the Sessions Court Ratnagiri sent a communication dated 28.6.2016 to the Superintendent of Yerawada Central Prison, Pune. The petitioner has also impugned the said communication. By the said communication, the Sessions Court informed that it cannot give opinion in the said matter as the Sessions Court had not convicted the petitioner and it was the High Court which had convicted the petitioner. This appears to be the correct position in law that the Court acquitting an accused cannot be called upon to give an opinion but it is the Court convicting the accused which can be called upon to give an opinion in relation to premature release of the prisoner. This is specially so because of the decision of the Supreme Court in the case of **Sangeet (supra)** and in view of the provisions of Section 432 of the Code of Criminal Procedure. The relevant provision of Section 432 of Cr.P.C. reads as under:

“432. Power to suspend or remit sentences.---

- (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without

conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

- (2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government **may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused**, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or such record thereof as exists;

- (3) *****
(4) *****
(5) *****
(6) *****
(7) *****
(a) *****
(b) *****

11 It appears to us that an exercise of power by the appropriate Government under sub-section (1) of Section 432

of Cr.P.C. cannot be suo motu by the Government for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to override a judicially pronounced sentence, subject to the fulfillment of certain conditions. Those conditions are found either in the Jail Manual or in the statutory Rules. Sub-section (1) of Section 432 of Cr.P.C. cannot be read to enable the appropriate Government to further override the judicial pronouncement over and above what is permitted by the Jail Manual or the statutory rules. On an application being made, the appropriate Government is required to approach the presiding Judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter, the appropriate Government may take a decision regarding remission and pass orders granting remission subject to some conditions, or refuse remission. Apart from anything else, this statutory procedure seems quite reasonable in as much as there is an application of mind to the issue of grant of remission.

12 In a situation when a person is acquitted by the Trial

Court and the said acquittal is reversed in an appeal by the Appellate Court and the said person is awarded conviction and sentence, further, in the event when the Court of Sessions awarded death penalty to convicted person and in an appeal by the accused or confirmation case the High Court set aside the death penalty and awarded punishment for life, whether the High Court or Sessions Court should give its opinion / appraisal as to whether the sentence should be remitted or commuted.

13 In the above circumstances, if the appropriate Government wants to exercise powers to commute or remit sentence under sub-section (1) of Section 432, the question arises, whether such opinion is to be sought either from the trial Court / Sessions Court or the High Court.

14 It is to be noted that in sub-section (2) of Section 432 Cr.P.C. the words used are **“Judge of the Court before or by which the conviction was had or confirmed to state his opinion.”** It indicates that the Judge of the Court before or by which the accused person is convicted, would be the Court which would have to give its opinion. It also indicates that the

Court confirming the sentence of the trial Court can also give its opinion.

15 It is therefore clear that in case the trial Court / Court of Sessions had acquitted a person and subsequently in an appeal, Appellate Court or the High Court reversed the acquittal and convicted such person, opinion under section 432(2) of Cr.P.C. needs to be sought from the Court that imposed the conviction. In a case where death penalty is awarded by the Sessions Court, even if it is confirmed or the sentence is commuted to life, the original Court which convicted the accused is the Sessions Court hence, it would be appropriate that the opinion is sought from the Sessions Court. So also in cases where life sentence is awarded by the Sessions Court and the appeal of the convict is dismissed by the High Court, it would be appropriate that opinion is sought from the Sessions Court. This would apply to all cases, where opinion is sought regarding grant of any kind of remission.

16 In view of the above facts, in the present case, as the petitioner has been convicted by this Court, the Sessions Court has rightly observed that it cannot give any opinion. In such

cases, that is, where the accused has been convicted by the High Court, it is to the High Court that request has to be made for an opinion and it is the High Court which has to give an opinion. Thus, in such cases, the High Court has to give its opinion / appraisal of the opinion given by the Advisory committee and / or the Superintendent of the Prison / or Home Department in relation to premature release of a prisoner.

17 There appears to be a lot of confusion about how such an application should be dealt with, when it is received by the Registry of the High Court. If the accused is convicted by the High Court and the Registry receives a communication seeking its opinion / appraisal for premature release or in relation to whether any remission like special State Remission is to be granted to a prisoner, then the Registry to place it for orders on the administrative side before the Senior Judge of the Bench of the High Court dealing with matters relating to commutation or remission of sentence and obtain opinion from the said Judge. The Registry to also put up the Appeal paper book with said communication. Once, the file is placed before a Judge, it will remain, with that Judge till the opinion is given.

After obtaining the opinion, the said opinion to be communicated by the office as expeditiously as possible to the concerned authority.

18 The facts in the present case are reflected above in paras 3 to 8. In short the facts are that the murder of Yashwant was committed by the petitioner and the two other accused as they suspected that he was indulging in practising witchcraft on their family. On being asked by the Government, the Superintendent of the Prison and the Advisory Committee have both opined that the case of the petitioner would fall under category 3(b) of the 2008 Guidelines. Category 3(b) of 2008 Guidelines reads as under:

Category		Categorization of crime	Period of imprisonment to be undergone including remission subject to a minimum of 14 years of actual imprisonment including set off period
3		Murder arising out of land dispute, family feuds, family prestige and <u>superstition</u>	
	a		...
	b	Crime committed as above with premeditation, either individually or by a gang	22

19 As the murder in the present case took place on account of superstition and it has been committed with premeditation, the petitioner has been rightly placed in category 3(b) of the 2008 Guidelines. Thus, this Court opines that the petitioner clearly falls under category 3(b) of the 2008 Guidelines framed by the Government for premature release of prisoners serving life imprisonment. We hasten to add that this is expressed only by way of opinion regarding categorization and it is for the State to take final decision regarding categorization. We may also add that as per the current roster, this Court is inter alia taking up matters relating to commutation and remission of sentence, hence, this petition came up before us.

20 The petitioner as on 31.5.2018 has completed 21 years and 4 months of imprisonment including remission, hence, if the Government places the petitioner in category 3(b), then within a period of a few months, the petitioner would be released from prison, hence, as of now, no further orders are necessary, hence, Rule is discharged. Petition is disposed

of accordingly.

21 Copy of this order be sent to the petitioner who is in Yerawada Open Prison, Pune. Copy of this order along with copy of judgment and order of this Court dated 6.8.2004 in Cri. Appeal No. 40 of 1993 and a copy of the paper-book in the appeal which contains the judgment and order of the trial Court, the evidence and the other record be sent to the (1) The Home Department, State of Maharashtra and (2) Superintendent of Yerawada Open Prison who shall in turn, forward the same to the concerned authorities.

M.S.SONAK, J.

ACTING CHIEF JUSTICE

[Corrected / Modified Judgment as per Speaking to the Minutes Order dated 7.8.2018]