

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.61 OF 2019

Tolabai w/o Raosaheb @ Dabya Kale
(C-8012), Central Prison,
Aurangabad

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through Superintendent of Jail,
Central Prison, Aurangabad,
- 2) State of Maharashtra,
Through Secretary,
Home Department (Prison),
Mumbai-400005.

...RESPONDENTS

...

Mr. R.A. Jaiswal, Advocate for Petitioner.
Mr.D.R. Kale, A.P.P. for Respondent Nos.1
and 2.

...

**CORAM: S.S. SHINDE AND
R.G. AVACHAT, JJ.**

DATE OF RESERVING JUDGMENT : 5TH FEBRUARY, 2019

DATE OF PRONOUNCING JUDGMENT: 13TH FEBRUARY, 2019

JUDGMENT [PER S.S. SHINDE, J.] :

1. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. The petitioner has filed this Petition with following substantive prayers :-

"A) By writ of mandamus or any other appropriate writ, order or direction in the like nature, the order passed by respondent No.2 (Exhibit-B) dated 06.01.2018 may kindly be quashed and set aside, and, or,

B) To place the petitioner in category 1(b) of Guidelines of 2010, and thereby direct the Respondents to release petitioner forthwith."

3. Learned counsel appearing for the petitioner submits that by Judgment and order dated 13th November, 2003, passed by the Additional Sessions Judge, Solapur in Sessions Case No.105 of

2003, the petitioner has been convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code, and sentenced to suffer life imprisonment. The Petitioner was under-trial prisoner since 11th January, 2002, till the date of conviction and sentence, and presently the petitioner is lodged in Central Prison, Aurangabad.

4. Learned counsel further submits that the story of the prosecution is that on 11th October, 2002, deceased Manisha Popat Kale was present in her house, at that time co-accused Raosaheb entered in her house and started beating her, and at the same time, co-accused Raosaheb poured kerosene on the person of deceased Manisha, and present Petitioner set her ablaze. The Petitioner along with another accused Raosaheb were tried before the Sessions Court at Solapur and convicted and sentenced as afore-stated.

5. Learned counsel further submits that Respondent No.2 by order dated 6th January, 2018, has decided the application filed by the petitioner for her premature release, and has placed the petitioner in Category 3(d) of the Guidelines of 1992, and Category 2(c) of the Guidelines of 2010, and directed that the Petitioner should undergo the sentence of 26 years. Learned counsel submits that the said order dated 6th January, 2018, is under challenge in this Petition.

6. Learned counsel further submits that the Petitioner being a woman should have been placed in Category 1(a) or 1(b) of Guidelines of 2010, but the Respondent authorities have placed the Petitioner in wrong category. In the present case, the crime is committed by a woman, but Respondent No.2 failed to consider this aspect and placed her

in wrong category, and therefore, the impugned order is bad in law. Learned counsel relying upon the Guidelines of 2010, submits that under the said Guidelines specific category i.e. Category 1 is introduced for "Offences relating to crime by women". It is submitted that as per Category 1(a), where convict has no criminal history and has committed the murder in an individual capacity and in moment of anger, and without premeditation or under physical mental provocation, the imprisonment is provided for 18 years, and as per Category 1(b), where murder is committed with premeditation, or by a gang, the imprisonment is provided for 20 years.

7. Learned counsel further submits that, the Government of Maharashtra amended the Guidelines, and brought new Guidelines of 2010, wherein a special category i.e. Category 1(a) and 1(b) had been inserted regarding "the offence relating to

crime by women". Learned counsel placed reliance upon the exposition of law by the Supreme Court in the case of State of Haryana and others vs. Jagdish¹, and submitted that in the said Judgment, it is held that if the Guidelines which were in existence at the time of conviction of convict are subsequently changed, the convict will be entitled to get the benefit of the Guidelines which are favourable to the convict. Learned counsel further submits that as per the Guidelines of 2010, special category i.e. Category 1 is provided for the offence by woman, and therefore, the Petitioner being woman, no other category will be applicable to her case. Learned counsel further submits that the Petitioner is aged about 62 years and she is never released on furlough or parole.

8. Learned counsel submits that as per Category 1(b) of the Guidelines of 2010, the

1 AIR 2010 SC 1690

convict needs to undergo imprisonment of 20 years and in the present case the Petitioner has already undergone more than 20 years imprisonment including remission. Learned counsel appearing for the petitioner in support of his submissions, placed reliance upon the exposition of law in the case of Usha Munna Upadhyay vs. the State of Maharashtra², and in particular Para-21 of the Judgment, which reads thus:

“21. In our opinion, category 1 of the 2010 guidelines which is exclusively for women offenders must cover all the cases of women offenders, and the women offenders can be fitted only in that category. Because of the creation of a special category of women offenders, the other categories which are of a general nature, classified on the basis of nature of offences, would not apply to women offenders. Consequently, we hold that the order dated 4 September 2012 passed by the Government of Maharashtra placing the petitioner in Category 5(b) of the 2010 guidelines and Category 6(a) of the 2010

² 2015 ALL MR (Cri) 3209

guidelines, is not proper and that the petitioner may be placed in Category 1(b) of the 2010 guidelines for considering her premature release."

9. Learned counsel appearing for the Petitioner submits that the impugned order dated 6th January, 2018, deserves to be quashed and set aside, by allowing the Petition.

10. On the other hand learned A.P.P. appearing for the State, referring to the reply filed on behalf of the Respondents, submits that the Petitioner is convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code. The conviction is on the basis of evidence adduced by the prosecution and the Petitioner along with co-accused namely, Raosaheb have been convicted for life imprisonment by the Sessions Court, Solapur. It is the case of pouring kerosene on the victim and thereby committing her

murder. Learned A.P.P. submits that, therefore, the categorization made by the Respondent authorities while passing the order on 6th January, 2018, is legal and proper.

11. Learned A.P.P. further submits that the accused have committed murder of Manisha due to the dispute of illicit relationship. It is further submitted that the Respondent authority has submitted proposal for premature release as per Category 3(d) of the Guidelines of 1992 and Category 2(c) of the Guidelines of 2010, whereby 26 years imprisonment is provided. It is submitted that the said proposal has been approved by District and Sessions Court, Solapur, by its letter dated 18th June, 2016, wherein it is opined that the Petitioner is liable to suffer 26 years imprisonment. Learned A.P.P. further submits that in the present case the offence is committed by the accused with exceptional violence and/or with

brutal death of victim due to burns. Therefore, the categorization applied by the Respondent authority is legal and proper, as the said offence is not committed in an individual capacity. The Petitioner, along-with another co-accused, has committed murder of the victim with intention and motive, and it is premeditated murder.

12. Learned A.P.P. further submits that, as per the provisions of Section 432 of the Code of Criminal Procedure, the Government has power to pass an order as per the prevailing policy wherein suspension and remission can be granted by the Government. Learned A.P.P. referring to the Judgment of the Supreme Court in the case of State of Haryana vs. Jagdish, cited supra, submits that in the said case the guidelines have been issued while passing order by the State Authority at the time of deciding the application for premature release. Learned A.P.P. further submits that in

the present case, the offence committed by the accused is of serious nature and victim sustained 75% burn injuries and therefore, as per the recommendation made by the District and Sessions Judge, Solapur, the Government has applied correct and legal categorization while deciding the proposal of the Petitioner for premature release, and the Petitioner is rightly placed under Category 3(d) of the Guidelines of 1992 and Category 2(c) of the Guidelines of 2010, wherein the imprisonment of 26 years is provided.

13. Learned A.P.P. submits that after applying its mind and after taking into consideration the opinion expressed by District and Sessions Court, Solapur, the Respondent authorities have rightly passed the impugned order dated 6th January, 2018. Learned A.P.P. therefore submits that the Petition deserves to be rejected.

14. We have heard learned counsel appearing for the Petitioner and learned A.P.P. appearing for the State. With their able assistance, we have perused the pleadings in the Petition, grounds taken therein, annexures thereto, reply filed on behalf of the Respondents, the relevant Guidelines of 2010, and the reported Judgments relied upon by learned counsel appearing for the parties.

15. We have carefully perused the opinion expressed by the District Judge-2, and Additional Sessions Judge, Solapur, dated 18th June, 2016, wherein it is opined that:-

"On perusal of entire record and proceedings of Sessions Case No.105/03, it appears that the accused Tolabai Ravsaheb @ Dabya Kale has brutally committed the murder of Manisha Popat Kale. Therefore, considering the circumstances under which the accused Tolabai Ravsaheb @ Dabya Kale has committed an offence her case falls under category

4(D) of Government Resolution dt.11-4-2008 and she should undergo the sentence of imprisonment for 26 years."

16. We have also independently perused and considered the findings recorded by Vth Additional Sessions Judge, Solapur, in Sessions Case No.105 of 2003, by which the Petitioner along with other co-accused Raosaheb, were convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life. In our considered view, the opinion expressed by the District Judge-2, and Additional Sessions Judge, Solapur that, the Petitioner shall undergo the sentence of imprisonment for 26 years, cannot be faulted with.

17. However, learned counsel appearing for the Petitioner has placed reliance upon the ratio laid down in the case of Usha Munna Upadhyay V/s the State of Maharashtra, cited supra, and made

submission that the view taken by the High Court that Category 1 of Guidelines of 2010, which is exclusively for women offenders must cover all the cases of women offenders, and therefore, the Petitioner being woman offender deserves to be placed in said Category 1 of 2010 Guidelines.

18. We have carefully perused the facts of the said case of Usha Munna Upadhyay, cited supra and the facts of the present case, and we find that in the present case the victim is also a woman. Therefore, upon careful perusal of the Guidelines of 2010, laid down by Government Resolution No. RLP No.100/CR621/PRS-3, dated 15th March, 2010. Category 2 of the said Guidelines of 2010, deals with "Offences relating to crimes against women and minors". In the facts of the Judgment in the case of Usha Munna Upadhyay, cited supra, the Division Bench did not consider that Category 2 in the Guidelines of 2010, is special

category for the offences relating to crimes against women and minors. Therefore, the observations of the Division Bench to the extent that, "Category 1 laid down in aforesaid Guidelines of 2010 is special category and all other categories are general categories", would not be applicable to the present case, as the facts of the present case are different than the facts in the case of Usha Munna Upadhyay, cited supra.

19. In the peculiar facts and circumstances of this case, in our considered opinion the categorization in the Guidelines of 2010, will have be harmoniously construed. Upon careful perusal of Category 1 and Category 2 of the Guidelines of 2010, conjointly, where the crime is committed with premeditation and with exceptional violence or with brutality or death of victim due to burns, will have to be harmoniously construed

with Category 1(a) and (b) of the Guidelines of 2010, and on such harmonious consideration, we deem it appropriate to categorize the case of the Petitioner in Category 2(b) of the Guidelines of 2010, and proper sentence in the case of the Petitioner, would be of 22 years.

20. In the light of discussion herein above, we direct the Respondent authorities to place the the Petitioner under Category 2(b) of the Guidelines of 2010, and accordingly the Petitioner should undergo the sentence of imprisonment of 22 years.

21. The Writ Petition is partly allowed and the same stands disposed of, accordingly. Rule made absolute in above terms.

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]