



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.08.2019

CORAM

**THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MR.JUSTICE B.PUGALENDHI**

H.C.P(MD)No.1388 of 2018

P.Karthiyammal

... Petitioner

Vs.

- 1.The State of Tamil Nadu,
represented by its Secretary,
Department of Home affairs,
State of Tamil Nadu,
Fort St.George,
Chennai.
- 2.The State of Tamil Nadu,
represented by the Principal Secretary
to Government,
Home (Prison V) Department,
Secretariat, Fort St. George,
Chennai-600 009.
- 3.The Director General of Prison,
Egmore, Chennai-600 008.
- 4.The Deputy Inspector General of Prison,
Department of Prison,
Madurai Range, Madurai-16.
- 5.The Superintendent of Prison,
Central Prison,
Madurai, Madurai District.

... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Habeas Corpus, directing the respondents to treat the petitioner's son namely Kandasamy @ Kabilan (C.P.No.4706) as an eligible life convict prisoner for premature release by G.O.(Ms). NO.64, dated 01.02.2018, passed by the second respondent and set him at liberty.



For Petitioner : Mr.T.Thirumurugan

For Respondents : Mr.K.Chellapandian
Additional Advocate General, assisted by
Mr.K.Dinesh Babu
Additional Public Prosecutor

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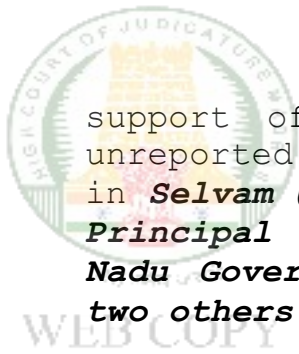
ORDER

(Order of the Court was made by M.SATHYANARAYANAN, J)

The petitioner is the mother of the life convict viz., Kandasamy @ Kabilan (Convict Prisoner No.4706) and he was convicted for the offence under Section 302 I.P.C., vide judgment dated 27.07.2007, passed by the Court of Principal District and Sessions Judge, Theni and in the appeal filed in CrI.A.(MD)No.323 of 2008, it was also confirmed, vide judgment dated 26.06.2008. A representation was submitted on 27.08.2018 by the petitioner, on behalf of his son, seeking premature release in terms of G.O.(Ms) No.64, dated 01.02.2018 and since no orders have been passed, the petitioner came forward to file this Habeas Corpus Petition and it was entertained.

2. The learned Counsel appearing for the petitioner would submit that during the pendency of the investigation, the son of the petitioner, who was arrayed as A.1 and one Jeeva @ Jeevanandam who was arrayed as A.2 in Cr.No.73 of 2006 were escorted for remand extension from Central Prison, Madurai to the Court of Principal Sessions Judge, Theni and after remand was extended, on their way back to the Central Prison, Madurai, when they nearing Arapalayam junction city bus stand, both of them were escaped from the lawful custody along with their hand cuff and therefore, prosecuted with the offence under Section 224 I.P.C. The Court of Judicial Magistrate No.V, Madurai, vide judgment dated 29.11.2010 had acquitted both of them, by awarding benefit of doubt.

3. The learned Counsel appearing for the petitioner has drawn the attention of this Court to paragraph Nos.18, 20, 22, 23 and 24 of the judgment of the trial Court and would submit that a categorical finding was recorded by the trial Court, as to their escape from lawful custody and though the trial Court has awarded benefit of doubt, actually both of them were acquitted for want of proper, sufficient and tenable evidence. Admittedly the State did not prefer any challenge to the said order of acquittal and therefore, it came to be final. In the light of the said judgment, there cannot be any impediment to consider the claim of the petitioner for granting the benefit of premature release to her son, in the light of the said G.O., and prays for appropriate orders. In



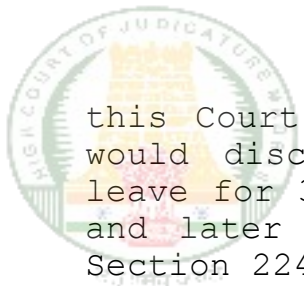
support of his contentions, he has also placed reliance on an unreported order, dated 01.08.2014, made in H.C.P.(MD)No.494 of 2019 in **Selvam @ Selvaraj Vs. the State of Tamil Nadu, represented by the Principal Secretary to Government, Home (Prison) Department, Tamil Nadu Government, Chief Secretariat, St.George Fort, Chennai-9 and two others.**

4. Per contra, Mr.K.Chellapandian, learned Additional Advocate Advocate General, assisted by Mr.K.Dinesh Babu, learned Additional Public Prosecutor, has drawn the attention of this Court to the counter affidavit of the respondents and would submit that despite the fact that the son of the petitioner was acquitted by the Court of Judicial Magistrate No.V, Madurai, vide judgment dated 29.11.2010 for the commission of offence under Section 224 I.P.C., he cannot take advantage of the said judgment for the reason that he was acquitted only on the benefit of doubt and that apart, as per paragraph No.5(II)2(A)(Viii) of the said Government Order, the prisoner's behaviour should be satisfactory and in the light of the fact that the son of the petitioner has been secured after ten days, his behaviour cannot be said to be satisfactory and as such, he is not entitled to the benevolence of the said Government Order.

5. It is further pointed out by the learned Additional Advocate General that in terms of paragraph No.5(II)2(A)(Viii) of the said Government Order, the escape or attempting to escape from lawful custody (except overstaying of parole leave only) is also a bar for the claim of the petitioner to consider his son for premature release under the said Government Order and therefore, prays for dismissal of this petition.

6. This Court has carefully considered the rival submissions and perused the materials placed before this Court.

7. The son of the petitioner was prosecuted for escaping from lawful custody under Section 224 I.P.C., in C.C.No.391 of 2007 and vide judgment dated 29.11.2010, the Court of Judicial Magistrate No.V, Madurai, has acquitted him for the charge. A perusal of the said judgment would disclose that the prosecution has miserably failed to prove the said charge. In paragraph No.23, the trial Court has also noted that the departmental proceedings were initiated against the concerned police personnel, with whom the custody of the son of the petitioner was entrusted for the purpose of remand and though it was claimed that the departmental proceedings are over, the result was also not made known and as against the said order of acquittal, admittedly the State did not prefer any appeal. The trial Court observed that the concerned accused was charged and on the ground of benefit of doubt, the accused was acquitted and the prosecution is failed to prove the case miserably and it could be taken only as an honorary acquittal. A similar case arose for consideration before the Division Bench of



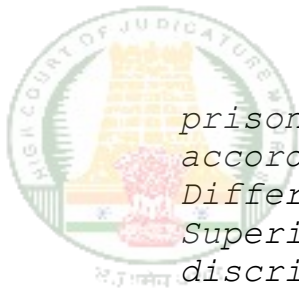
this Court in H.C.P.(MD)No.494 of 2019 and the facts of that case would disclose that the concerned accused was granted emergency leave for 3 days on 23.07.2003, but he did not return to the prison and later on, he was arrested and the case was registered under Section 224 I.P.C. and the prosecution was also ended in acquittal.

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8. It is relevant to extract hereunder paragraph Nos.23, 24 and 27 to 28 and 29 of the said order:

23. From the material on record, it is abundantly clear that the detenu has been acquitted of the Crime No.1139 of 2003, registered under Section 224 IPC, on the file of Kumbakonam East Police Station, vide judgment made in C.C.No.46/2004 dated 22.09.2005 by the learned Judicial Magistrate, Kumbakonam. When acquittal has been recorded by the competent court of criminal jurisdiction, it cannot be said that there is a wilful commission of act, which would be amounting to violation of the Prison Regulations and deemed to constitute an offence, under Section 45 of the Prison Act, 1894. Once the aspect of wilfulness is not proved, the alleged breach of any enumerated acts, would not fall under Rule 297(62) of Tamil Nadu Prison Rules, 1983, and on the alleged act, which could not be proved before the court of law, the Superintendent of Prison, Central Prison, Trichy, ought not to have recorded the general behaviour of the prisoner in prison as "Not Satisfactory". Satisfaction of not maintaining good behaviour in the Prison can be recorded only when the misconduct is wilfulness. When the detenu has already been acquitted by the competent court of criminal jurisdiction, we are of the view that the Superintendent of Prison, Central Prison, Trichy, ought not to have recorded the behaviour of the prisoner as "Not Satisfactory".

24. On an earlier occasion, when similar objection was raised by the State in HCP(MD)No.793/2014 on the aspect of acquittal and still considering the behaviour of the prisoner, falling within Rule 297(62) of Tamil Nadu Prison Rules, 1983, this Court negatived the contention. In the abovesaid case, when the prisoner was acquitted, in a case registered, under Section 224 IPC, by the competent court of criminal jurisdiction, the Superintendent, Central Prison, Trichy, has recorded the behaviour of the prisoner therein, inside the prison, as satisfactory. Whereas, in the present case on hand, on the same set of facts, (i.e) when the prisoner has been acquitted of the offence under Section 224 IPC, the very same Superintendent of Prison, Central Prison, Trichy, has recorded the general behaviour, as not satisfactory. Satisfaction of behaviour of the



prisoners on the same set of facts, cannot be made, according to the whims and fancies of the authority. Different yardsticks cannot be applied by the Superintendent of Prison, and it would amount to discrimination, violating Article 14 of the Constitution. Considering the language employed in Rule 297(62) of Tamil Nadu Prison Rules, 1983, we make it clear that once, wilfulness is not proved, the question of considering the alleged misconduct under Rule 297(62) of Tamil Nadu Prison Rules, 1983, does not arise.

27. At this juncture, this Court deems it fit to consider a decision of the Apex Court in *State of Haryana vs. Ghaseeta Ram*, reported in 1997 (3) SCC 766, wherein, for commission of certain offences, the prisoner therein was imposed with a punishment by the competent court of criminal jurisdiction. Subsequently, for the very same act, the Jail Superintendent also imposed a punishment on the prisoner. When the prisoner questioned the same, under Section 482 of the Criminal Procedure Code, the High Court of Punjab and Haryana held that it amounted to double jeopardy. When the correctness of the order was tested on appeal, the Hon'ble Apex Court at paragraphs 13 and 14, held as follows:-

"13. So far as the commission of heinous offences are concerned, Section 52 of the Prisons Act is in parimateria the same as para 627 of the Manual. An analysis of the two provisions shows that where a prisoner is guilty of commission of any offence against prison discipline which in the opinion of the Superintendent of Jail is not adequately punishable by infliction of any of the punishments which he has the power under the Act

or the Manual to impose, he may forward the offending prisoner to the Court of the District Magistrate or to any Magistrate of the First Class, having jurisdiction to enquire into and try the offence, together with a statement of the circumstances under which the prisoner was being so forwarded for trial in accordance with law. The trial court upon conviction, may sentence the prisoner to undergo imprisonment in addition to any term for which the prisoner was undergoing imprisonment when he committed such an offence. The trial court may also convict and punish the prisoner for committing various offences referred to in para 610 of the Manual for which he was charged and tried by it. Para 611 of the Manual leaves it to the discretion of the Superintendent of Jail, to determine with respect to any other act which constitutes both a prison offence



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and an offence under the Indian Penal Code, whether he will use his own powers of punishment or forward the prisoner to a competent Magistrate exercising jurisdiction to enquire into the offence in accordance with the Code of Criminal Procedure. The exercise of powers under Section 52 of the Prisons Act or para 627 of the Manual, however, is subject to the proviso that no person shall be punished twice for the same offence.

14. From an analysis of the provisions of the Prisons Act and the Manual (supra) it follows that where the offence, which is both a prison offence and an offence under the Indian Penal Code, or is otherwise a heinous offence, and is committed by the prisoner after his admission to jail, for which the Superintendent of Jail can impose punishment, which in his opinion is adequate for the said offence, he may proceed to impose the punishment on the prisoner under the Prisons Act and the Manual by following the procedure prescribed therein. But where he is of the opinion that adequate punishment cannot be inflicted by him, as his power to award punishment in that behalf is limited by the Act or the Manual, he shall forward the prisoner to the competent court having jurisdiction to try the offence. Where the Superintendent of Jail, has inflicted punishment, which in his opinion was adequate punishment for the offence, then the prisoner cannot also be forwarded to the Magistrate for trial and be punished for the same offence twice in view of the bar contained in the second proviso to Section 52 of the Prisons Act and para 627 of the Manual."

28. Thus reading of the judgment makes it clear that there cannot be two punishments for the same offence. As per Rule 301 of the Tamil Nadu Prison Rules, 1983, the Superintendent of Prisons has got the discretion, either to impose appropriate punishment, under the Prison Rules, 1983, or to prosecute the prisoner, in a court of competent jurisdiction. The Superintendent of Prisons can take recourse to either one of the modes and not both.

29. In the case on hand, the Superintendent of Prison, Trichy, had opted to prosecute the prisoner and failed. In the light of the judgment of the Apex Court, he cannot take action against the prisoner under the Prison Rules. Under law, when he is precluded from taking action, mere accusation of overstaying, ought not to have been taken, as the basis for recording the behaviour inside the prison, as



"Not Satisfactory".

9. The Division Bench, in the said order, made a categorical observation that in the light of the judgment rendered by the Honourable Apex Court in **State of Haryana Vs. Ghaseeta Ram**, reported in **1997 (3) SCC 766**, it is open to the Superintendent of Prisons to take recourse to either one of the modes and not both and therefore, it is not open to him to take action against him under the Prison Rules, in the light of the failure of the prosecution to prove his case to the charge under Section 224 I.P.C. and accordingly, allowed the Habeas Corpus Petition and directed the respondents to apply the benefit of G.O.Ms.No.1155/Home (pri.IV) Department/2009, dated 11.09.2008 and release him forthwith, if his presence is not required in connection with any other case.

10. It is also brought to the knowledge of this Court that apart from the alleged escape from lawful custody, the son of the petitioner, during the course of incarceration, is not visited with any punishment alleging prison offences. In the considered opinion of this Court, in the light of the above facts and circumstances, coupled with the order dated 01.08.2014 made in H.C.P.(MD)No.494 of 2019, his claim is liable to be considered, in terms of G.O.(Ms) No.64 of the first respondent, dated 01.02.2018.

11. In the result, the Habeas Corpus Petition is allowed and the respondents 1 to 5 are directed to consider the claim of the petitioner's son for premature release in terms of G.O.(Ms)No.64, dated 01.02.2018 positively and pass appropriate orders within a period of four weeks from the date of receipt of a copy of this order and release him, if his custody or detention is not required in connection with any other case / proceedings.

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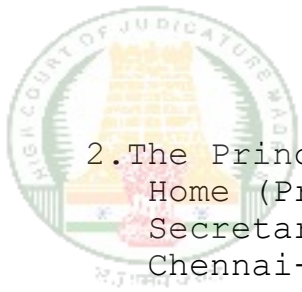
Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

To

1.The Secretary,
Department of Home affairs,
State of Tamil Nadu,
Fort St.George,
Chennai.



2.The Principal Secretary to Government,
Home (Prison V) Department,
Secretariat, Fort St. George,
Chennai-600 009.

3.The Director General of Prison,
Egmore, Chennai-600 008.

4.The Deputy Inspector General of Prison,
Department of Prison,
Madurai Range, Madurai-16.

5.The Superintendent of Prison,
Central Prison,
Madurai, Madurai District.

6.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.T. THIRUMURUGAN, Advocate (SR-83033[F] dated
22/08/2019)

H.C.P (MD)No.1388 of 2018
22.08.2019

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