

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 134 OF 2021

Gabriel @ Baba Hana Moben
Age 58 years, Occ. Nil, Convict No. 7737,
R/o 7/153, Sayyad Chal, Shanti Nagar, MIDC
12th Road, Andheri East, Mumbai-93.
At present in Central Prison, Aurangabad,
District Aurangabad.

... Petitioner.

Versus

1. The State of Maharashtra,
Through Under Secretary Home Department,
Mantralaya, Mumbai.
2. The Inspector General of Prisons,
Maharashtra State, Pune.
3. The Superintendent of Central Prison,
Aurangabad, District Aurangabad.

... Respondents.

WITH
CRIMINAL APPLICATION NO. 541 OF 2021
IN CRIMINAL WRIT PETITION NO. 134 OF 2021

Kamal s/o Sundardas Bathija
Age 60 years, Occ. Business,
R/o. 5th Floor, Bage Laxmi Kutir,
O.T. Section, Ulhas Nagar-3,
District Thane.

... Applicant

Versus

1. Gabriel @ Baba Hana Moben,
Age 58 years, Occ. Nil, Convict No. 7737,
R/o 7/153, Sayyad Chal, Shanti Nagar, MIDC
12th Road, Andheri East, Mumbai-93.
At present in Central Prison, Aurangabad,
District Aurangabad.
2. The State of Maharashtra,
Through Under Secretary Home Department,
Mantralaya, Mumbai.
3. The Inspector General of Prisons,
Maharashtra State, Pune.
4. The Superintendent of Central Prison,
Aurangabad, District Aurangabad.

... Respondents.

WITH
CRIMINAL WRIT PETITION NO. 327 OF 2021

Kamal s/o Sundardas Bathija
Age 60 years, Occ. Business,
R/o. 5th Floor, Bage Laxmi Kutir,
O.T. Section, Ulhas Nagar-3,
District Thane.

... Petitioner

Versus

1. The State of Maharashtra,
Through Under Secretary Home Department,
Mantralaya, Mumbai.
2. The Inspector General of Prisons,
Maharashtra State, Pune.
3. The Superintendent of Central Prison,
Aurangabad, District Aurangabad.
4. Gabriel @ Baba Hana Moben,
Age 58 years, Occ. Nil, Convict No. 7737,
R/o 7/153, Sayyad Chal, Shanti Nagar, MIDC
12th Road, Andheri East, Mumbai-93.
At present in Central Prison, Aurangabad,
District Aurangabad.

... Respondents.

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Mrs. Bharati B. Gunjal, Advocate for the Petitioner in Cri.W.P. 134/2021.

Mr. D. P. Palodkar, Advocate h/f Mr. Shubham S. Khose, Advocate for the
Petitioner in Cri.W.P. 327/2021 and the Applicant in Cri. Application
541/2021.

Mr. A. S. Shinde, A.P.P. for Respondent – State.

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**CORAM : V. K. JADHAV AND
S. G. DIGE, JJ.**

**Date of Reserving
the Judgment : 12.07.2021**

**Date of pronouncing
the Judgment : 23.07.2021**

JUDGMENT (PER V.K. JADHAV, J.) :-

1. Rule. Rule made returnable forthwith. By consent, heard finally at admission stage.
2. The petitioner is a life convict in connection with Sessions Case No. 218 of 1999. He was convicted for the offences punishable under Sections 302, 120-B, 450 of I.P.C. and sentenced to suffer imprisonment for life on 3.12.2013. The said judgment and order of conviction passed by the Additional Sessions Judge, Kalyan in Sessions Case No. 218 of 1999 dated 3.12.2013 has attained finality as the apex court has dismissed the criminal M.P. No. 4975 of 2015 on 5.5.2015.
3. According to the petitioner, till filing of the petition he has undergone 24 years, 7 months and 15 days of imprisonment including remission and the actual imprisonment of 21 years and 2 months. Thus, the jail authorities by exercising its powers conferred by sub-section (1) of Section 432 of Cr.P.C., remitted the petitioner's sentence of imprisonment for life which is in excess of 24 years of the total imprisonment by placing him initially in category 4(d) as per the Government guidelines dated 15.3.2010 and thereafter, in category 6(a) of the Government guidelines dated 15.3.2010 and forwarded his proposal dated 23.5.2017 to the Home department, Mantralaya, Mumbai i.e. respondent No.1 herein. By order dated

9.7.2019, initially the said proposal was rejected on the question of breach of peace, possibilities of threatening the complainant and witnesses etc. Being aggrieved by the same, the petitioner had approached this Court by filing criminal writ petition No. 1520 of 2019. By order dated 9.1.2020, this Court has allowed the said criminal writ petition and directed the respondent authorities to reconsider the proposal of the convict.

4. By order dated 04.01.2021 the respondent No.1 has placed the petitioner in the category of 5(b) of the Government guidelines dated 15.3.2010 as “murderes arising out of political rivalry and political interest with premeditation”. By way of this petition, the petitioner has challenged the said order dated 4.1.2021.

5. Learned counsel for the petitioner submits that respondent No.1 has not gone through the judgment and order of conviction dated 3.12.2013 passed by the learned Additional Sessions Judge, Kalyan in Sessions Case No. 218 of 1999. It has been specifically observed by the learned Sessions Judge in para 88 and 94 that it is not the case that the petitioner had any axe to grind with the deceased. He had no relations *inter se* with the deceased. As such there is no personal enmity between them or motive to murder him brought on record. Learned counsel submits that thus, the petitioner had no concern with political rivalry as it is limited to the extent of accused No.1 and the deceased. Therefore, the act committed by the

petitioner is for other reasons and therefore, the categorization made by respondent No.1 is illegal and against the facts on record and category No. 4(d) would be appropriate.

6. Learned A.P.P. submits that the petitioner was convicted for the offences punishable under Section 302 r.w. Section 120-B of I.P.C, Section 450 r.w. 34 of I.P.C., section 506 (2) r.w. 34 of I.P.C., under Section 353 r.w. 34 of I.P.C and Section 27(2) of the Indian Arms Act and sentenced to suffer life imprisonment with fine of Rs.5000/- i/d to suffer R.I. for six months under section 302 r.w. 120-B of IPC, ten years RI with fine of Rs. 5000/-, i/d to suffer RI for six months under section 450 r.w. 34 of IPC, seven years RI with fine of Rs.3000/- i/d to suffer RI for three months under Section 506 (2) r/w 34 of IPC, two years RI with fine of Rs.1000/-, i/d to suffer RI for one month under section 353 r/w 34 of IPC and one year RI with fine of Rs.1000/- i/d to suffer RI for one month under section 27(2) of the Indian Arms Act. Learned A.P.P., by referring the para 105 of the judgment in Sessions Case No. 218 of 1999, submits that it was a murder for political reasons and murder arising out of political interest with premeditation.

7. Learned A.P.P. submits that in exercise of the powers in terms of Section 432 of Cr.P.C. and Section 59(5) of the Prisons Act, 1894, the State of Maharashtra being the appropriate government, has formed guidelines for premature release of convict prisoners and

those guidelines came to be revised from time to time by the State of Maharashtra. The Supreme Court, in the case of ***State of Haryana vs. Jagdish*** reported in ***AIR 2010 SC 1690***, has held that in case a liberal policy prevails on the date of consideration of the case of a “lifer” for premature release, he should be given benefit thereof. Learned A.P.P. submits that since the petitioner was convicted by the Adhoc Additional Session Judge Kalyan on 3.12.2013, as such the guidelines dated 15.3.2010 for premature release of convict prisoner would be appropriate Government guidelines. Thus, the proposal of the petitioner for premature release was submitted to the Government. The state of Maharashtra, respondent No.1 herein, by order dated 4.1.2021 has appropriately placed the convict under clause 5(b) of the Guidelines dated 15.3.2010, wherein the petitioner is to be released prematurely on completion of 26 years of imprisonment including remission. Learned A.P.P. submits that the petitioner has completed 24 years, 1 month and 29 days of imprisonment with remission as on 11.5.2020. Thus, the petitioner may be released after undergoing 26 years of imprisonment with remission.

8. The real brother of deceased Inder viz. Kamal Sundardas Bathija has filed criminal application No. 541 of 2021 seeking permission to intervene in criminal writ petition No. 134 of 2021. The intervener however, has also filed criminal writ petition No. 327 of 2021 to quash and set aside the order dated 4.1.2021 passed by

respondent No.1 which is subject matter of the criminal writ petition No. 134 of 2021. According to the intervener, the case of the convict does not fall in clause 5(b) of the Government Resolution dated 15.3.2010 and the same would fall in clause 6(a) i.e. murders for serious offences committed by gangsters, contractor killers, racketeers etc. for which the period of imprisonment to be undergone with remission is 28 years.

9. Mr. Palodkar, learned counsel submits that deceased Inder was real younger brother of the applicant and the applicant is prosecuting the case throughout against the accused persons in connection with Sessions Case No. 218 of 1999 since last 21 years. The applicant has submitted various protest petitions before the State Government opposing the proposal for seeking remission of sentence but none of his proposals was considered by the State Government before passing the impugned order dated 4.1.2021. The photocopies of the said protest petitions are annexed at Exhibit "C-1" to the application. Learned counsel submits that from the chequered history of the antecedents of the petitioner, there is possibility of threat to the applicant if the convict (petitioner) is released by granting remission. The antecedents of the convict (petitioner) in criminal writ petition No. 134 of 2021 are annexed to the application and marked Exhibit "C-2".

10. Learned counsel for the applicant (intervener), in order to

substantiate his contentions, placed reliance on the judgment in the case of ***Epuru Sudhakar and another v. Govt. of A.P. and others*** reported in **(2006) 8 SCC 161**. Learned counsel submits that the Hon'ble Supreme Court in the above cited case has observed that judicial review of the order is available on certain grounds i.e. (a) that the order has been passed without application of mind; (b) that the order is mala fide; (c) that the order has been passed on extraneous or wholly irrelevant considerations; (d) that relevant materials have been kept out of consideration and (e) that the order suffers from arbitrariness.

11. We have carefully gone through the judgment and order passed by the Adhoc Additional Sessions Judge, Kalyan dated 3.12.2013 in session Case No. 218 of 1999. The present petitioner is accused No.7 in the said Sessions case. In para 105 of the judgment in Sessions case No. 218 of 1999, the learned Judge of the trial court has made the following observations:-

"105. In the present case, as already discussed in the main body of the Judgement, there is a history of bitter political rivalry between the factions to which accused no.1 belongs and the faction to which victim belonged. Admittedly, the victim, his uncles, father and other close relatives as well as the accused no.1 and his uncle and other close relatives are all politicians and had at some point or the other occupied official posts like Municipal Councillor, President of Ulhasnagar Municipal Council,

MLA etc. There was bitter rivalry between the two factions which led to a spurt of murders of victims belonging to both factions including the present case. From this, it is clear that this is a political murder and does not fall within the category of rarest of rare cases justifying death penalty."

12. Learned Judge of the trial court in unequivocal words has observed that there was bitter rivalry between the two factions which led to a spurt of murders of victims belonging to both factions including the present case and it is clear that this is a political murder and does not fall within the category of rarest of rare cases justifying death penalty.

13. Learned counsel for the petitioner-convict has drawn our attention to the observations of the learned Judge of the trial court in para 94 of the judgment, which is as follows:-

"94. To sum up, the circumstantial evidence in the form of FIR in SC no. 219/99, the letters and telegrams addressed by PW12 Sunderlal as well as application of deceased Inder for police protection as already discussed in the foregoing paragraphs are a clear indication of the strong rivalry and enmity between the deceased and the accused no.1. Coupled with the statements of PW9 & PW11 Ex. 406 & 408, prosecution has established a nexus between the accused Nos. 3, 6 & 7, who were frequent guests of accused no.1. Apparently, they were close associates. This would amount to a reasonable

ground to believe that the accused nos. 1, 3, 6 & 7 have conspired to commit the alleged offences. Especially so, when the accused nos. 3, 6 & 7 have no personal enmity with the deceased. There is also no explanation forthcoming on the close association of these accused with accused no.1. In this scenario, I am inclined to hold that the prosecution has successfully established the conspiracy hatched by them and that the murder was committed as a result of the same. It follows therefore, that point no.2 is answered in the affirmative as against accused nos. 1, 3, 6 & 7 only."

14. Learned counsel for the petitioner-convict submits that as observed by the trial court there was political rivalry and enmity between the deceased and accused No. 1. Accused nos. 3, 6 and 7 (accused No.7 is the petitioner-convict) were frequent guests of accused No.1 and apparently they were close associates. Thus, they have conspired to commit the alleged offence. Especially so, when the accused Nos. 3, 6 and 7 have no personal enmity with the deceased. Learned counsel for the petitioner-convict submitted that in view of this further observation by the trial court, the petitioner's case does not fall in the category of murder arising of the political interest vide clause 5(b). Learned counsel submitted that as far as the guidelines dated 15.3.2010 are concerned, the petitioner's case falls under category No.4 for categorization of crime of murder for other reasons and clause (d) is appropriately attracted which determines the period of imprisonment to be undergone including

remission as 24 years.

15. We need to repeat here again that the petitioner-convict has been convicted by the trial court for the offences punishable under Sections 302 r.w. 120-B of I.P.C. and sentenced to suffer imprisonment for life. In the facts of the instant case, though the learned Judge of the trial court in para 94 has observed that the present petitioner-convict has no personal enmity with the deceased, however, accused Nos.1, 3, 6 and 7 have conspired to commit the alleged offence. The accused Nos. 3, 6 and 7 were frequent guests of accused No.1. The gist of offence of conspiracy is bare agreement and association to break the law. Thus, the meeting of mind is essential aspect. In case of criminal conspiracy necessary ingredients are (1) that there must be an agreement between the persons who are alleged to have conspired (2) that agreement should relate to doing or causing to be done either (i) an illegal act or (ii) an act which is not illegal in itself but is done by illegal means.

16. The Hon'ble Apex Court explained the same in the case of ***Ram Narayan Poply vs. Central Bureau of Investigation, reported in (2003) 3 SCC 641*** and observed that the elements of a criminal conspiracy are (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for

the accomplishment of the object by the means embodied in the agreement, or by any effectual means.

17. We are thus of the considered opinion that by application of Section 120-B of I.P.C. and recording conviction as against the petitioner- convict with the aid of Section 120-B of I.P.C. by the trial court, the petitioner cannot escape from his criminal liability. We find no substance in the submissions made on behalf of the petitioner- convict that there was political rivalry between original accused No.1 and deceased Inder and as such, the case of the petitioner does not fall in the category of murder arising out of the political interest. In view of the same, in terms of the provisions of section 120-B (1) of I.P.C., since the petitioner-convict is a party to the criminal conspiracy committing the offence of murder punishable with imprisonment for life or rigorous imprisonment for a term of two years or upwards, is liable for the punishment in the same manner as if he had abetted the said offence.

18. So far as criminal writ petition No. 327 of 2021 and criminal application No. 541 of 2021 filed by the intervener, we would refer the observations of the Hon'ble Supreme Court in the case of ***Epuru Sudhakar*** (supra). In the said judgment, the Supreme court in para 65 and 66 has made the following observations.

“65. *Exercise of executive clemency is a matter of*

discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.

66. *Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the*

victims, the society as a whole and the precedent it sets for the future.”

19. The Hon'ble Apex Court has explained the scope and the ambit of executive clemency as a matter of discretion and yet subject to certain standards. We are aware that the power of executive clemency is not only for the benefit of the convict, but the same would also have effect on the family of the victims, the society as a whole and the precedent it sets for the future. We have however, serious doubts to entertain the application seeking intervention. The learned counsel for the intervener has not shown us any direct case on the point as to whether the relative of the deceased can be permitted to intervene in the matter of premature release of the convict. Further, we do not find any substance in the prayers made in the criminal writ petition No. 327 of 2021 that the petitioner's case would fall in category No.6 (a) of the Government guidelines dated 15.3.2010. The category No.6 (a) of the Government Guidelines dated 15.3.2010 is for the categorization "murders of serious offences" and in terms of the category of murders committed by gangsters, contract killers, racketeers etc. the period of imprisonment to be undergone with remission is 28 years. In Sessions case No. 218 of 1999 the trial court has not observed that the murder of the deceased was committed by the gangsters. The trial court has also not observed that the petitioner-convict is a contract killer. In para No.94 of the judgment in Sessions case No. 218 of 1999, it is

observed by the trial court that accused Nos. 3, 6 and 7 were frequent guests of accused No.1 and they were close associates. We find no substance in the submissions made on behalf of the intervener that category No.6 (a) of Government Resolution dated 15.3.2010 stands attracted in the present case. Though the intervener has submitted a list of antecedents in detail of the petitioner convict, however, the petitioner convict has also filed his affidavit-in-reply wherein it is submitted that the real sister of the petitioner-convict had collected information about pending cases right from 1.1.1982 to 4.7.2014 against the petitioner-convict. The petitioner convict is having no concern with any gang. It is contended by the petitioner-convict that during this period he has been released on parole/furlough leave on 11 times and surrendered within time before the jail authority. He has also given regular attendance to the concerned police station while on leave and during that period itself no complaint was filed against him. Therefore, the Superintendent of Central Prison Aurangabad has also issued good conduct certificate to him.

20. Respondent No.1, in the impugned order has given reference to good behaviour of the petitioner-convict in prison. There is nothing in the impugned order to indicate that the State Government has exercised the powers with some malafides and suffers from utter non application of mind.

21. In view of the above, we find no substance in criminal writ petition no. 134 of 2021, so also in the criminal application No. 541 of 2021 seeking intervention and in criminal writ petition No. 327 of 2021. Hence, we proceed to pass the following order:-

O R D E R

- I) Criminal writ petition No. 134 of 2021 (Gabriel @ Baba Hana Moben vs. State of Maharashtra and others) is hereby dismissed.
- II) Criminal application No. 541 of 2021 (Kamal s/o Sundardas Bathija vs. Gabriel @ Baba Hana Moben and others) seeking intervention and criminal writ petition No. 327 of 2021 (Kamal s/o Sundardas Bathija vs. The State of Maharashtra) are also dismissed.
- III) Criminal writ petition No. 134 of 2021, criminal application No. 541 of 2021 and criminal writ petition No. 327 of 2021 are accordingly disposed of. Rule discharged.

(S. G. DIGE, J.)

(V. K. JADHAV, J.)

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