

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 01.03.2021
PRONOUNCED ON : 10.03.2021

CORAM:

The Hon'ble Mr. Justice P.N.PRAKASH
and
The Hon'ble Mr. Justice V.SIVAGNANAM

W.P.No.33102 of 2019 and W.M.P.Nos.33542 & 33543 of 2019

Manoharan

: Petitioner

vs.

State of Tamil Nadu
Represented through
Superintendent, Cuddalore
Central Prison

: Respondent

Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorari, calling for the records in D.No.1554 of 2019 dated 18.11.2019 in S.C.No. 44 of 2011 on the file of the Sessions Court (Mahila Court), Coimbatore and quash the same.

For petitioner : Mr.Yashod Vardhan
Senior Counsel
for Mrs.R.Poongkhulali

For respondent : Mr. R.Prathap kumar
Additional Public Prosecutor

ORDER

P.N. PRAKASH, J.

The petitioner faced a prosecution in S.C.No.44 of 2011 for the offences under Sections 376 (2)(f) and (g), 302 r/w 34, 364 A, 120 B and 201 I.P.C before the Mahila Court, Coimbatore, in which, on 01.11.2012, he was sentenced to death. On reference, the High Court confirmed the death sentence on 24.03.2014. The Supreme Court dismissed the appeal of the petitioner on 01.08.2019. The Supreme Court also dismissed the Review Petition of the petitioner on 07.11.2019. Thereafter, on 12.11.2019, a relative of the petitioner gave a representation to the Superintendent, Central Prison, Cuddalore, stating that the petitioner is going to file a mercy petition before the Hon'ble Governor, under Article 161 of the Constitution of India.

However, on 18.11.2019, the trial Court issued a warrant under Form 42 and Sections 413 and 414 Cr.P.C to the Superintendent, Central Prison, Coimbatore and fixed the date of execution as 02.12.2019.

2 The petitioner filed the present writ petition on 21.11.2019 challenging the warrant by contending that the death sentence is being executed hurriedly and that he should be given the opportunity to appeal for mercy to the constitutional authorities. This Court, on 26.11.2019, heard the learned counsel for the petitioner and ordered that the death warrant dated 18.11.2019 shall be kept in abeyance until further orders. However, in paragraph 5 of the order dated 26.11.2019, this Court has stated as follows:

'5. We also make it clear that our order will not stand in the way of the petitioner making mercy plea before His Excellency The Hon'ble Governor of Tamil Nadu, as submitted by the learned Senior Counsel appearing for the petitioner.'

3 After 26.11.2019, this case did not see the light of the day and came up for final disposal on 01.03.2021. Mr.Yashod Vardhan, learned Senior Counsel representing Mrs. R. Poongkhulali, learned counsel on record for the petitioner, placed strong reliance on the judgement of the Supreme Court in Shabnam V. Union of India¹ and contended that the trial Court ought not to have issued the warrant in Form 42 hurriedly and should have given sufficient opportunity to the petitioner to file a clemency petition. The relevant portion from the said judgment is as under:

"12.2. That apart, the right to file mercy petition to the Governor of the State as well as to the President of India also remains intact. These remedies are also of substance and not mere formalities. This remedy is again a constitutional remedy as the Executive Head is empowered to pardon the death sentence (this power lies with the President under Article 72 and with the Governor of the State under Article 161 of the Constitution). Thus, power to pardon is a part of the constitutional scheme which has been reposed by the people through the Constitutional in the Head of the State, and enjoys high status. In exercise of their powers, the President or the Governor, as the case may be, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. It clarified by this Court that while exercising such a power, the Executive is not sitting as a court of appeal. Rather, power to grant remission of sentence is an act of

grace, humanity in appropriate cases i.e distinct, absolute and unfettered in nature (see Shatrughan Chauhan). Even this Court in V.Sriharan v. Union of India observed that clemency procedure under Articles 72/161 of the Constitution provides a ray of hope to the condemned prisoners and his family members for commutation of death sentence into life imprisonment. Of course, in a given case, it would be for the convict to make out a justifiable case for remission of death sentence. However, what is emphasized in the present context is that this is again a constitutional remedy provided to the convicts of death sentence and they have a right to avail this remedy which cannot be snatched by executing the death sentence even before giving such convicts a chance or opportunity to avail the same. For this purpose, the State has to wait for reasonable period, even after such convicts fail in the review petition, if they so file. Otherwise, there would be violation of the famous rhetoric of Emperor Ashoka who said, "State should not punish with vengeance".

4 He also placed strong reliance on the judgement of the Allahabad High Court in Peoples' Union for Democratic Rights (PUDR) Vs. Union of India², which has also been referred to in Shabnam [supra]. One can have no quarrel with the proposition that the death penalty should not be hurriedly executed.

5 In this case, the trial Court has waited for the dismissal of not only the SLP filed by the petitioner but also the review petition that was filed by him. Thereafter, the trial Court cannot indefinitely wait for the prisoner to file a clemency petition. The role of the judiciary stops when a person is convicted and sentenced finally and thereafter, the ball goes to the court of the executive to execute the sentence passed by the Courts. Even in Shabnam [supra], it has been clearly held that the State has to wait for a reasonable period, even after the convict fails in the review petition. There is no provision in the Cr.P.C. calling upon the trial Judge to wait for the issuance of the warrant in Form 42.

6 On 01.03.2021, during the hearing of this petition, when this Court posed a straight question to Mr. Yashod Vardhan as to whether the petitioner has submitted the mercy petition to the Governor, he answered in the negative and submitted that young anti-death penalty activist lawyers have taken the cause of the petitioner and that they are working on the mercy petition. Thus, it is clear that even till 01.03.2021, the petitioner had not filed mercy petition. From this conduct of

the petitioner, it is obvious that he has taken advantage of the stay order that was passed by this Court on 26.11.2019 and has conveniently ignored the observations made in paragraph 5, extracted in paragraph 2 above, which forms a part of the stay order. This Court does appreciate the concern of the anti-death penalty activist lawyers to save the life of the petitioner, but, they should achieve their objective by adopting fair means and not by foul methods like obtaining an order of stay, but, not submitting the mercy petition despite a specific direction of this Court and not taking steps to list this case thereafter. After we assumed this portfolio, we directed the posting clerk to list all old and buried matters for disposal, whereupon, this petition got resurrected. These activists will lose their credibility if they were to adopt sharp practices and tomorrow, their word will not carry weight with the Courts. We do not want to say anything beyond this.

7 After reserving orders on 01.03.2021 at 1.25 p.m., we called for the records from the Central Prison, Cuddalore, in order to satisfy our judicial conscience as to whether the petitioner was afforded the necessary advice by the prison authorities. Records received from the Central Prison, Cuddalore, show that after we had reserved orders on 01.03.2021, a mercy petition has been submitted in the afternoon by the petitioner through his advocate Ms. A.K. Sowmya and the same has been forwarded by the Superintendent of Central Prison, Cuddalore, to the Governor of Tamil Nadu through the Director General of Prisons. This amply demonstrates that the moment the advocates knew that this Court was unhappy with the conduct of the petitioner in not giving the mercy petition for more than a year, they were able to immediately submit the mercy petition in the afternoon. To be noted, the expression "reasonable period" used in Shabnam (supra), can, by no stretch of imagination, be for a year and more as in this case. The petitioner cannot also take shelter under the lockdown owing to COVID-19 pandemic, as the lockdown was only from 24.03.2020, whereas, this Court had granted interim stay on 26.11.2019 itself, with a clear caveat that the said order will not stand in the way of the petitioner making a mercy plea before the Governor of Tamil Nadu.

8 The decision in Shabnam (supra) cannot be applied de hors the provisions of the Tamil Nadu Prison Rules, 1983 (for short "the Prison Rules") which has been framed under Section 59 of the Prisons Act, 1894. Rule 913 of the Prison Rules requires the Superintendent of the Prison to inform the convict, of his opportunity to submit a petition for mercy, immediately upon the dismissal of his appeal by the Supreme Court. The rule further states that a petition for mercy shall be submitted in writing within 7 days, exclusive of the date on which the convict has been informed by the Superintendent and such petition shall be

addressed to the Governor of Tamil Nadu and the President of India. If no such petition is filed within the time limit prescribed under Rule 913, the Superintendent shall intimate the fact to the Government and the execution shall take place on the date fixed by the Court of Session (Rule 914). If, however, the convict does prefer a petition for mercy under Rule 913, the Superintendent is required to despatch it to the Commissioner and Secretary to Government, Home Department reporting the date fixed for execution and certifying that the execution has been stayed pending orders of the Government (Rule 915). Thereafter, Rule 916 requires the Superintendent to remind the Commissioner and Secretary to Government, Home Department, if no orders are received on the petition within 15 days from the date of despatch of the petition from the prison. A cumulative reading of Rules 915 and 916, would show that upon receipt of a petition for mercy, the execution of the sentence shall remain stayed pending orders of the Government. Furthermore, what cannot be lost sight of is the fact that in Shabnam (supra), the Supreme Court was dealing with a case where the death warrants were issued by the Court of Session prior to the filing of review petition by the convict. In the case on hand, it is not in dispute that the petitioner's review petition has been rejected by the Supreme Court on 07.11.2019. Therefore, the observations in Shabnam (supra) cannot be read divorced from the context in which they were made. While it is no doubt true that the convict has a right to prefer a petition for mercy, it cannot be lost sight of that the exercise of this right is still the prerogative of the convict and the Courts cannot indefinitely order deferment of a judicially upheld sentence on the supposition that an application for mercy would be filed by the convict.

9 Coming to the case of the petitioner, the prison records show that on 15.11.2019, the petitioner was informed about the dismissal of his review petition by the Supreme Court and the petitioner was advised by the prison authorities to submit a curative petition. On 19.11.2019, the prison authorities have informed the petitioner that they have received the death warrant dated 18.11.2019, fixing the date as 02.12.2019 from the trial Court. On the same day, he has stated that he does not want to file a curative petition and that he has engaged M/s.Ninny Soosan Thomas, Advocate, to submit a mercy petition. This has been communicated by the prison authorities vide letter No.11854/19 dated 19.11.2019, to the office of the Director General of Prisons. On 21.11.2019, the petitioner submitted a petition to the prison authorities, seeking extension of time under Rule 917 for filing a mercy petition. This petition was forwarded by the prison authorities to the State Government and the State Government, by order dated 26.11.2019, accepted the petition and extended the time for

submitting a mercy petition. These facts were never brought to the notice of this Court either by the petitioner or by his counsel till date and they surfaced only when this Court called for the records from the prison. We do not know the state of affairs in other Indian States, but, we can say with certainty that we have a robust prison reformation system functioning under the watchful eyes of the judicial officers of the Tamil Nadu State Legal Services Authority.

10 Under the scheme of the Prison Rules, even if the trial Court issues the death warrant, the same will automatically get stayed on the prisoner submitting the mercy petition and thereafter, the next date of execution will be fixed only by the prison authorities and not by the trial Court, if the mercy petition is dismissed. In the light of the fact that the petitioner has now submitted the mercy petition to the Governor of Tamil Nadu on 01.03.2021, he can be rest assured that he will not be hanged, till the same is disposed of.

With the above observations, this writ petition fails and is accordingly dismissed. Connected miscellaneous petitions are closed. Costs made easy.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

vsn/cad

To:

- 1.The Sessions Judge, Mahila Court, Coimbatore.
- 2.The Superintendent, Central Prison, Cuddalore
- 3.The Public Prosecutor, Madras High Court, Chennai - 600 104.

+2cc to Ms.Poongkhulali, Advocate, S.R.No.15344.

W.P.No.33102 of 2019

SKY (CO)
CSR 29.03.2021