

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.950 OF 2022

Bharat s/o Fakira Dhivar
Age: 70 years, Occu.: Convict,
R/o Undergoing his sentence,
in Central Prison Yerwada.
Permanent Resident of village
Shrirampur, Dist. Ahmednagar

.. Petitioner

Versus

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

.. Respondents

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WITH
CRIMINAL WRIT PETITION NO.1001 OF 2022

Bhagwan s/o Ranoji Patole
Age: 53 years, Occu.: Convict,
R/o. Undergoing his sentence,
in Open Prison Paithan,
Permanent Resident of Village
Satephal, Dist. Jalna

.. Petitioner

Versus

1. State of Maharashtra,
Through Superintendent of Jail,
Open Prison, Paithan.
2. State of Maharashtra,
Through Secretary,
Home Department (Prison),
Mumbai-400005.

.. Respondents

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Mr. Rupesh A. Jaiswal, Advocate for petitioner in both the matters (Appointed as Amicus Curiae in WP/950/2022).

Mr. A. M. Phule and Mr. M. M. Nerlikar, APPs for respondents - State in respective matters.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : NOVEMBER 22, 2022.

ORDER :- [Per Smt. Vibha Kankanwadi, J.]

. Both the petitioners are life convicts. The petitioner - Bharat Dhivar has prayed for quashing the order dated 02.03.2020 passed by respondent No.2 and to issue directions to respondent No.2 to place him in Category 2 (e) of Guidelines of 2010 or Category 1(e) of year 1992 Guidelines and to release him forthwith, whereas the petitioner - Bhagwan Patole prayed for directing respondent No.2 to decide his Premature Release Application and when his application was decided, he amended the petition and prayed for quashment of the order passed by respondent No.2 dated 02.03.2020 and to issue directions to respondent No.2 to place him in Category 2(b) of Guidelines of 2010.

2. Heard learned Advocate Mr. Rupesh A. Jaiswal for the petitioners in both the matters, learned APP Mr. A. M. Phule and learned APP Mr. M. M. Nerlikar for respondents - State in respective matters. Perused the affidavits-in-reply filed on behalf of the

respondents in both the petitions.

3. At the outset, it is to be noted that both the convicts were held guilty for the offence punishable under Section 302 of Indian Penal Code (for short "IPC") as well as other Sections of IPC and were sentenced to undergo imprisonment for life. The fact differs as regards the petitioner Bharat Dhivar that he was sentenced to death by learned Sessions Judge, Ahmednagar, then he preferred appeal before this Court. Thereupon this Court allowed his appeal and thereby acquitted him. Thereafter, being aggrieved with the said order the State has preferred Criminal Appeal No.1246 of 1997, wherein Hon'ble the Supreme Court upheld the order of learned Sessions Court, but altered the death sentence to imprisonment for life. Both of them have undergone imprisonment for a period of 23 years 10 months actual imprisonment and including remission 31 years and 10 months as well as 14 years and 10 months actual imprisonment and including remission 21 years respectively on the date of respective petitions.

4. It has been vehemently submitted on behalf of the petitioners that respondent No.2 has not considered various guidelines especially in ***M/s. Kranti Associates Pvt. Ltd. Vs. Sh. Masood Khan and others, [2010 (6) ALL MR 992 (S.C.)]***. Even though the petitioners are convicts, they have right to life and

liberty enshrined under Article 21 of the Constitution of India. Various factors i.e. criminal antecedents, conduct during incarceration, likelihood of abstaining from crime etc. have not been properly considered. Further it was not considered that the guidelines which were applicable at the time of sentence ought to have been considered and not those guidelines which come up by way of amendment periodically. The subsequent guidelines cannot be made applicable respectively to the petitioners. Therefore, taking into consideration the various guidelines of this Court as well as the Hon'ble Supreme Court, the category of the petitioners need to be changed and directions are required to be issued in that respect.

5. Learned Advocate for the petitioners has relied on the decision in ***Life Convict Laxman Naskar Vs. State of West Bengal and anr., [2000 ALL MR (Cri.) 1526]***, wherein it has been observed by the Hon'ble Supreme Court that :-

" The reasons given by the Government are palpably irrelevant or devoid of substance. Firstly, the views of the witnesses who had been examined in the case or the persons in the locality cannot determine whether the petitioner would be a danger if prematurely released because the persons in the locality and the witnesses may still live in the past and their memories are being relied upon without reference to the present and the report of the jail authorities to the effect that the petitioner has reformed himself to a large extent.

Secondly, by reason of one's age one cannot say whether the convict has still potentiality of committing the crime or not, but it depends on his attitude to matters, which is not being taken note of by the Government. Lastly, the suggestion on that the incident is not an individual act of crime but a sequel of the political feud affecting society at large, whether his political views have been changed or still carries the same so as to commit crime has not been examined by the Government. On the basis of the grounds stated above the Government could not have rejected the claim made by the petitioner"

6. He further relied on the recent decision in ***Ram Chander Vs. The State of Chattisgarh and Anr., [2022 LiveLaw (SC) 401]***, wherein which factors are required to be considered while considering remission under Section 432(2) of the Code of Criminal Procedure (for short "Cr.P.C.") have been enumerated. It has been observed in this case that "it cannot be said that the opinion of the presiding judge is only a relevant factor, which does not have any determinative effect on the application for remission. The purpose of the procedural safeguard under Section 432(2) of the Cr.P.C. would stand defeated if the opinion of the presiding judge becomes just another factor that may be taken into consideration by the government while deciding the application for remission....

An opinion accompanied by inadequate reasoning would not satisfy the requirement of Section 432(2)."

In the said case, the Hon'ble Supreme Court had observed the relevant factors to be considered to include while assessing the point of remission (i) whether the offence affects the society at large; (ii) the probability of the crime being repeated; (iii) the potential of the convict to commit crimes in future; (iv) if any fruitful purpose is being served by keeping the convict in prison; and (v) the socio-economic condition of the convict's family. It was held that all these factors should be considered by the presiding judge also. Then it has been opined that if the opinion of the presiding officer does not comply with the requirements of Section 432(2) or if the judge does not consider the relevant factors for grant of remission that have been laid down in ***Laxman Naskar (Supra)***, the government may request the presiding judge to consider the matter afresh." The Hon'ble Supreme Court had reiterated the decision in ***Union of India Vs. Sriharan @ Murugan, [(2014) 4 SCC 242]***. Learned Advocate for the petitioners has further relied on the decision in ***Sharafat Ali Vs. State of Uttar Pradesh and Another, [2022 LiveLaw (SC) 179]***, which is the full bench decision of the Hon'ble Supreme. It reiterates that prior criminal history, conduct and behaviour in jail, possible danger to society etc. are relevant considerations for premature release of a convict. Learned Advocate for the petitioner has also relied on the decisions of this Court in ***Mr. Dilip S. Shetye***

Vs. State Sentence Review Board, Chief Secretary Govt. of Goa, [Criminal Writ Petition No.255 of 2019] decided on 06.11.2020, wherein the petitioner was directed to be released prematurely. Similar decisions were taken in ***V. V. Mohan Vs. State of Goa and others, [2022 (2) Bom. C.R.(Cri.) 72], Ravi Patil Vs. State of Goa and others, [2020 DGLS (Bom.) 1314], Anup Pratapsingh Varma Vs. State of Maharashtra, [2007 (Supp.) Bom.C.R. 794], Satish @ Sabbe Vs. The State of Uttar Pradesh, [2020 CJ (SC) 550], Shor Vs. State of Uttar Pradesh and Another, [Writ Petition (Criminal) No.58 of 2020]*** decided by the Hon'ble Supreme Court on 05.08.2020.

7. Learned APP on the basis of the affidavit-in-reply filed on behalf of the respondents submitted that all the necessary information and opinion has been taken by the government in both the cases and taking into consideration the facts of the case also, the prayer for premature release of the petitioners was rejected.

8. We have perused the file and the documents those are attached by the respondents along with the affidavit. As regards the petitioner Bharat Dhivar is concerned, his present age is 70 years and as aforesaid, he has undergone a substantial imprisonment. The facts of the case were that he had committed rape on a three year old girl and had murdered her. That appears

to be the main consideration that has been taken by respondent No.2 for rejecting his prayer for released/granting remission to him. However, perusal of the impugned order would show that the presiding judge when called upon to give opinion has given opinion on 03.03.2014 stating that "the offence committed by the accused is serious and the convict appears to be habitual criminal and, therefore, he is not entitled to remission."

9. The opinion that was given on 03.03.2014 by the learned Sessions Judge has been considered by the respondent No.2 - State and order to that effect has been passed on 02.03.2020. Why the decision has been taken after so many years is not explained and if at all a fresh consideration ought to have been decided to be taken by the State, then they could have called a fresh opinion from the concerned Judge. Whatever opinion that has been given by the learned Sessions Judge does not appear to be in consonance of the requirements as laid down in **Laxman Naskar** (Supra) and **Ram Chander** (Supra). Note was taken in **Laxman Naskar** (Supra) and guidelines were issued which should be the basis for the release of a convict prematurely and they are as follows :-

"1. Whether the offence is an individual act of crime without affecting the society at large.

2. Whether there is any fruitful purpose of confining of

this convict anymore.

3. Whether there is any chance of future reoccurrence of committing crime.

4. Socio-Economic condition of the convict's family."

10. Further, note will have to be taken in respect of the guidelines given in **Sriharan's** case (Supra). It was held that the government is bound to seek the opinion of the sentencing Court under Section 432(2) of the Cr.P.C. Thereafter, in **Sangeet Vs. State of Haryana, [(2013) 2 SCC 452]**, the Hon'ble Supreme Court held that the opinion of the presiding judge of the sentencing court must be accompanied by reasons. Here, in the present case, whatever reason has been given is vague and similar opinion was deprecated by the Hon'ble Supreme Court in **Bhagwat Saran Vs. State of UP, [Writ Petition (Criminal) Nos.1145-1149 of 19782]** decided on 06.12.1982. In that case also, the presiding judge had simply stated that in his opinion in view of all the facts and circumstances, it is not appropriate to allow the application of remission. There is nothing to indicate that the judge took into consideration the following three factors to grant remission, which were (i) antecedents of the petitioner, (ii) conduct of the petitioner in prison; and (iii) the likelihood of the petitioner of committing crime if released and, therefore, the Hon'ble Supreme Court observed, "bald statement without any attempt to indicate how law

and order is likely to be adversely affected by their release cannot be accepted."

11. All these decisions of the Hon'ble Supreme Court were considered in ***Ram Chander*** (Supra) and it was then further considered that there appears to be a difference of opinion between the High Courts on whether the opinion of the presiding judge is binding on the government and in that respect following observations are important :-

"20. In ***Sriharan*** (Supra), the Court observed that the opinion of the presiding judge shines a light on the nature of the crime that has been committed, the record of the convict, their background and other relevant factors. Crucially, the Court observed that the opinion of the presiding judge would enable the government to take the 'right' decision as to whether or not the sentence should be remitted. Hence, it cannot be said that the opinion of the presiding judge is only a relevant factor, which does not have any determinative effect on the application for remission. The purpose of the procedural safeguard under Section 432(2) of the Code of Criminal procedure would stand defeated if the opinion of the presiding judge becomes just another factor that may be taken into consideration by the government while deciding the application for remission. It is possible then that the procedure under Section 432(2) would become a mere formality

21. However, this is not to say that the appropriate government should mechanically follow the opinion of

the presiding judge. If the opinion of the presiding judge does not comply with the requirements of Section 432(2) or if the judge does not consider the relevant factors for grant of remission that have been laid down in **Laxman Naskar** (Supra), the government may request the presiding judge to consider the matter afresh."

12. In **Ram Chander** (Supra) thereafter the Hon'ble Supreme Court found that there was nothing to indicate that the presiding judge took into account the factors, which were laid down in **Laxman Naskar** (Supra) and held that the petitioners application for remission therefore needs to be sent for reconsideration. It will not be out of place to mention here that the petition filed by Ram Chander was under Article 32 of the Constitution of India, yet the law laid down in that decision has not been followed in this case. Hence, in view of above observations in paragraph No.21 in **Ram Chander** (Supra), the matter needs to be sent back to respondent No.2 with a direction that the opinion of the presiding judge should be called afresh and then a decision be arrived at.

13. As regards the petitioner Bhagwan Patole is concerned the presiding judge had given opinion on 21.08.2017 and the impugned order by respondent No.2 appears to have been passed on 02.03.2020. In his case, it was opined by the learned Additional Sessions Judge, Jalna that "accused has brutally committed murder

of his own innocent daughter of 02 years. He has committed very heinous offence by killing his own innocent daughter of 02 years. In such circumstances, considering nature of charge leveled against accused and act committed by him, in my opinion he is not deserving for his premature release." At the cost of repetition it can be said that the learned Judges in both the matters had not considered the relevant factors. It has not been placed on record as to which documents were supplied to the concerned presiding officers when their opinions were called. Even the petition filed by petitioner Bhagwan Patole deserves to be remitted for the above reasons.

14. This Court is again and again coming across such kind of petitions. When guidelines have been issued by the Hon'ble Apex Court then they are binding on all the authorities, yet it appears that the authorities are mechanically giving their opinions and not considering the guidelines, then, once again it is required to be harped upon all those who are involved in the process of the act of remission that they should adhere the guidelines those have been given in various decisions of the Hon'ble Apex Court. The presiding officers, when such opinion is called from them, should be armed with all the necessary documents and it would be then the job of the prison authorities, who call their opinion to place before them

the necessary documents including the behaviour of the convict while undergoing imprisonment. We take this opportunity to give directions to the respondents as well as to the presiding officers/the judges from whom the opinion is sought under Section 432(2) of the Cr.P.C.. It will not be out of place to mention here that it appears from the various judgments those have been produced by the learned Advocate for the petitioners that the presiding officers of the sentencing Court are giving casual opinion and, therefore, the training/sensitization of the presiding officers at the judicial academy needs to be held periodically. If such presiding officers are trained, then it would not only help the State to arrive at a conclusion in respect of remission, but it may also avoid such petitions before this Court. Unnecessarily then the convicts are required to approach this Court and even time is lapsed when they either give simple application to this Court which would then be treated as petition, some legal assistance in the form of appointment of amicus curiae would then be required to be appointed and it will cause loss of time. In order to avoid all these difficulties, such training is then necessary. In view of the aforesaid discussion, the following order is passed :-

ORDER

- I) Writ Petition No.950 of 2022 and Writ Petition No.1001 of 2022 stand partly allowed.

II) The order passed by respondent No.2 on 02.03.2020 in both the cases stand quashed and set aside.

III) Respondent No.2 to consider respective petitioner's application for remission afresh by calling upon the opinion from the Judge of the sentencing Court in respective matters.

IV) Such request letters from respondent No.2 or the appropriate authority under the directions of respondent No.2 be sent to the concerned judges of the sentencing court afresh on or before 15.12.2022 along with all the necessary documents. It would be necessary for the concerned Judge to form opinion.

V) The concerned presiding officers of the sentencing Court should give the opinion afresh accompanied by adequate reasoning taking into consideration all the relevant factors that govern the grant of remission as laid down in **Laxman Naskar** (Supra) and **Ram Chander** (Supra).

VI) After receipt of such application, the concerned presiding officer of the sentencing Court should give his opinion before 31.12.2022.

VII) After receipt of the said opinion, respondent No.2 to take final decision on the petitioners applications for remission afresh within a period of a month i.e. on or before 01.02.2023.

VIII) Registrar (Judicial) High Court of Bombay, Bench at Aurangabad to forward a copy of this order to Joint Director, Maharashtra Judicial Academy, Uttan with direction to hold periodical training of the judicial officers as to how they should give opinion when such applications under Section 432(2) of the Cr.P.C. are forwarded to them.

IX) Fees of learned Advocate Mr. Rupesh A. Jaiswal, who came to be appointed as amicus curiae in Criminal Writ Petition No.950 of 2022, is quantified at Rs.8,000/- to be paid by High Court Legal Services Sub Committee, Aurangabad.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm