

Uday S. Jagtap

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 4721 OF 2021

Bilal Bashid Shaikh

.. Petitioner

Vs.

1. The State of Maharashtra

2. Secretary, Home Department (Prison)
Mantralaya, Mumbai

.. Respondents

.....

Mr. Rupesh Jaiswal for the petitioner

Ms. M.H. Mhatre, APP for the respondent - State

.....

**CORAM : REVATI MOHITE DERE &
PRITHVIRAJ K. CHAVAN, JJ.**

DATED : 16th SEPTEMBER, 2022.

ORDER :- *(Per Prithviraj K. Chavan)*

1. Rule.

2. Rule made returnable forthwith.

3. Heard finally with the consent of the learned Counsel for the parties.

4. Learned APP waives notice on behalf of the respondent no.1 – State.

5. Shorn of unnecessary details, a few facts essential for disposal of this petition are as follows.

6. The petitioner has been convicted by the Additional Sessions Judge, Sangli for an offence punishable under Section 302 r/w Section 34 of the Indian Penal Code and has been sentenced to suffer life imprisonment vide Sessions Case No. 93 of 2001 on 30th October, 2002.

7. The petitioner has been convicted along with one more accused viz. Irfan Sikandar Bagewadi.

8. Appeals preferred by both the convicts came to be dismissed by a Division Bench of this Court vide judgment and order dated 9th July, 2009 passed in Criminal Appeals No. 1378 of 2002 and 1379 of 2002. The Division Bench of this Court concurred with the findings arrived at by the learned Additional Sessions Judge.

9. Respondent no.2 decided premature release of the petitioner and had placed him in Category 6(a) of 1992 Guidelines and Category 4(a) of 2010 Guidelines by an impugned order dated 12th May, 2021 by virtue of which, the petitioner has to undergo 26 years of imprisonment including remission, which impelled him to approach this Court invoking its writ jurisdiction.

10. We heard Mr. Jaiswal, learned Counsel for the petitioner. At the outset, the Counsel would argue that looking to the nature of sentence and the findings arrived at by the trial Court as well as a Division Bench of this Court, the petition ought to have been categorized in 4(d) of the year 2010 Guidelines and category 3(b) of 1992 Guidelines, for the reason that the said category/s provide punishment for murder committed by more than one person or group of persons, for 24 years of imprisonment including remission, subject to minimum 14 years of actual imprisonment. In support of his contention, reliance has been placed upon a judgment of this Court in case of *Rajaram Patil Vs. State of Maharashtra*,¹ and *Vitthal Pundalik Zendge Vs. State of Maharashtra*².

1 1996 DGLS (Bom.) 18

2 2019 (1) Bom. C.R. (Cri.) 926

11. Learned APP while countering the argument of the learned Counsel for the petitioner, emphasized that the respondent had rightly categorized premature release of the petitioner in 6(a) by virtue of a Circular dated 11th May, 1992 issued by the Deputy Secretary to the Government of Maharashtra, Home Department vide Circular No. PLP-1092/13/252/PRS-3.

12. Learned APP would submit that the petitioner will have to undergo 26 years of imprisonment since he had escaped from lawful custody while undergoing imprisonment.

13. Before advertng to the Guidelines dated 11th May, 1992 as well as Guidelines dated 15th March, 2010 vide Government Resolution No. RLP-1006/C.R.621/PRS-3, it would be apposite to have a brief reference qua the concurrent findings arrived at by the trial Court and a Division Bench of this Court. Both the trial and the Division Bench of this Court have concurrently recorded the role attributable to the petitioner to the effect that he had beaten the deceased with an iron bar and the blows of a sharp knife were

inflicted by the co-accused Irfan Bagewadi on the vital parts of the deceased. The autopsy report at Exh.33 records the following external injuries :-

“1. Penetrating stab wound over Lt. Inframammary region 13 cm. Below Lt. Nipple 2cm x 1 cm. Deep into thoracic cavity elliptical in shape with clean cut edges.

2. Incised wound over Lt. Buttock 2cm x 1cm x muscle deep elliptical in shape with clean cut edges.

3. Incised wound over Lt. Occipital region 7 cm. Away from Lt. Mastoid process 2cm. x 1 cm. x bone deep elliptical in shape with clean cut edges.

4. Abrasion over Lt. Shin of tibia upper third 1cm x 1cm. Red.

5. Abrasion Lt. Knee joint lateral aspect 1cm. X 1 cm. Red.

Age of injury - recent

Nature - grievous

Object - Sharp cutting instrument for injury No.1, 2 and 3. Hard and blunt object for injury No.4 and 5.”

14. It has, thus, been observed that the cause of death of the deceased was due to injury no.1, which could be caused by a sharp edged weapon like knife. Accepting the case of the prosecution as it is, role attributable to the petitioner appears to be much lesser than the role attributable to convict Irfan Bagewadi. No doubt, the

petitioner has been convicted along with the co-accused Irfan Bagewadi for sharing a common intention while committing murder of the deceased, and, even if, it has been observed by the trial Court that it was a brutal attack on the deceased, yet, as already stated hereinabove, the proximate cause of death of the deceased was the injuries stated hereinabove and not an iron rod, said to have been held by the petitioner. It is not the case of the respondent that the petitioner has a history of indulging in such activities.

15. The following chart of the 1992 and 2010 Guidelines would make the position clear at a glance, as regards different categories *vis-a-vis* the benefit of remission to which the convicts are entitled.

1992 GUIDELINES

		MURDER FOR OTHER REASON	
3	a)	Where murder is committed in course of quarrel, without premeditation in an individual capacity and where person has no criminal history	22 years (Twenty two years)
	b)	As an (a) above, but with premeditation or by a gang.	24 years (twenty four years)

2010 GUIDELINES

		MURDER FOR OTHER REASON	
4	a)	Where murder is committed without premeditation in an individual capacity and the person has no criminal history.	20 years (Twenty years)
	b)	Murder committed with premeditation or by a person having criminal history.	22 years (Twenty two years)
	c)	Murder resulting from trade union activities and business rivalry	22 years (Twenty two years)
	d)	Murder committed by more than one person / group of person.	24 years (Twenty four years)

16. It is explicit that the petitioner ought to have been categorized in clause 4(d) of the 2010 Guidelines as the murder was committed by more than one person, which entitles him a remission, subject to minimum of 14 years of actual imprisonment including set off period.

17. It appears that the petitioner has been wrongly categorized in 6(a) of 1992 Guidelines and category 4(e) of 2010 Guidelines by the impugned order dated 12th May, 2021.

18. The following chart depicts the Guidelines of 2010.

2010 GUIDELINES

Category No.	Sub category	Categorisation of Crimes	Period of imprisonment to be undergone including remission subject to a minimum of 14 years of actual imprisonment including set off period.
4	(e)	Where the crime is committed with Exceptional violence / with brutality / kidnapping. Murder committed by dacoits and Robbers in the act of committing dacoities and robberies. Murder committed by bootleggers, gamblers, flesh traders etc.	26 years

19. The case of the petitioner does not fall in this category for the reasons stated hereinabove. Similarly, it would not fall even in the category 6(a) of the 1992 Guidelines, which states :-

“Prisoners who have escaped from lawful custody while undergoing imprisonment or who has absconded while on parole or furlough.”

20. Learned Counsel for the petitioner contends that the convict can be placed in category 6(a) of the 1992 Guidelines only if he escapes from a lawful custody or absconding from parole or furlough leave. He would further submit that the petitioner had never escaped from lawful custody.

21. The Counsel would submit that in order to declare any convict as an absconder, if the convict does not surrender on time after availing furlough or parole leave, then, first notice needs to be issued to surrender and to serve him with a copy of the notice. If he fails to comply with the said notice by remaining absent, then, offence under Section 172 of the Indian Penal Code needs to be registered. Even if he does not comply with the said formalities by not surrendering, a warrant needs to be issued under Section 82 of the Cr.P.C. and thereafter he is deemed to be an absconder.

22. Record reveals that the petitioner had proceeded on furlough leave but was brought by the police by arresting him after 1660 days. The District Prison, Kalyan appears to have excluded 1661 days while calculating the total period of sentence undergone by the petitioner as 20 years 02 months and 19 days.

23. In case of *Rajaram Patil* (supra), the Division Bench of this Court while entertaining a writ petition under Article 226 of the Constitution of India has made the following pertinent observations,

which can be extracted from paragraph 4, as under :-

“4. Every murder is a result of some kind of violence. Use of weapon or blows on the vital part by itself cannot be termed to be an exceptional violence. Such a violence would be ordinary violence for committing murder. It appears that the State Government wanted to create a separate category of murders in which there is an exceptional violence or which show the perversity of mind. In a peace loving society, every murder is bound to shock the members of the society but the exceptional violence creates tremors of shock and indignation. We do not wish to give examples which amount to exceptional violence but suffice it to say that, the present case is not one which can be labelled as a case of exceptional violence. Though every offence of murder is creation of an ill-mind, perversity is something more than that. Perverse individuals may act in a fashion in committing the murder as would show that depravity of balance of mind. We do not see anything in the acts committed by the present petitioner which show any perversity in his mind. The question as to whether there is an exceptional violence or there is perversity in a particular case will have to be decided on the basis of the facts and circumstances of that case and no yardstick of universal application can be available for this purpose.”

24. It has been reiterated that while considering a case of premature release of a convict, amongst others, the question as to whether there was an exceptional violence or perversity will have to be decided on the basis of the facts and circumstances of that case and no yardstick of universal application can be available for that

purpose. In that case, the convict was given benefit of category 3(d) of the Guidelines of 11th May, 1992. However, the Division Bench of this Court found that the petitioner ought to have been categorized in category 3(b) *inter alia* directed his release after completion of 24 years of imprisonment. The ratio can be made applicable to the present set of facts also.

25. In case of **Vitthal Zendge** (supra), the Division Bench of this Court echoed in a similar manner. Paragraph nos. 11 to 13 of the said judgment read thus :-

“11. Now, coming back to Clause 4 of Annexure I, sub-clause (a) will not apply, as the murder is not committed in an individual capacity. Sub-clause (b) will apply when murder is committed with premeditation or by a person having criminal history. This clause will not apply. On the face of it, sub-clause (c) will not apply. Taking the prosecution case as correct, the category in sub-clause (d) will be attracted, which is of murder committed by more than one person/group of persons. Sub-clause (e) will apply if the murder is committed with exceptional violence/brutality/kidnapping. Even according to the case of the prosecution, other two parts of sub-clause (e) are not applicable. When we consider the applicability of various clauses of Annexure-I to Government Resolution dated 15th March, 2010, roles played by the concerned accused will have to be considered and not by the coaccused.

12. Taking the case of the prosecution as correct, it cannot be said that the petitioner was guilty of

committing murder with exceptional violence/brutality. Considering the role attributed by the prosecution to the petitioner, he will not fall in any of the categories of sub-clause (e) of sub-clause (4). Therefore, her case will be covered by sub-clause (d) of Clause 4 as in this case, the murder was committed by more than one persons and by a group of persons.

13. Therefore, going by the said Government Resolution, the case of the petitioner for premature release of the petitioner will have to be considered on petitioner undergoing imprisonment for a period of 24 years, including remission, subject to undergoing minimum 14 years of actual imprisonment, including the set off period.”

26. The learned Counsel for the petitioner has placed reliance upon a well known judgment of the Supreme Court in the case of ***State of Haryana and Ors. Vs. Jagdish***³. the Hon’ble Supreme Court in para 43 of the judgment observed thus :-

“43. The High Court, therefore, in our opinion, was absolutely justified in arriving at the conclusion that the case of the respondent was to be considered on the strength of the policy that was existing on the date of his conviction. State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for premature release would be considered after serving the sentence, prescribed in the short sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that

3 AIR 2010 SC 1690

purpose, in our opinion, it should relate to a policy which, in the instant case, was in favour of the respondent. 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."

27. It has been law laid down by the Supreme Court that while considering a case of a convict for premature release, the State has to keep in mind all such benefit/s which are required to be considered liberally in favour of a convict, which may depend upon case to case. It is further observed that such remission shall be in consonance with the policy which was in favour of the petitioner. 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.

28. As such, we pass the following order :-

ORDER

- (i) The petition is allowed.
- (ii) We direct the respondents to consider the case of the petitioner for premature release on completion of 24 years of

imprisonment, including all remissions, subject to the petitioner undergoing minimum 14 years of actual imprisonment including the set off period.

(iii) Rule is made absolute in the aforesaid terms.

(iv) Petition is disposed off.

PRITHVIRAJ K. CHAVAN, J.

REVATI MOHITE DERE, J.