

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

CRIMINAL WRIT PETITION NO. 1745 of 2019

Chhedilal @ Shiva Ramlal Nirmal

...Petitioner

Versus

The State of Maharashtra

...Respondents

Mr. Sushan Mhatre, Advocate for Petitioner.

Mrs. S.D. Shinde, APP for the Respondent–State.

**CORAM : A.S. GADKARI AND
PRAKASH D. NAIK, JJ.**

RESERVED ON : 31st JANUARY, 2023.

PRONOUNCED ON : 8th FEBRUARY, 2023.

JUDGMENT – (PER : PRAKASH D. NAIK, J.) :-

1. This Petition is filed through jail. Petitioner is detained at Kolhapur Central Prison, Kalamba Kolhapur. Petitioner has prayed that, he may be transferred to open prison.

2. The contents of the Petition would indicate that, the Petitioner has been convicted for an offence punishable under Sections 302, 307, 321, 392 r/w 397 of Indian Penal Code (for short 'IPC') and sentenced to suffer imprisonment for life for offence under Section 302 of IPC and imprisonment for 7 years for conviction under Section 307 of IPC and for conviction under Section 394 r/w 397 of IPC, has been sentenced to suffer imprisonment for 7 years. The Petitioner had filed an appeal challenging the conviction before this Court and vide Judgment

and Order dated 21st January, 2014, the conviction under Section 307 was converted to Section 326 of IPC but the sentence of 7 years imprisonment was maintained. The conviction under Section 394 with Section 397 of IPC also maintained. However, the High Court directed that all the substantive sentences shall run concurrently. Petitioner is in jail from 17th November, 2008. Petitioner may be transferred to open prison.

3. The incharge Superintendent, Kolhapur Central Prison, Kolhapur has filed affidavit stating that the Petitioner is convicted by the Sessions Court, Mumbai vide Judgment and Order dated 29th April, 2011 in Sessions Case No.221 of 2009 for the offences punishable under Section 302, 307, 324, 394, 397 of IPC. The Petitioner had preferred Criminal Appeal No.1299 of 2011 before this Court which was dismissed and the conviction under Section 302 and 324 was confirmed as well as conviction and sentence under Section 394 r/w Section 397 was maintained and conviction under Section 307 was converted to Section 326 of IPC. All the substantive sentences were directed to run concurrently. The complaint was lodged against the Petitioner under Section 188 of IPC, Section 42, 45(12) of Prison Act, 1894 and Section 27 of NDPS Act, 1985 with Juna Rajwada Police Station, Dist. Kolhapur in connection with F.I.R. No.335 of 2021. The said case is under

investigation. As per Prison Manual Chapter-II Open Prison Rule No.4(ii)(d) the Petitioner cannot be transferred to open prison against whom, any case is pending in the Court. Hence, the Petitioner cannot be transferred to open prison.

4. Learned A.P.P. on instructions from Superintendent, Nashik Road Central Prison, Nashik submitted that, Petitioner has requested for transfer to open prison. However, in accordance with Chapter-II, Rule-4 (ii)(g) accused convicted and sentenced for offences under Sections 121, 121-A, 122, 123, 124, 124-A, 125, 126, 128, 129, 128, 129, 130, 131, 132, 133, 134, 135, 376, 392 to 402 of Indian Penal Code or for offences under the Bombay Prevention of Gambling Act, 1887, or for offences under the Sea Customs Act are not entitled for transfer to open prison. Due to pendency of case also the Petitioner is not entitled for transfer to open prison.

5. Undisputedly, the Petitioner has been convicted for the aforesaid offence. He has been sentenced to imprisonment for life and imprisonment for 7 years. Both the sentences were directed to run concurrently. Petitioner has undergone sentences more than 10 years. Thus, the Petitioner has completed the sentence imposed for conviction under Section 394 r/w 397 of IPC.

6. This Court vide Judgment dated 12th August, 2010 passed in Criminal Writ Petition No.362 of 2010 and other connected petitions has observed that, in a case, where the convict has been sentenced for the offences punishable under Sections 392, 394 or 397 of Indian Penal Code alongwith the offence punishable under Section 302 of Indian Penal Code and the sentences are directed to run concurrently, he will be eligible for admission to the open prison on completion of the sentences so awarded under Sections 392, 394 or 397 of Indian Penal Code. However, while considering this eligibility, other factors like the jail record so as to point out whether he was a habitual, escaping and absconding etc. are required to be taken into consideration.

7. In the affidavit in reply it is also stated that the proposal of the Petitioner was placed before Open Prison Selection Committee in 2021. However, the Selection Committee did not select the Petitioner for open prison. The Petitioner has undergone actual imprisonment of 14 years and 14 days upto 30th November, 2022. Hence, the proposal was placed before the Advisory Board for recommendation under 14 year's premature release. It will be forwarded immediately.

8. In accordance with Chapter-II of Prison Manual and open prison Rule-4(2)(iv) the convict cannot be transferred to open

prison against whom case is pending in the Court and since the case registered vide C.R. No.335 of 2021 is pending against petitioner, he cannot be transferred to open prison.

9. The affidavit-in-reply also indicate that the Petitioner had undergone 14 years of actual imprisonment and hence his proposal is placed before the Advisory Board for recommendations for 14 years premature release.

10. In the aforesaid circumstances, the Petitioner cannot be transferred to open prison. However, the proposal for recommendation under 14 years premature release as stated in affidavit-in-reply may be considered expeditiously and decision be communicated to the Petitioner.

11. Petition is disposed of in the aforesaid terms.

[PRAKASH D. NAIK, J.]

[A.S. GADKARI, J.]