

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

***CRIMINAL WRIT PETITION NO. 2204 OF 2023
WITH
INTERIM APPLICATION NO. 791 OF 2024***

Anwar Abdul Aziz Pathan

.... Petitioner/Applicant

Versus

The State Of Maharashtra And Ors.

.... Respondents

Mr. N. N. Gawankar a/w Mr. Shreyas N. Gawankar i/b Mr. Manas N. Gawankar, for the Petitioner/Applicant.

Mrs. P. P. Shinde, A.P.P, for the Respondent – State.

***CORAM : REVATI MOHITE DERE &
MANJUSHA DESHPANDE, JJ.***

DATE : 7th MARCH 2024

ORDER [PER MANJUSHA DESHPANDE, J.]

1. The Petitioner herein has been convicted by the learned Additional Sessions Judge – 3, Kalyan, in Sessions Case No. 46 of 2003 vide the Judgment and Order dated 16th August 2011. The petitioner was sentenced to suffer rigorous imprisonment for life. The petitioner filed an appeal against the said judgment and order, which came to be dismissed by this Court vide Judgment and Order dated 10th May

2018.

2. While the petitioner was undergoing imprisonment at the Kolhapur Central Prison, Kalamba, he was selected for open prison by the Selection Committee on 20th March 2014, and he was transferred to Yerwada District Open Prison. While the petitioner was in open prison, he was released on parole leave by order dated 30th December 2016 issued by Divisional Commissioner, Pune, for a period of 30 days. After completion of the said parole period, the petitioner was supposed to surrender on 29th January 2017. However, on 28th January 2017, the petitioner was arrested in connection with the C.R. No. 34 of 2017, registered with Ambernath Police Station, for the offences punishable under Sections 386, 387 and 34 of the IPC. The learned J.M.F.C., Ulhasnagar, District – Thane, granted remand and sent petitioner to the police custody upto 31st January 2017. Thereafter, the petitioner was sent to Yerwada Open District Prison, alongwith warrant for the said new case. Because of the crime registered against him, for security reasons, he was temporarily

transferred to Yerwada Central Prison on the same day i.e. on 31st January 2017, as per oral instruction of the Deputy Inspector General (DIG), Western Region, Pune. The petitioner's case was placed before the Selection Committee on 24th March 2017, and the Committee came to the conclusion that the petitioner should be permanently transferred to the closed prison, at Kolhapur Central Prison. The said order was passed by the Committee on 24th March 2017. Thereafter, the petitioner was acquitted by the learned J.M.F.C., 5th Court, Ulhasnagar, District- Thane, in connection with RCC No. 1128 of 2017, by its Judgment and Order dated 27th February 2023.

Since, the petitioner was acquitted in the second case, his name was forwarded to be considered for open prison before the Selection Committee on 4th October 2023. The Committee favourably considered the case of the petitioner and, accordingly, transferred him to the Yerwada Open District Prison on 8th November 2023. The petitioner has been given benefit of remission of open prison from 8th November 2023. Initially, when this petition was heard, the petitioner had challenged the order of his transfer from open prison to closed

prison on various grounds raised in this Petition. However, thereafter, the petitioner filed an Interim Application and he has given up the other challenges raised in the petition, and did not press for the same. Consequently, he has prayed only for his release from the prison, as per his entitlement on the terms and conditions as this Court may deem fit.

3. We have heard learned counsel for the petitioner as well as learned APP for the respondent- State.

4. Learned APP has filed a detailed affidavit with regard to the various orders passed by the respondent- State authorities in respect of the petitioner, whereby the petitioner was transferred from open prison to closed prison and again to the open prison. Alongwith the said affidavit, which justifies the order passed by the authorities, learned APP has annexed a chart, which reflects the remissions granted to the petitioner. Learned APP has also annexed the order dated 24th March 2017, issued by the Selection Committee, which has taken a decision to cancel the petitioner's order of open prison and sending

him to the closed prison. When the aforesaid Interim Application of the petitioner was heard on 29th February 2024, time was granted to the learned APP to take instructions regarding the said Interim Application.

5. According to the Rules of remission, a regular convict is granted 7 days remission for every month in a closed prison, as against that, 30 days remission for every month in open prison, is admissible to a convict. In case of the petitioner, as per the chart annexed to the affidavit by the respondent- authorities, the petitioner has been granted 7 days remission for each month, for a period from 16th August 2011 to 22nd March 2014, in addition to 30 days remission for his good conduct in the prison, for each year. Similarly, from 22nd March 2014 to 31st January 2017, the period during which the petitioner was in open prison, the petitioner has been granted 30 days remission for each month, in addition to 30 days yearly remission for his good conduct. So far as the period from 1st February 2017 to 8th November 2023 is concerned, the petitioner has been granted 7 days

remission for each month since he was in the closed prison during the said period. Thereafter, the petitioner was again selected for open prison and he is in open prison since then. Therefore, the petitioner has been granted remission of 30 days per month from 8th November 2023 to 31st March 2023.

6. Learned counsel for the petitioner relying on the said remission chart has argued, that after the remand period of the petitioner was over on 31st January 2017, the DIG (Prison), Western Region, Pune, had given oral telephonic orders to transfer the petitioner to the Yerwada Central Prison (closed prison), which according to the learned counsel for petitioner, is unheard of and not tenable in the eyes of law. He submits that such oral orders cannot be passed, when a particular procedure has been prescribed for passing such orders. According to him, the procedure for transfer of a prisoner from open prison to closed prison is given in Rule – 6 of the Open Prison Rules, 1971. As per the said Rule, it is the Inspector General of Prison, who has to grant approval for such transfer.

7. In the present case, no such approval is granted by the Inspector General of Prison. In the affidavit filed by the Director General of Police and Inspector General of Prison, State of Maharashtra, dated 6th March 2024, it is mentioned in paragraph No. 6 of the affidavit that the petitioner was temporarily transferred to the Yerwada Central Prison on same day, i.e. on 31st January 2017, as per oral instruction of DIG (Prison), Western Region, Pune. It is further submitted by the learned counsel for the petitioner, that after the oral directions of DIG (Prison) Western Region, Pune, dated 31st January 2017, the Selection Committee passed the impugned order transferring the petitioner permanently to closed prison at Kolhapur Central Prison, on 24th March 2017. It is a undisputed fact that, from 31st January 2017 to 24th March 2017, the petitioner was in closed prison, without there being any formal written order to that effect. Therefore, the petitioner is claiming remission as admissible to a prisoner in a open prison during that period. The said fact about passing of the order by the Selection Committee on 24th March 2017 is also accepted in the

affidavit filed by the respondent – State authorities. It is also admitted, that prior to the petitioner’s arrest in the C.R. No. 34 of 2017, he was in open prison and an official order for cancellation of the order of open prison was passed only on 24th March 2017.

8. After going through the record and considering the submissions made by the parties in the peculiar facts of the present case, we deem it appropriate to allow the Petition by holding that the period from 31st January 2017 to 24th March 2017 undergone by the petitioner in closed prison, will have to be treated as a period in open prison for the purpose of counting remission. The respondent- authorities have placed on record the chart reflecting the remission period of the petitioner with his probable date of release. In the said chart, the date of the petitioner’s release is shown to be 1st April 2024.

9. Since, we have come to the conclusion that the petitioner would be entitled for grant of remission during the period from 31st January 2017 to 24th March 2017, the remission of 30 days in each month for the aforesaid period would be admissible to him. On including the

said remission of 52 days in the total remission as admissible to the petitioner and considering the probable date of his release which is projected to be 1st April 2024, the petitioner is entitled to be released from the prison forthwith. Hence, we pass the following order:

ORDER

- i) The Writ Petition is allowed.
- ii) The petitioner to be released forthwith by the prison authority, if not required in any other matter.

10. With the aforesaid directions, the Writ Petitions stands disposed of.

11. In view of the disposal of the Writ Petition, the Interim Application does not survive and the same is also disposed of.

12. All concerned to act on the authenticated copy of this operative order.

MANJUSHA DESHPANDE, J.

REVATI MOHITE DERE, J.