IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 7483 of 2017

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RAFIK AALAM PARMAR

Versus

STATE OF GUJARAT & 3 other(s)

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Appearance:
for the Applicant(s) No. 1
MR PIYUSHKUMAR K BASERI(7933) for the Applicant(s) No. 1
MS MAITHILI MEHTA, ADDITIONAL PUBLIC PROSECUTOR for the Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI**

Date : 19/12/2022

ORAL ORDER

1. By way of present petition, the petitioner herein has prayed for to direct the respondents to consider the case of the petitioner for full remission of sentence under Section 432 and/or 433-A of the Criminal Procedure Code.

2. It is the case of the petitioner that the petitioner herein was convicted and sentenced to suffer rigorous imprisonment for life and fine of Rs.1850/- and in default to undergo simple

imprisonment for further three months under Section 302, 304(2), 307, 324, 149 of Indian Penal Code and by the learned City Sessions Court No.7, Ahmedabad in the Sessions Case No.67 of 1999 on 23.10.2001.

3. Mr. Piyushkumar K. Baseri, the learned advocate appearing for the petitioner submitted that the petitioner had completed the sentence of 16 years, 7 months and 8 days on date 31.07.2017 as per the custody certificate issued by the Deputy Superintendent, Ahmedabad. Under such circumstances, the case of the petitioner-prisoner is required to be considered for the remission of sentence. That the committee for the remission of the petitioner sentence was met on 20.05.2017 and the report was sent to the State Government on 13.07.2017. The decision for his remission of his remaining sentence is not taken till the filing of the present petition. Mr. Piyushkumar K. Baseri, the learned advocate appearing for the petitioner further submitted

that the petitioner has also made an application in the month of August to the respondents to consider his case for full remission of his sentence under Section 433-A of the Criminal Procedure Code. The application is also not been decided till the date of filing of the present petition.

Mr. Piyushkumar K. Baseri, the learned advocate appearing for the petitioner further submitted that the case of the petitioner is also required to be considered in view of the Government Resolution dated 23.10.1992, wherein the only condition is of condition of 14 years of imprisonment. As the petitioner has completed the imprisonment of 16 years, his case is required to be considered. A copy of the Government Resolution dated 23.10.1992 is duly produced on record at Annexure-C.

4. Heard Mr. Mr. Piyushkumar K. Baseri, the learned advocate appearing for the petitioner and Ms. Maithili D. Mehta, the learned Additional Public

Prosecutor appearing for the respondent - State.

5. Mr. Piyushkumar K. Baseri, the learned advocate appearing for the petitioner vehemently submitted that, petitioner's application for release on remission is concerned, should have been considered in tune with the policy which was prevailing on the date of his conviction and not the subsequent policies, if any, unless they are beneficial and accordingly, the case of the petitioner for full remission of his sentence is required to be considered in tune with the policy of the Government Resolution dated 23.10.1992, which was prevailing at the time of his conviction dated i.e. 23.10.2001. Mr. Piyushkumar K. Baseri, the learned advocate appearing for the petitioner has also relied on the decision of the Hon'ble Supreme Court in the case of ***State of Haryana & Others Versus Jagdish***, reported in ***2010 (4) SCC 216*** and ***Special Criminal Application No.1520 of 2012, order dated 18.05.2012.***

6. Ms. Maithili D. Mehta, the Additional Public Prosecutor appearing for the respondent - State submitted that the case of the petitioner herein is pending consideration before the Advisory Board Committee and therefore, the case of the petitioner shall be considered in the next meeting of the Advisory Board Committee. Ms. Maithili D. Mehta, the Additional Public Prosecutor appearing for the respondent - State submitted that the policy of the 1992 was replaced by Government Resolution dated 14.01.2014 issued by the State Government, and the petitioner is not fulfilling the condition of the aforesaid Government Resolution, however, at present in view of the representation dated 01.08.2017 addressed to the Secretary, Home Department, Sachivalaya, Gandhinagar, the application preferred by the petitioner is pending before the Secretary Home Department for further consideration and therefore, the case of the petitioner herein would be considered as per

the said policy when the said meeting of the Advisory Board Committee would be held.

7. Having heard the learned advocates appearing for the respective parties.

8. POSITION OF LAW :-

8.1 At this state, it is apposite to refer to the law as laid down by this Court in the case of **Harishankar Gayaprasad Jaiswal Versus State of Gujarat** reported in **2018 (0) AIJEL-HC 239908,** para 78 reads thus :-

> " 78. Let me now summarise the aforesaid discussion:
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> [1] The imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code means “the imprisonment for the rest of the life of the convict”. To put it in other words, till the convict breathes his last.
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> [2] The grant of remission is a matter of policy and it is for the Executive Branch of the Government to decide as to when, to what extent and in what manner, remission is to be granted.

[3] The policy decision may be based on so many factors, like the prevailing general law and order situation, the impact of remission on the social life and social security at the relevant time and the type of the prisoners to be covered by it. Further, if the reformative imprisonments are already underway in the prisons themselves, perhaps, the immediate release may not be desirable or beneficial and thus, remission may have to be turned down accordingly.

[4] It is not for the judiciary to enter into this arena. Indeed, where the judicial function ends by awarding conviction and imposing sentence, it is there that the executive function begins and it is then for the latter to consider the question of suspension, remission and commutation of sentences.

[5] The Courts should not issue any direction in the matter of policy, which is purely within the executive domain of the Government. If the Government decides to categorise the prisoners for the grant of remission and the classification is rational and intelligible and it is not discriminate between the same class of prisoners, the Court is not competent to say that such classification should not be made or that the same yardstick of remission be made applicable to each class.

[6] The Executive Wing of the State in its discretion on consideration of the cry and aspiration of the society for imposition of the deterrent punishment on certain type of offenders may decline to grant the benefit of

remission. For example, an offence punishable under Section 376 I.P.C. is not only an offence against a singular individual, but against the collective as it offends the dignity of a woman and creates a terror trodden atmosphere in the society, because a rapist is a menace in the civilised society. Sometime, liberal delineation with a convict of this nature decreases the faith in the system and a feeling of insensitivity prevails. Offences for dowry death and cruel treatment for demand of dowry have their own social impact, as the said offences corrode the essential social fabric and slowly denude it of stability affecting the age of old established institutions.

[7] Remissions are granted under the special circumstances by the State and also with the object of reforming the prisoners, after ensuring that there is no possibility of repeating the offences.

[8] The right to be released seeking the benefit of remission is neither a fundamental right nor a common law right, but is a statutory right and flows from the Act and Rules framed in this behalf. By earning remissions, a life convict does not acquire a right to be released prematurely. But, if the Government has framed any rules or made a scheme for the early release of such convicts, then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of the Constitution.

[9] Considerations of public policy and humanitarian impulses - supports the concept of executive power of clemency. If the clemency power

is exercised and the sentence is remitted, it does not erase the fact that an individual was convicted of a crime. It merely gives an opportunity to the convict to reintegrate into the society.

[10] All the convicts cannot be classified as one homogeneous class. They can be classified on the basis of different considerations. Heinousness or gravity of the offence committed by a convict can be one of the basis for such classification.

[11] Ordinarily, when any application or representation is received from the convict as regards grant of remission, the authorities concerned should not keep it pending for an unduly long time. It is a matter of great concern to a prisoner as to when he will regain his freedom from jail specifically when the sentence imposed is a life imprisonment. Therefore, without keeping such applications pending for a long time, those should be taken up for consideration within a reasonable period of time and the outcome should be communicated to the prisoner.

[12] The order passed under Article 161 of the Constitution granting remission in favour of a convict undergoing life imprisonment can be challenged before the High Court under Article 226 of the Constitution of India by any person aggrieved, if such aggrieved person is able to show that the power had been exercised taking into account the extraneous consideration, not germane to the exercise of the power conferred, or in other words, that the order is a result of mala fide exercise of power. However, it needs to be clarified that the

> exercise of power in this regard cannot be questioned on the ground of adequacy or inadequacy of the reasons, which resulted into the passing of the order. The court is not entitled to investigate the matter on merits, but can certainly go into the question whether the power given has been exercised mala fide or not.
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> [13] It is completely a different matter that a person aggrieved, say for example, kith and kin of the victim or deceased may fail to prove or make good his case that the power was exercised taking into account the extraneous consideration or had been exercised mala fide, but, to say that no such person has locus standi to challenge an order issued under Article 161 of the Constitution of India, will not be the correct position of law. Though, no legal right of any kith and kin of the victim or deceased could be said to have been infringed by the grant of remission, but, such person has certainly got a personal or modified right, as he would be the real person, who felt aggrieved because of the criminal acts done by the convict. [See: Godde Venkateswara Rao vs. Government of Andhra Pradesh (AIR 1966 SC 828)].
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> [14] **The policy, which was prevailing on the date of conviction, shall be made applicable for the purpose of grant of remission."**

9. Considering the ratio as laid down by this Court in the aforesaid judgment, it is no longer res-integra that while considering the case of the

petitioner for remission the policy prevailing on the date of conviction shall be made applicable for considering the grant of remission. The petitioner herein was convicted on 23.10.2001 and the respondent authority shall taking into consideration the same, considering the case of the petitioner in accordance with the policy prevailing on that dated 23.10.2001.

10. This Court is conscious of the limitation while considering the application for remission at the instance of the petitioner however in exercise of powers under Section 482 of the Code of Criminal Procedure and in the interest of justice, considering the fact that the petitioner was convicted by the Sessions Court in Sessions Case No.67 of 1999 on 23.10.2001 and the position of law as referred above, the respondent authority is directed to decide the application dated 4.8.2017 duly produced on record at page No.12 taking into consideration the policy which was prevailing on the date of conviction of the petitioner, More particularly,

in view of the statement made by Ms. Maithili D. Mehta, the learned Additional Public Prosecutor appearing for the respondent - State that the meeting of the Advisory Board Committee is yet to be held and the decision would be taken within a period of **FOUR WEEKS** taking into consideration the policy prevailing as on date of conviction.

11. With the aforesaid, the present application is allowed to the aforesaid extent.

Direct service is permitted.

(VAIBHAVI D. NANAVATI,J)

Pallavi