2023:KER:45052

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 11TH DAY OF JULY 2023 / 20TH ASHADHA, 1945

WP(CRL.) NO. 854 OF 2022

PETITIONER :

THRESSIAMMA JOSE,
AGED 68 YEARS,
W/O JOSE, MADASSERY HOUSE,
MANJAPRA P.O, ERNAKULAM DISTRICT,
PIN – 683 574.

BY ADVS.
P.K.VARGHESE
K.R.ARUN KRISHNAN
JERRY MATHEW
REGHU SREEDHARAN
RAMEEZ M. AZEEZ
APARNA ANIL

RESPONDENTS :

1 STATE OF KERALA,
REPRESENTED BY THE SECRETARY,
DEPARTMENT OF HOME, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

2 THE STANDING ADVISORY BOARD (PRISONS)
REPRESENTED BY ITS CHAIRMAN -
THE INSPECTOR GENERAL OF PRISONS,
PRISON HEADQUARTERS,
THIRUVANANTHAPURAM – 695 001.

3 DIRECTOR GENERAL OF PRISONS &
CORRECTIONAL SERVICES,
PRISONS HEADQUARTERS, KERALA,
POOJAPPURA, THIRUVANANTHAPURAM – 695 012.

4 SUPERINTENDENT,
CENTRAL PRISON, VIYYUR,
THRISSUR, PIN-680 010.

BY SRI.NOUSHAD K.A., PUBLIC PROSECUTOR

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION ON 11.07.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"CR"

BECHU KURIAN THOMAS, J.

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W.P.(Crl.) No.854 of 2022

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Dated this the 11th day of July, 2023

JUDGMENT

The maternal anguish of a mother, whose son is a convict has compelled her to approach this Court seeking premature release of her son from life imprisonment. The mother claims that her son thoroughly repents for his misdeed and has also transformed competely.

2. While studying for his graduation, petitioner's son Rijo Jose (hereinafter referred to as 'the convict') got embroiled in a murder case when he caused the death of a lady by the name of Mariamkutty on 16.06.2000. The trial court convicted the accused for life imprisonment, which was affirmed by this Court on 14-10-2009 in Crl.A.No.1804 of 2005. According to the petitioner, her son has been in jail for the last 22 years and two months as on August 2022, as evidenced by Ext.P6 certificate and hence she pleads for premature release of her son.

3. Concededly, the convict has, while in prison, graduated in English Literature obtained Post Graduation also in English Literature, took his Masters in Business Administration and even appeared for the preliminary examination for the Civil Services.

4. Sri. Arun Krishnan, the learned counsel for the petitioner, submitted that the Jail Authority had recommended the release of the convict along with another life convict. However, for reasons that are curious, petitioner's son alone was not released, while the other convict Sri. Velayudhan Nair was prematurely released. The learned counsel further submitted that petitioner had filed a representation on 26.08.2022, requesting for the premature release of her son and the said request is also pending consideration without any decision having been taken. The representation refers to the transformation of the convict, including his repentance for the criminal act reflecting on the convict's reformation.

5. Sri. Noushad K.A., the learned Government Pleader, on the other hand, after referring to the statement filed by the 4th respondent, pointed out that petitioner was the accused in S.C.No.387 of 2001 on the files of the Sessions Court, Ernakulam, and he was sentenced to undergo rigorous imprisonment for life and other allied offences, which judgment was confirmed on 14.10.2009. The convict's educational achievement mentioned in the earlier paragraph was admitted. It was also pointed out from the statement filed, that the petitioner has been a well-behaved prisoner, and no complaints relating to his conduct in jail or even while he was released on parole have been reported. The learned Government Pleader submitted that though one Sri.Velayudhan Nair and petitioner's son were both recommended for release by the Jail Advisory Board by an

order dated 21.08.2022, Velayudhan Nair alone was directed to be released, and the convict's recommendation for release was rejected. The learned Government Pleader further submitted that it is the specific stance of the Government not to release prisoners prematurely if they are undergoing imprisonment for crimes involving the murder of women and children.

6. I have considered the rival submissions.

7. While confirming the conviction and sentence of petitioner's son for the offence of murder, housebreaking and trespass, the Division Bench of this Court, in Crl. A. No. 1804/2005, had observed as follows: "*It cannot be said that "once a criminal, always a criminal". If the feeling of remorse has dawned on the convict, it is a factor which cannot be ignored. His desire to reform and to be useful to the family and society needs to be taken care of. The appropriate Government seems to be more equipped in this regard to take such steps as far as possible to meet the situation*." It was further observed that *"the appropriate Government may consider all the aspects and reach a just conclusion. The interest of the society and the concern for the convict, who wishes to transform sincerely, will have to be considered."* The aforesaid observations of this Court indicate that even while confirming the conviction of the accused, this Court was mindful of the possible reformation that had set in on the accused.

8. Premature release of a prisoner is a process by which

compassion is shown by the State towards the offenders by adopting a lenient approach after conviction. The power of premature release is a constitutional power flowing from Article 161 of the Constitution of India. The factors that guide premature release are manifold. The reformation that has taken place over the convict is the primary factor. Even though the decision of premature release of a convict is the prerogative of the State Government, the exercise of such a plenary power cannot be left to the whims and fancies of the Government, but must be entwined with reason, after considering the relevant parameters.

9. In the decision in **Sisir Roy S/o. Late Biweswar Ch. Roy and Others v. Union of India** [(2000) 2 SCC 595], it has been held that, if the Government has framed any rule or made a scheme for early release of convicts, then those rules or schemes will have to be treated as guidelines for exercising its power under Art.161 of the Constitution. It was also observed that if, according to the government policy/instructions in force at the relevant time, the life convict has already undergone the sentence for the period mentioned in the policy/instructions, then he acquires a right to have his case considered for premature release. The said consideration must be done consistently with the legal position and the government policy/instructions prevalent.

10. Pardon or remission is an act of grace. The power to remit is a constitutional power and any legislation that seeks to curtail its scope must fail. The Supreme Court has observed that every civilised society

recognises the power of pardon and provides pardoning to be exercised as an act of grace and humanity in appropriate cases. The Court has explained that the power of pardoning has been exercised in most States from time immemorial and has always been regarded as a necessary attribute of sovereignty. It is also an act of justice supported by wise public policy. It cannot, however, be treated as a privilege. It is as much an official duty as any other act. It is vested in the Authority not for the benefit of the convict only, but for the welfare of the people, who may properly insist upon the performance of that duty. The above has been laid down in the decision in **State of Haryana and Others v. Jagdish** [(2010) 4 SCC 216]. The Supreme Court had further observed in the above judgment that the question of premature release of a convict must be considered on the strength of the policy that existed on the date of his conviction.

11. In Kerala, Section 77 of the Kerala Prisons & Correctional Services (Management) Act 2010, (for brevity, the Act) deals with 'premature release, which reads as follows; S.77. (1). *Well behaved, long term convicted prisoners may be prematurely released with the objective of their reformation and rehabilitation by the Government, either suo moto or on the recommendations of an Advisory Committee as may be prescribed.*

(2). The Advisory Committee constituted as per sub-section (1) shall have the powers and duties as may be prescribed.

12. 9. Chapter 36 of the Kerala Prisons & Correctional Services (Management) Rules 2014 (for brevity, the Rules) also deals with

premature release. Rule 462 of the Rules creates an Advisory Body. The said body, referred to as The Jail Advisory Body, is to recommend the release of prisoners prematurely.

13. The Jail Advisory Board of Central Prison considered the case of 36 convicts in its meeting on 11-04-2022. Out of the 36 persons, only two were recommended for premature release. Petitioner's son's name was considered and recommended, as is evident from serial No. 12 in the minutes of the meeting produced as Annexure R4(d). Of the two persons recommended, one was Sri. Velayudhan Nair, and the other was petitioner's son. On the date of recommendation i.e. 11-04-2022, petitioner's son had completed 17 years and 11 months and 23 days of actual imprisonment (excluding the period of remission). As on 26-09-2022, he has completed 22 years 3 months and 16 days including the period of remission.

14. However, it is evident from Annexure R4(a) Government Order dated 21.08.2022, that the case of Sri.Velayudhan Nair alone was considered for release by the Government, and the case of petitioner's son was not at all considered. Subsequent to Annexure R4(a), petitioner had represented, on 26.08.2022, to the Government, seeking release of her son through Ext.P5. No decision has yet been taken, even on Ext.P5. Despite the recommendation to release the petitioner's son by the Jail Advisory Board on 11.04.2022, a decision thereon has, surprisingly, not been taken.

15. The contention of the respondents that the claim for premature release of the petitioner's son was rejected cannot be accepted. In the absence of an order, it can only be assumed that the recommendation is still pending consideration before the Government. The contention of the respondents that the rejection of petitioner's son's premature release must be deemed from Annexure R4(a) order of the Government cannot be accepted. Such an assumption cannot be countenanced in a State governed by the principles of the rule of law. As noticed from the decision in Jagdish's case (supra), the power of pardon is an official duty vested in the Authority not merely for the benefit of the convict but for the welfare of the people, who may insist upon the proper performance of that duty. Therefore the Government was bound to pass orders on the recommendation of the Jail Advisory Board regarding Sri. Rijo Jose - Convict No. 4028.

16. Though it was submitted that the present Government's consistent stand was not to release prematurely, persons convicted for the offence of murder of women and children, instances have come to the notice of this Court that in several cases, the Government has released persons who had murdered women and children. Again as observed in the decision in Jagdish (supra), the decision must be taken based on the policy prevalent on the date of conviction and not the policy on the date of considering his application. Petitioner was convicted by judgment dtd. 29-09-2004 which was confirmed by Judgment dtd.14-10-2009.

17. The magnitude and brutality of the crime committed as well as the hardened nature of the convict and even the impossibility of reformation of the individual, can be reasons to deny premature release from prison. However, the circumstances in which the crime was committed, the convict's attitude in prison, and even his penchant for personality development as reflected by his character, conduct and acquisition of educational qualifications can all be mitigating factors enabling the consideration of premature release favourably. The age of the accused at the time of the commission of the offence, the period of imprisonment already undergone, and the nature of reformation that has come upon the convict are also significant supervening factors that should be taken into reckoning while considering cases for premature release.

18. A blanket stance that all persons who have murdered a woman or a child shall not be prematurely released *de hors* any other circumstances is not conducive to a welfare State. Such a stance will be contrary to the principles that govern the commutation of imprisonment. Commutation is based on the principles of reformation of the individual and intended to bring the convict back to society as a useful member. The supervening factors that are conducive to the convict must be taken into reckoning, while considering the issue of premature release.

19. In this context, a reference to the decision in **Home Secretary (Prison) and Others v. H. Nilofer Nisha** [(2020) 14 SCC 161] is appropriate. In the said decision, reference is made to an accused who

claimed premature release. He was a young man of 21 years when he committed a heinous murder. Subsequently, while serving the prison sentence, he continued his studies and obtained various degrees. Taking into summation those factors, the Court directed his premature release. The following observations are worth reproducing:

> "*The detenu was aged about 21 years when he was detained. More than 17 years have elapsed and he is about 38 years of age now. We are informed that during the period of incarceration in jail, he has completed the following educational courses:*" After referring to the various academic achievements, it was further observed as below; "*This young man who may have committed a heinous crime, has obtained various degrees including Masters in Computer Application, Masters of Business Administration, Masters Degree in Criminology & Criminal Justice Administration and M.A. in Journalism & Mass Communication and various other vocational diplomas. The learning which he has obtained in jail must be put to use outside. The jail record shows that his behaviour in jail has been satisfactory. The only ground against him is that he had murdered a person from another community and, therefore, it is said that some religious enmity may still prevail. It has come on record that on various occasions, he has gone back to his native place though under police escort.*
>
> *We are clearly of the view that in these circumstances this is a fit case where we should not send this respondent to another round of litigation. Therefore, in exercise of our power under Art.142 of the Constitution we direct the release of the respondent.*"

20. Since the convict in the instant case has already been recommended for release and the petitioner herself had also applied for premature release of her son, this Court is of the opinion that a decision

must be taken by the Government based on the policy existing on the date of conviction.

21. It was specifically mentioned in the report of the Jail Advisory Board that the convict could lead a normal life after reformation. The fact that the convict had acquired Graduation, Post Graduation and even a Master's Degree while in jail is remarkable and cannot be ignored. The murder was committed when he was only 21 years of age, and he is now around 40 years. Not a single adverse incident has been reported against him throughout his period of incarceration. As mentioned earlier, while considering the commutation of a sentence, these factors cannot go unnoticed. Apart from all the academic achievements and the various qualifications the convict has attained, it has been pointed out in Ext.P5 that the convict is genuinely repenting for the crime committed at an age when he was just out of his teens. The aforesaid factors that have a bearing on the concept of reformation cannot be shelved aside on the bare premise and blanket statement that persons who have committed the murder of women and children will not be given commutation of sentence. Such blanket concepts derogate from the very purpose and object of the commutation of a sentence. There is also nothing to indicate the existence of such a policy on the date of conviction of the petitioner.

22. As a welfare State, it was incumbent upon the Government to consider the case of the petitioner in the light of the above recommendations and grounds favouring premature release.

23. Having regard to the aforesaid, there will be a direction to the first respondent to consider the recommendation of the Jail Advisory Board relating to the premature release of petitioner's son, Rijo Jose, Convict No.4028, and the request of the petitioner submitted as Ext.P5, as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a copy of this judgment, in the light of the observations made in this judgment.

The writ petition is allowed to the above extent.

Sd/-

BECHU KURIAN THOMAS, JUDGE

RKM

APPENDIX OF WP(CRL.) 854/2022

PETITIONER'S EXHIBITS :

EXHIBIT P1	A TRUE COPY OF THE JUDGMENT DATED 14-10-2009 OF THIS HON'BLE COURT IN CRL. APPL NO. 1804/2005.
EXHIBIT P2	A TRUE COPY OF APPLICATION SUBMITTED BY MR. REEJO JOSE DATED 25.08.2022 TO THE STATE PUBLIC INFORMATION OFFICER, CENTRAL PRISON, VIYYUR.
EXHIBIT P3	A TRUE COPY OF THE REPLY DATED 29.08.2022 ISSUED BY THE STATE PUBLIC INFORMATION OFFICER, CENTRAL PRISON & CORRECTIONAL HOME, VIYYUR.
EXHIBIT P4	A TRUE COPY OF THE ORDER DATED 14.06.2022 ISSUED BY THE DEPARTMENT OF HOME.
EXHIBIT P5	A TRUE COPY OF THE REQUEST SUBMITTED BY THE PETITIONER TO THE 1ST RESPONDENT.
EXHIBIT P6	A TRUE COPY OF IMPRISONMENT CERTIFICATE DATED 26.08.2022 ISSUED BY THE 4TH RESPONDENT.
EXHIBIT P7	A TRUE COPY OF THE JUDGMENT DATED 18.05.2022 OF THE HON'BLE APEX COURT IN CRIMINAL APPEAL NOS. 833/2022 & 834/2022.

RESPONDENTS' ANNEXURES :

ANNEXURE R4(A)	TRUE COPY OF THE GOVERNMENT ORDER G.O(MS) NO. 173/2022/HOME. DATED THIRUVANANTHAPURAM. 21.08.2022
ANNEXURE R4(B)	A TRUE COPY OF THE APPLICATION TO THE STATE PUBLIC INFORMATION, CENTRAL PRISON, VIYYUR DATED 25.08.2022

ANNEXURE R4(C)	**TRUE COPY OF THE REPLY LETTER NO.G-2881/2021/CPV, DATED 29.08.2022 UNDER RTI ACT, 2005 ISSUED BY THE STATE PUBLIC INFORMATION OFFICER, CENTRAL PRISON AND CORRECTIONAL HOME, VIYYUR**
ANNEXURE R4(D)	**A TRUE COPY OF THE MINUTES OF THE JAIL ADVISORY BOARD HELD ON 11.04.2022**