

Shivaji Jaising Babar

Vs

State of Maharashtra

Diary No. 1491 of 1991

(K. Ramaswamy, S. R. Pandian, K. Jayachandra Reddy JJ)

11.09.1991

JUDGMENT

S. RATNAVEL PANDIAN J.

1. The petitioner Shivaji Jaising who stands condemned to death is approaching this Court for modification of the sentence of death into one of imprisonment for life. A brief resume of the facts is necessary to appreciate the plea of the petitioner.
2. The case of the prosecution is that on August 3, 1980 the petitioner and his younger brother Ram Hari Jaising Babar in furtherance of their common intention committed triple murder and also attempted to cause the death of three others by causing grievous hurt. On the above allegations both the brothers were jointly tried for offences under Sections 302 read with 34 and 307 read with 34 IPC, in the alternative Section 326 read with 34 IPC in Sessions Case No. 136 of 1981 on the file of the court of the 3rd Additional Sessions Judge at Solapur. The trial court by its judgment dated June 28, 1982 found both the appellants guilty of the charges and convicted them thereunder and sentenced the petitioner with the extreme penalty of law - death sentence, but sentenced Ram Hari Jaising Babar to imprisonment for life on all the three counts. Besides, they were also sentenced to various terms of imprisonment for offences under Section 307 read with 34 IPC.
3. Feeling aggrieved by the judgment of the trial court the convicted accused preferred Criminal Appeal No. 498 of 1982. On a reference made by the Sessions Judge under Section 366 of the Code of Criminal Procedure, Confirmation Case No. 8 of 1982 was registered. The High Court by its common judgment and order dated August 30, 1983 dismissed the Criminal Appeal No. 498 of 1982 and confirmed the death sentence in Confirmation Case No. 8 of 1982.
4. The petitioner and his brother filed SLP (Criminal) Nos. 620 and 637 of 1984 as against the judgment of the High Court which were dismissed in limine by order of this Court dated April 30, 1984. Thereafter the petitioner filed a Review Petition No. 245 of 1984. This Court by its interim order dated June 14, 1984 stayed the execution of the death sentence till the review petition was disposed of. The condemned prisoner Shivaji Jaising Babar sent a mercy petition dated May 12, 1984. Thereafter, mother of the petitioner, Smt. Shahuai Jaising Babar submitted a separate mercy petition praying for commutation of the death sentence passed on the condemned petitioner which petition was received by the Minister of Home Affairs in July 17, 1984. It appears one Subhash Shankar Chauhan of Pune and some others of the village Chopri, District Solapur submitted one other mercy petition dated nil for the commutation of the death sentence passed on the condemned prisoner Shivaji Jaising Babar. That petition was received in the Ministry of Home Affairs, New Delhi on August 3, 1984. When it was so, on September 18, 1984 this Court dismissed the Review

Petition (Criminal) No. 245 of 1985. It is noted from the files produced by the Home Department of the Central Government that the State Government by its letters dated August 7, 1985, October 18, 1985, January 15, 1986 and April 16, 1986 reminded the Secretary to the Government of India, Ministry of Home Affairs, New Delhi inviting the attention of the Secretary about the pendency of the mercy petition stating that the State Government would be grateful if the orders of the President of India on the condemned prisoner were communicated to the State Government at an early date. It is not in dispute that nothing had happened till May 1988. The file relating to the disposal of the mercy petition produced by the Ministry of Home Affairs shows that the Home Department put up a note to the President of India only on May 13, 1988 and thereafter the President rejected the mercy petition on June 10, 1988. After the dismissal of the mercy petition by the President the date of execution was fixed on August 26, 1988. Meanwhile, the mother of the condemned prisoner presented yet another mercy petition dated August 24, 1988 before the President. She also filed a Writ Petition (Criminal) No. 256 of 1988 with Criminal Miscellaneous Petition No. 3625 of 1986 (sic) praying for the stay of the execution before the Supreme Court and this Court by order dated August 25, 1988 stayed the execution, but the Writ Petition (Criminal) No. 356 of 1988 was dismissed by this Court on November 21, 1988. (A Review Petition No. 2 of 1990 was filed, but the same was rejected on January 10, 1990). While it is so, the condemned prisoner addressed a letter to the Registrar of the High Court at Bombay praying that the order issued for execution the death sentence imposed on him should be stayed. That letter was converted into a writ petition and was numbered as Writ Petition (Criminal) No. 914 of 1988 which was dismissed on April 17, 1990 by a Division of the High Court.

5. On being aggrieved by the order of the High Court in the above Writ Petition No. 914 of 1990 the petitioner filed SLP (Criminal) No. 1216 of 1990 which SLP was dismissed by an order of this Court dated August 27, 1990. Now he has filed this Diary No. 1491 of 1991, in which the petitioner has raised several contentions, one of which being some serious factual mistakes have been committed in the judgment of the Bombay high court in Writ Petition (Criminal) No. 914 of 1988, which obviously have misled this Court while disposing SLP No. 1216 of 1990. The Solicitor General representing the Union of India and Mr A.S. Bhasme, the learned counsel for the Maharashtra State are appearing before us. Mr B.L. Shelar of Pune, the learned counsel at the choice of the condemned prisoner is appearing for the petitioner.

6. We heard all the learned counsel representing all the parties. The High Court seems to have misdirected itself by wrongly understanding certain salient features which have weighed with the High Court and influenced the said Court to take a decision in dismissing the Writ Petition No. 914 of 1988. The factual incorrect statements in the judgment of the High Court in Criminal Writ Petition No. 914 of 1988 are (1) that the petitioner filed a mercy petition before the President of India in accordance with provisions of Article 72 of the Constitution of India but the same was turned down by order dated May 12, 1984; (2) that the petitioner filed a second mercy petition on July 10, 1984 while the mother of the petitioner filed a separate mercy petition on May 12, 1984 and (3) that both these mercy petitions viz. the second mercy petition sent by the mother of the petitioner on May 19, 1988. The relevant portion of the judgment of the High Court which is demonstrably shown as totally and factually incorrect from the entries in the files reads thus :

"The petitioner thereafter filed mercy petition before the President of India in accordance with provisions of Article 72 of the Constitution of India but the same was turned down by order dated May 12, 1984. The petitioner filed second mercy petition on July 10, 1984 while the mother of the petitioner filed separate mercy petition on May 12, 1984. Both these mercy petitions were dismissed by the

President by order dated August 19, 1988... it is crystal clear that the Supreme Court declined to entertain the plea of the petitioner that the sentence should be reduced because of delay in disposal of second mercy petition by the President of India... it is not permissible for this Court to reopen the controversy as to whether the delay in disposal of second mercy petition should entitle the prisoner to claim that the sentence of death should be reduced to one of life imprisonment. In our judgment, it is not possible to grant any relief to the prisoner and the petition must fail."

7. A plain reading of the above order of the High Court clearly shows that the High Court dismissed the writ petition mainly on the ground that the first mercy petition filed by the petitioner, has been dismissed and hence the delay caused in the disposal of the second mercy petition has no significance. We have waded through the file submitted by the Ministry of Home Affairs very carefully and found that there was no earlier mercy petition by the condemned prisoner and consequently there was no question of that mercy petition having been turned down on May 12, 1984 by the President of India. In fact, the first mercy petition itself was sent by condemned prisoner only on May 12, 1984 which was dismissed by the President on June 10, 1988. Now both the learned Additional Solicitor General as well as Mr Bhasme admit these serious and grave factual mistakes - quite rightly too. Probably, had the High Court been apprised of these facts that the condemned prisoner filed only one mercy petition on May 12, 1984 and that was rejected on June 10, 1988, it might have commuted the sentence of death into one of life imprisonment followings its own judgment in *Bhagwan Patilba Palve v. State of Maharashtra* (1989 Mah LJ 1001). In fact, the file discloses that in view of the similarity of the cases of the petitioner and Palve, the State Government considered whether the Government could review his decision already taken on the petitioner's mercy petition, but it was found not possible for the Governor to review his earlier decision. When this Court disposed of SLP No. 1216 of 1990 filed against the order in Writ Petition No. 914 of 1988, only the judgment of the High Court containing the abovementioned factual mistakes was available and no other material. Further, it is nobody's case that these mistakes were brought to the notice of this Court which mistakes were found now only on examination of the entire file.

8. In view of the above special facts and circumstances of the case we without expressing any precise and decisive opinion as to the fixed period within which a mercy petition should be disposed of, feel that justice demands modification of the sentence of death into one of life imprisonment. Accordingly, we direct that the death sentence should not be carried out and the sentence of death imposed on him be altered into one of imprisonment for life. This Diary Case No. 1491 of 1991 is disposed of with the aforesaid direction.

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