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Case Comment: Bilkis Yakub Rasool vs Union of India

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INTRODUCTION

In India, meeting the ends of justice has become a privilege rather than a core human right. The pendency of litigations, inconsistency among various agencies of the judicial system, inadequate number of judges, language barriers, and several other reasons have already made the judiciary fragile and slow. Even if one gets through this highly exhaustive process of justice deliverance, so-called reformative concepts like remission flush out the hope of not only the victim but the entire community.

This is exactly what this nation has seen on completing the 75th year of Independence on August 15, 2022. 11 convicts of gang rape and mass murder walked out of jail and were further garlanded and hailed like heroes only because of this reformative concept of remission. Remission[1] talks about reducing the duration of a punishment without interfering with its nature. This concept was introduced in India through the "Prison Act, of 1894". The Indian Constitution gives the power to remit a sentence to the President of India and the Governor of the state under articles 72 and 161 respectively. Whereas under procedural laws it's been

[1] Code of Criminal Procedure 1973, s 432

mentioned under Criminal Procedure Code (hereinafter referred to as CRPC) under sections 432,433,434,435. Section 432 of CRPC puts forth the concept of an "appropriate government" which may suspend or remit a sentence in whole or in part, with or without conditions. Moreover, each state has its policy of remission.

Through this[2] case comment, the authors are trying to highlight the struggle Bilkis Yakub Rasool had to go through from first getting the complaint lodged, to an independent inquiry, to then trial and conviction of the offenders at some other venue, to further getting adequate compensation, to now witnessing the same offenders walking out free in the daylight. When Bilkis Bano approached the apex court to challenge its judgment of declaring the Gujarat government as the 'appropriate government' for remission i.e., for pre-mature releasing of the 11 convicts, the Supreme Court unambiguously rejected the review petition of its May 2022 judgment[3] which set the perpetrators free stating that the judgment had no error to mend. The authors very well appreciate the idea of a reformative justice system but at the same time, they also ask, what kind of a message does this send to society? The crafts also take the readers to all the methodology and procedures the entire system went through to deliver justice which ex-facie seems faulty.

FACTS OF THE CASE

Bilkis Bano is a gang rape survivor who was brutally gang-raped aftermath of the violence of the Gujarat riots. On February 27, 2002,[4] when Sabarmati Express was set on fire by a mob that killed hundreds of Hindus returning from Ayodhya. Bilkis Bano, who was five-month pregnant[5], fled from the village fearing arson with her three and half-year-old daughter, and 15 other members of the family who were brutally attacked by a mob with swords near a village

[2] *Bilkis Yakub Rasool v Union of India* Writ Petition (Crl) No 135 of 2022
[3] *Radheshyam Bhagwandas Shah @ Lala v The State Of Gujarat* Writ Petition (Crl) No 135/2022
[4] Ashutosh Varshney, 'Gujarat 2002 was independent India's first full-blooded pogrom. Delhi 1984 was a semi-pogrom' (*The Print,* 26 February 2020) <https://theprint.in/opinion/gujarat-2002-was-independent-indias-first-full-blooded-pogrom-delhi-1984-was-a-semi-pogrom/371684/>accessed 04 January 2023
[5] PTI, 'SC to consider listing of review plea of Bilkis Bano against its order asking state to consider remission pleas of 11 convicts' (*The Indian Express,* 12 December 2022) <https://indianexpress.com/article/india/supreme-court-bilkis-bano-review-plea-consider-remission-convicts-8319977/ > accessed 04 January 2023

called Pannivel. She, her mother, and other women were brutally gang-raped. All her family members and her three-year-old daughter were killed in front of her. She solely survived the inhuman massacre.

After regaining consciousness from the attack, she registered an FIR with the head constable Somabhai Gori. According to the CBI[6], he concealed material facts and was convicted by the court to save the accused. After public outrage, the Supreme Court ordered a CBI investigation, and the case was taken up by the National Human Rights Commission. She continued receiving death threats and was not able to get well-deserved justice due to a faulty investigation by the head constable. Then the trial of her case took place in Maharashtra instead of Gujarat where the offence was committed to ensuring a free and fair trial. The Special CBI court conducted a trial against 19 accused and ultimately convicted 11 accused on the charges of gang rape, unlawful assembly, criminal conspiracy, and under other sections of the Indian Penal Code. Seven[7] accused were acquitted by the court citing a lack of evidence and one died during the trial. The court convicted[8] Naresh Kumar Mordhiya, Govindbhai Nai, and Jaswantbhai Nai for gang-raping Bilkis Bano, and her daughter was killed brutally by smashing her head on the ground by Shailesh Bhatt. Later in the year May 2017, the Bombay HC upheld the conviction of life imprisonment of eleven convicts. Bilkis approached the apex court against the Gujarat government for inadequate compensation of 5 lakhs. In the year 2019, the Supreme Court directed the Gujarat government to compensate[9] Bilkis with Rs. 50 lakh, employment, and accommodation.

After serving 15 years of conviction, two persons named Ramesh Rupabhai and Radheyshyam Shah approached the Bombay High court for premature release. However, the court ruled that

[6] Express Web Desk, 'Who is 2002 Gujarat riots survivor Bilkis Bano?' (*The Indian Express*, 23 April 2019) <https://indianexpress.com/article/who-is/who-si-bilkis-bano-5690419/> accessed 04 January 2023
[7] Explanied Desk, 'Who is Bilkis Bano, who was gangraped during the 2002 Gujarat riots?' (*The Indian Express*, 30 November 2022) <https://indianexpress.com/article/explained/explained-bilkis-bano-gangraped-2002-gujarat-riots-8093937/> accessed 04 January 2023
[8] *Ibid*
[9] PTI, 'SC directs Gujarat govt to give Rs.50 lakh compensation, job, accomdation to Bilkis Bano' (*The Times of India* 23 April 2019) <https://timesofindia.indiatimes.com/india/sc-directs-gujarat-govt-to-give-rs-50-lakh-compensation-job-accommodation-to-bilkis-bano/articleshow/69005866.cms> accessed 05 January 2023

the Gujarat government is an appropriate government for granting remission. This was challenged before the supreme court in the case.[10]

LEGAL ISSUES

- Which government is the appropriate government under sections 433 and 433A of the CRPC for granting premature release? (Contention put forward by the petitioner).
- Which remission policy of the Gujarat government will be applicable for premature release? (Contention put forward by the petitioner).
- Why the Gujarat government is appropriate if the trial and conviction concluded in the state of Maharashtra? (contention put forward by respondent).

SUPREME COURT DECISION

On 13 May 2022, in this case[11], the petitioner seeks direction from the supreme court in the form of an issuing writ of mandamus to the Gujarat government to consider the petitioner's application for premature release under section 433A of the CRPC. The petitioner and the other co-accused faced trial in the state of Maharashtra for the offence committed in the state of Gujarat under section 302, 376(2)(e)(g) and 149 of the IPC[12]. The trial court sentenced rigorous life imprisonment to the petitioner and which was later upheld by the Bombay High Court. The petitioner as on April 2022 has undergone fifteen years of life imprisonment without remission. One of the co-accused Ramesh Rupabhai approached the Bombay HC for seeking remission but his application was dismissed by the court on the pretext that the state of Maharashtra is the appropriate government for granting remission. Likewise, Gujarat High Court dismissed the petitioner's application for premature release citing the judgement ***Union Of India v V. Sriharan @, Murugan & Ors.***[13] on the pretext that since the trial and conviction were held by the state of Maharashtra and not in the state of Gujarat, the appropriate government to grant premature release is Maharashtra. The Supreme Court held that the appropriate government in the

[10] *Radheshyam Bhagwandas Shah* (n 3)
[11] *Ibid*
[12] Indian Penal Code 1860
[13] *Union Of India v Sriharan @ Murugan & Ors* Writ Petition (Crl) No 48/2014

ordinary case would be the Gujarat government but in this case of extraordinary circumstances where trial concluded in a different state like Maharashtra. Then the appropriate government under section 432(7) would be where the crime has been committed, hence, the Gujarat government is the appropriate government for granting the premature release of the petitioner. Gujarat government (respondent) reliance on the judgement[14] placed no reliance in this case as there cannot be a concurrent jurisdiction of the two-state government under the "appropriate government", it can be either the state government or the central government.

The application for premature release will have to be considered based on the remission policy of the state. The Gujarat government has two remission policies. The old 1992 remission policy and the current 2014 remission policy. The court decided that the policy dated 9th July 1992 should be applied for considering the petitioner's application for premature release as this policy was existing on the date of conviction of the petitioners and other co-accused referring to the State of Haryana v Jagdish case[15]. The relevant para of this judgement was cited "54. The State authority is under an obligation to at least exercise its discretion about an honest expectation perceived by the convict, at the time of his conviction that his case for premature release would be considered after serving the sentence, prescribed in the short-sentencing policy existing on that date. The State has to exercise its power of remission also keeping in view any such benefit to be construed liberally in favour of a convict which may depend upon case to case and for that purpose, in our opinion, it should relate to a policy which, in the instant case, was in favour of the respondent. In case a liberal policy prevails on the date of consideration of the case of a "lifer" for premature release, he should be given benefit thereof."

The supreme court's decision to allow the petitioner to seek premature release under sections 433 and 433A of the CRPC from the Gujarat government as per the terms of the policy on 9th July 1992 was challenged. The review petition[16] has been filed by the BILKIS YAKUB RASOOL under article 137 of the constitution of India. On 13 December 2022, the supreme court dismissed the review petition on the ground that the 13 May 2022 judgement of the court has recorded no

[14] *Ibid*
[15] *State Of Haryana & Ors v Jagdish* Criminal Appeal No 566/2010
[16] *Bilkis Yakub Rasool* (n 2)

apparent error. Hence, no case of review has been made out from the earlier court decision on 13 May 2022.

LAWS TO PROTECT THE VICTIM OR THE CRIMINALS?

After the Supreme Court verdict that the Gujarat government is the "appropriate government" under section 432 of CRPC for remission, even after having valid precedents of how the Maharashtra government would have been the suitable one, the question of the role and intention of the judiciary stand obvious. Probably, this was just the inception of a series of a disappointment for the preachers and followers of natural justice and human rights. As Gujarat government then at the order of the apex court constituted a committee to decide whether remission was an option for the convicts or not. Sadly, the constitution of the said committee is feared to be contaminated by the demons of vote-reapers and religion-based politics.

Not only the name of the convicts was associated with the prevailing BJP government in the state of Gujarat as well as the centre but also the panel gave a green signal to the culprits to come out and celebrate their life. But a reasonable person would rightfully ask why the updated 2014 remission policy was not taken into account but 1992 one. When the same question was posed in front of the Supreme court which policy should be considered? The one who is prevailing now or the one who prevailed during their conviction, Supreme Court through its reasoning cleared that the latter would apply. Yet another reason for the public rage. Had it been for the application of the 2014 policy[17], the remission of these convicts would have never seen the light of day. The updated policy not only forbids the remission of offences like murder and rape but also makes sure that no remission takes place if an inquiry has been done by an agency established under Delhi Special Police Establishment Act which again fulfills the criteria since this case was inquired by the CBI. The question asked is legitimate enough who is the law protecting- the victims of the crimes or the criminals themselves? Whom should one blame for the miscarriage of justice in this 21st century? Though it appears to be the failure of the

[17] Rajat Tripathi, 'Duty to act fairly: bilkis bano' (2022) 1(4) Journal of Legal Research and Juridical Sciences

'Judiciary' in reality, the whole process of the remission was much to do with the 'Executive' that is the government.

CONCLUSION

First remission and then the dismissal of the review petition filed by the victim of unspeakable horror Bilkis Bano not just distorted her peace and trust in the judiciary and the overall system but also put the entire country in deep thought. How strange is that feeling when everything has been performed through methods, procedure, and law and yet each of us finds it faulty, flawed, and frustrating? It is high time to find out and mend every piece of the system that has made us speechless and helpless as well. The judiciary, for instance, must look into its basic values, and why it exists in the first place. Loopholes like that in remission laws as to deciding the "appropriate government" must be reformed. The term "appropriate government" is not only vague and ambiguous but also can be conveniently manipulated and hence need a touch of newness and comprehension. Instead of rigidly following the laws, the entire judicial system must read between the lines to do the needful to protect the needy. The judiciary is considered to be the almighty on earth and it must protect that belief at any cost. The legislation on its way forward should not only come up with new incentives but also make sure that wherever the outdated guidelines are implied, it is done with full discretion, precision, and vigilance. And as it has been said by the great Charles-Louis "there is no greater tyranny than that which perpetrated under the shield of the law and in the name of justice."