Shaikh Razzak Shaikh Salim Vs State of Maharashtra and others

Court: Bombay High Court (Aurangabad Bench)

Date of Decision: Dec. 15, 2006

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 428
Penal Code, 1860 (IPC) â€" Section 302
Prisons Act, 1894 â€" Section 11, 3, 59

Hon'ble Judges: S.P. Kukday, J; S.B. Deshmukh, J

Bench: Division Bench

Advocate: Vivek Lomte appointed, for the Appellant; P.M. Shinde, APP, for the Respondent

Final Decision: Dismissed

Judgement

S.B. Deshmukh, J.
Heard Advocate Shri Vivek Lomte (appointed) on behalf of the petitioner and learned APP Mr. P. M. Shinde, on

behalf of respondent-State.

2. Rule. Rule is taken up for hearing forthwith by consent of respective parties.

3. The petitioner, who was the accused in Sessions Case No. 136/1996 stands convicted by learned 2nd Additional Sessions Judge, Aurangabad,

for the offence punishable u/s 302 of the Indian Penal Code (for short ""IPC""). He was sentenced to suffer RI for life and to pay a fine of Rs.

1000/-, in default, to undergo RI for three months. Criminal Appeal No. 4/1998 filed by the petitioner/appellant came to be dismissed by the

Division Bench of this Court, by judgment and order passed on January 31, 2003. The petitioner, thus, is undergoing conviction inflicted upon him,

as noted above.

4. The petitioner had addressed the communication dated September 4, 2006 to this Court through the Superintendent, Aurangabad Central

Prison, Aurangabad, for grant of furlough. It appears that the request made by the petitioner is rejected by Deputy Inspector General of Prison

Aurangabad, (for short ""DIG, Prison"") by the order passed on July 19, 2006. It is this order which is assailed by the petitioner in this Criminal Writ

Petition.

5. We have heard learned counsel Shri Vivek Lomte (appointed) on behalf of the petitioner. Shri Lomte submits that furlough is a matter of right.

According to him, the order passed by the respondent is contrary to the Rules concerned. In support of his submissions, he relied on the judgment

of the Division Bench of this Court in the matter of Prahlad Dnyanoba Gajbhiye Vs. State of Maharashtra and another, . In the matter of Pralhad,

the Division Bench of this Court has considered the ""furlough"" and ""parole"" and carved out distinction between them. This Court, referred to Rules

3 and 4 of Prisons (Bombay Furlough and Parole) Rules, 1959, (hereinafter referred to as ""Rules of 1959"" for convenience). This Court, has also

considered the provisions laid down under Rule 3 of the Rules, 1959 in relation to provision laid down u/s 428 of the Criminal Procedure Code,

1973. Learned counsel for the petitioner invited our attention to the observations of this Court in the matter of Pralhad (supra) that the Rules of

1959 have been framed with social purpose.

6. Learned counsel for petitioner also relied on the judgment of learned single Bench of this Court in the matter of Santosh Bhagwandin Bachharaj

Vs. Superintendent, Central Prison, . Learned single Judge of this Court, has observed in the matter of Santosh (supra) that all prisoners, as of

right, are entitled for furlough leave on furnishing of surety. Learned counsel for the petitioner has invited our attention to para No. 7 of the said

judgment. It is observed by learned single Bench of this Court in para No. 7 as under :

7..... It is true that in the present case, the applicant/accused, on earlier three occasions, had surrendered late to the prison. It is not disputed by

the learned APP that the punishment has been imposed on the applicant/accused for surrendering late to the prison. It is also not disputed that the

total days of late surrender by the applicant to the prison were of 105 days and, therefore, total 105 x 5 = 525 days have been deducted from

remission earned by the applicant/accused. This punishment has been imposed as per the provisions contained in sub-rule (a) of Rule 2 of statutory

Rules made by the Inspector General of Prisons on 2nd July, 1964, vide Notification No. MJM/1561/39466 dated 2nd July, 1964, in exercise of

powers conferred under sub-section (1) of section 11 of the Prisons Act, 1894 (K of 1984)"".

7. Learned counsel for petitioner Shri Lomte has also relied on another judgment of learned single Judge of this Court in the matter of Pandurang

Gomaji Wakode Vs. State of Maharashtra and Others, . In the matter of Pandurang, learned Judge has considered the provisions laid down under

Rule 4(10) of the Rules, 1959 and held that the rejection on the ground that on earlier occasions, he (petitioner) had surrendered late for which he

was punished, is erroneous. It appears that in the matter of Pandurang, the petitioner therein has surrendered late for earlier five occasions and was

punished.

8. Learned APP Mr. Shinde has referred to the affidavit-in-reply along with report and other material which is placed on record. In Para No. 4 of

the affidavit-in-reply, it is pointed out that on receipt of the application for grant of furlough from the petitioner, the same was forwarded to the O/o

the DIG, Prisons, Aurangabad and report was called for from the O/o Commissioner of Police, Aurangabad. In pursuance of the same, the

Commissioner of Police had submitted his report on March 6, 2006. An apprehension is expressed in the affidavit that in case of grant of furlough

in favour of the petitioner, he will not return to the prison. In support of such apprehension, the earlier instance is quoted. According to the affiant,

earlier furlough was granted and petitioner was released on 7-5-2003 for a period of 15 days. However, the petitioner did not return to the Prison

on expiration of the period of furlough. The petitioner was ultimately arrested on 1st April, 2004 i.e. after 315 days. Thus, the Commissioner of

Police, Aurangabad ultimately submitted his adverse report to the authority concerned i.e. DIG, Prison, Aurangabad. Considering the report

submitted and the material placed along with the report, the DIG, Prison, as noted above, rejected the prayer made by the petitioner seeking

furlough leave.

9. Prayer made by the prisoner seeking furlough leave can be considered by the Competent Authority, in consonance with Rule 4 of the Rules of

1959. In this case sub-rule (4) of Rule 4 is relevant, which is reproduced herein below:

4. When prisoners shall not be granted furlough :

1.....

2.....

3.....

4. Prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere, by the District Magistrate on

the ground of public peace and tranquility.

Rule No. 6 is also relevant in respect of grant of furlough sought by the prisoner. Rule 6 is couched in the following terms :

6. Furlough not be granted without surety. - A prisoner shall not be granted furlough unless he has a relative willing to receive him while on

furlough and ready to enter into a surety bond in Form A appended to these rules for such amount as may be fixed by the Sanctioning Authority.

10. It is apposite to refer to some other relevant Rules of 1959. It is provided in Rule 13 of the Rules of 1959 that in certain circumstances and for

a specific period of time, extension of period of furlough can be considered by the Sanctioning Authority. It is provided under Rule 13 that the

Sanctioning Authority may, on the application of the appellant/prisoner or otherwise, by an order in writing extend the period of furlough for such

further period as may be specified in such order on the same conditions on which the prisoner was originally granted furlough or on such other

conditions as the Sanctioning Authority may determine. The object behind Rule 13 seems to be that in case of grant of furlough leave for a specific

period, there may be contingency for which prisoner may require to seek extension of the furlough leave already granted by the Sanctioning

Authority. From this point of view, Rule 13 seems to have provided remedy to such prisoner. However, discretion is vested with the Sanctioning

Authority to consider such a request made by the prisoner. Rule 17 of the Rules of 1959 provides that nothing in these Rules (Rules of 1959) shall

be construed as conferring a legal right on a prisoner to claim release on furlough.

11. It is apposite to refer to the judgment of the Apex Court in relation to the rules i.e. Nos. 4 and Rule 6 of the Rules of 1959, in the matter of

State of Maharashtra and Another Vs. Suresh Pandurang Darvakar, , the Apex Court held that grant of furlough is not a matter of absolute right.

Relevant paragraph is paragraph No. 5 which is reproduced hereinbelow :

5. According to the learned counsel for the appellants, the High Court has not kept in view Rules 4(4) and 6 of the Prisons (Bombay Furlough

and Parole) Rules, 1959 (in short ""the Rules""). The said Rules have been framed in exercise of powers conferred by clauses (5) and (28) of

section 59 of the Prisons Act, 1894 (in short ""the Act"") in its application to the State of Maharashtra as it stood then. The expression ""furlough

system"" is defined in clause (5-A) of section 3 of the Act, while the expression ""parole system"" is defined in clause (5-B) of the said provision. The

underlying object of the Rules relating to ""parole"" and ""furlough"" have been mentioned in the report submitted by All-India Jail Manual Committee

and the objects mentioned in Model Prison Manual. The ""furlough"" and ""parole"" have two different purposes. It is not necessary to state the

reasons while releasing the prisoner on furlough, but in case of parole reasons are to be indicated in terms of Rule 19. But release on furlough

cannot be said to be an absolute right of the prisoner as culled out from Rule 17. It is subject to the conditions mentioned in Rules 4(4) and 6.

Furlough is allowed periodically under Rule 3 irrespective of any particular reason merely with a view to enable the prisoner to have family

association, family and social ties and to avoid ill-effect of continuous prison life. Period of furlough is treated as a period spent in the prison. But

Rule 20 shows that period spent on parole is not to be counted as remission of sentence. Since the furlough is granted for no particular reason, it

can be denied in the interest of society; whereas parole is to be granted only on sufficient cause being shown.

12. Turning to the case on hand, it appears that the prayer made by the petitioner was rejected by the authority, relying on the provisions laid down

under Rule 4 as well as Rule 6 of the Rules of 1959. The Competent Authority has referred to the adverse report submitted by the Commissioner

of Police, Aurangabad. The copy of the said report is also produced on record. From the record, it appears that initially material was not annexed

with the report submitted to the DIG, Prison. Thereafter DIG had sought for fresh report from the Commissioner of Police, Aurangabad. In

consonance with this direction, the Commissioner of Police, Aurangabad obtained report from the Police Station concerned. We find on record

statement of Sk. Mohammed Sk. Ibrahim recorded by the Police Sub Inspector, Begumpura Police Station, Aurangabad City on June 16, 2006.

It appears that daughter of Sk. Mohammed namely, Rukhsana was married to the prisoner. It is to be noted that petitioner is undergoing conviction

for murder of his another wife, namely, Barket Begum. Mr. Sk. Mohammed has expressed his apprehension from the prisoner, in case of grant of

furlough. He has specifically stated in his statement that he is not ready to stand as surety to the prisoner. We have also perused another statement

recorded by the Police Sub Inspector Begumpura Police Station, Aurangabad. This statement is of Mr. Sk. Naser Sk. Mohammed recorded on

June 16, 2006. He is brother of Rukhsana, wife of the prisoner/petitioner. According to him, the petitioner can be released on furlough leave,

however, he expressed an apprehension of assault from the prisoner. According to him, the prisoner/petitioner is also addicted to liquor. We have

also perused other statements recorded by Police Sub Inspector, Begumpura. Out of these, one statement is of Sau. Jameelabi w/o Sk. Salim,

recorded on 2nd June, 2006. The prisoner/petitioner is son of Smt. Jameelabi. In her statement, she states that she was admitted to a Hospital on

account of ailment and she requested for release of petitioner on furlough. She also assured the authority that in case of grant of furlough in favour

of petitioner, she would see that petitioner surrenders himself. Smt Jubeida Begum R/o Baijipura, Aurangabad, has expressed her apprehension of

assault in case of release of petitioner on furlough, in her statement recorded by the Police Inspector on June 18, 2006. Another lady Baby Begum

w/o Sk. Habib has also expressed apprehension of murderous assault by the petitioner in case he is released on furlough.

13. The DIG, Prison, Aurangabad after considering the adverse police report and material, based on which, report was submitted to him, has

rejected the prayer made by the petitioner for grant of furlough. In addition to this ground, the DIG Prisons, Aurangabad has also considered the

circumstance of overstaying the period of furlough earlier by the petitioner.

14. Thus, on facts, except the mother, no other friend or relative has shown readiness and willingness to stand as surety to the petitioner. We have

carefully considered the statement of the mother of the petitioner. She is an old and ailing lady and at the relevant point of time was admitted in the

Hospital. She has also not made a categorical statement to the effect that she is ready to stand surety to the petitioner in case of his release on

furlough. Apart from this, it cannot be said that the mother of the petitioner is capable to stand surety to the petitioner and see that petitioner would

surrender after completion of the period of furlough. Adverse report filing by the Commissioner of Police is a subjective satisfaction. This

subjective satisfaction is recorded by the Commissioner of Police on the basis of material collected by the Police Sub Inspector. The DIG, Prison

has within the scope of sub-rule (4) of Rule 4 of the Rules, 1959, considered the adverse report and arrived at the conclusion that there is no case

for recommendation of the furlough in favour of the petitioner on the ground of public peace and tranquility. We are satisfied that the DIG, Prison

has justifiably rejected the prayer of furlough made by the prisoner.

Apart from this aspect, and in view of the judgment of the Apex Court, noted above, furlough leave cannot be said to be an absolute right vested

with the petitioner. The prayer made for furlough has to be read with Rule 17 and subject to Rule 17, as held by the Supreme Court. The

punishment suffered by the petitioner for late surrender cannot be a ground for considering the request made by the petitioner for furlough leave.

Rule 17 of the Rules of 1959, is reproduced hereinbelow:

17. No legal right to furlough. - Nothing in these rules shall be construed as conferring a legal right on a prisoner to claim release on furlough.

15. It is also appropriate to refer to Rule 4(10) of the Rules, 1959, which reads thus:

4. When prisoners shall not be granted furlough. - The following categories of prisoners shall not be considered for release on furlough:-

1).....

2).....

3).....

4).....

5).....

6).....

7).....

8).....

9).....

10) Prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves

at the appropriate time after release on parole or furlough.

From the above-quoted Rule 4(10), it is clear that conditions for not granting furlough are embodied. These conditions are :-

(i) if prisoner/s who have at any time escaped

(ii) or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on

parole or furlough.

Thus, the category of prisoners under Rule 4(10) of the Rules, 1959 is disentitled for the consideration of furlough. In the case on hand, the

petitioner. as noted above, was granted furlough, however did not surrender after expiration of the said period. The petitioner ultimately was

arrested and brought in prison. He overstayed for about 315 days. The distinction in surrender of the prisoner and arrest of the prisoner has to be

considered. The surrender is a voluntary act of the person released for a particular period; arrest is by the police and, therefore, cannot be equated

to that of the surrender. On facts, therefore, in our view, the petitioner never surrendered to the authorities and was required to be arrested and put

to the prison. This ground is justifiably accepted by the authority as the ground disentitling the petitioner for furlough leave. The view taken by

learned single Judge of this Court in relation to Rule 4(10) is difficult to be subscribed to by us.

16. In view of the view, which we have taken and the judgment of the Apex Court, the judgments of learned single Judge of this Court reported in

(1) Pandurang Gomaji Wakode Vs. State of Maharashtra and Others, in the matter of Santosh Bhagwandin Bachharaj Vs. Superintendent,

Central Prison, = 2004(1) BCR. (Cri) 453 in the matter of Sanlosh Bachhraj vs. Superintendent, Central Prison, stand overruled.

17. We are not inclined to interfere in the order passed by the authority concerned. However, it cannot be forgotten that right of furlough cannot be

foreclosed permanently to the petitioner. Rule 9 in this respect is relevant, which permits the prisoner to file a fresh application, he desires to do so,

in case of rejection of his earlier application, after period of six months. In this view of the matter, writ petition stands dismissed. However, with

liberty in favour of the petitioner, in view of Rule 9, to file a fresh application accordingly.

18. Mr. Vivek Lomte, Advocate, is appointed to conduct this matter. We quantify his professional fees at Rs. 2,000/- (Rupees two thousand).

19. Rule is made absolute in the above terms.