Dinesh Kumar Vs Govt. of Nct of Delhi

Court: Delhi High Court

Date of Decision: May 1, 2012

Acts Referred: Constitution of India, 1950 â€" Article 14, 19, 21
Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 â€" Section 3, 3(3), 4
Penal Code, 1860 (IPC) â€" Section 120B, 216A, 302, 363, 364A
Prisons Act, 1894 â€" Section 48A, 59, 59(28), 59(5)

Citation: (2012) CriLJ 2959 : (2012) 129 DRJ 502 : (2012) 2 JCC 1367

Hon'ble Judges: Rajiv Sahai Endlaw, J; A.K. Sikri, J

Bench: Division Bench

Advocate: Vivek Sood, for the Appellant; N. Waziri, Standing Counsel with Ms. Zubeda Begum and Ms. Neha Kapoor, Advocates for Govt. of NCT of Delhi and Mr. Pawan Sharma, Standing Counsel (Crl.) for Govt. of NCT of Delhi, for the Respondent

Judgement

A.K. Sikri, Acting Chief Justice

1. In all these writ petitions challenge is to the constitutional validity of Clause 26.4 of the Parole/Furlough: Guidelines, 2010. These Guidelines are

approved by the Lt. Governor, Govt. of NCT of Delhi which are applicable in case of convicts i.e. those who have been convicted by a competent

court under various laws and are undergoing sentencing in prison. The purpose of the Guidelines is to regulate applications for parole and furlough

and to ensure that they are considered in a fair and transparent manner. Separate provisions for regular parole as well as furlough are made in these

Guidelines. Insofar as grant of furlough is concerned which is the subject matter of these writ petitions, Clause 24 states that a prisoner who is

sentenced to 5 years or more of rigorous imprisonment and has undergone imprisonment for 3 years or more period excluding remission, can be

released on furlough. A prisoner is entitled 7 weeks of furlough in a year. The first spell can be of 3 weeks while the subsequent spells have to be

of 2 weeks each. Clause 26.4 mentions eligibility conditions which a prisoner has to fulfill before he would be eligible to obtain furlough. Clause 26,

in toto, is reproduced as under:-

26. In order to be eligible to obtain furlough, the prisoner must fulfill the following criteria:-

26.1 Good conduct in the prison and should have earned three ""Annual Good Conduct Remissions"" and continues to maintain good conduct;

26.2 The prisoner should not be a habitual offender;

26.3 The prisoner should be a citizen of India.

26.4 The prisoner should not have been convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion.

26.5 The prisoner should not have been convicted of any offence relating to any offence against the State such as sedition;

26.6 The release of the prisoner should not be considered dangerous or deleterious to the interest of national security or there exists reasonable

ground to believe that the convict is involved in a pending investigation in a case involving serious crime;

26.7 The convict is no such a person whose presence is considered highly dangerous or prejudicial to the public peace and tranquility by the

District Magistrate by his home district.

2. As is clear from Clause 26.4, any prisoner who has been convicted for an offence of robbery, dacoity, arson, kidnapping, abduction, rape and

extortion is not eligible for grant of furlough. All the petitioners have been convicted of one or the other offences which is covered by Clause 26.4

and for this reason, having regard to the aforesaid Guidelines, they are not rendered ineligible for grant of furlough. According to the petitioners,

this Clause is arbitrary and unreasonable and not based on any intelligible differentia and hence violative of Article 14 of the Constitution. It is also

contended that it violates fundamental right of the petitioner to life and liberty under Article 21 of the Constitution.

3. Before we deal with this contention in detail, we may record the background of these petitioners, in brief.

W.P.(C) 8279/2010:(Shashi Shekhar @ Neeraj)

4. The petitioner Shashi Shekhar @ Neeraj was convicted under Sections 302, 392, 397 IPC in case FIR No. 538/1995, P.S. Vasant Kunj on

27.2.2002 by the Additional Sessions Judge and sentenced to rigorous imprisonment for life. The petitioner was also convicted under Sections

302,392,397,216-A IPC in case FIR No. 76/1996, PS C.R. Park on 23.4.2004 by the Additional Sessions judge and sentenced to rigorous

imprisonment for life on 28.4.2004 The petitioner was also convicted u/s 302 IPC in case FIR No. 509/1995 P.S. Vasant Kunj on 23.4.2004 and

sentenced on 28.4.2004 by the Additional Sessions Judge to rigorous imprisonment for life. The petitioner claims that as a convict in prison he has

maintained a good, disciplined behaviour and nothing adverse has been reported against him so far. The petitioner has been granted parole on four

occasions by this Court and the NCT of Delhi in the last three years, the last being from 12.10.2010 to 23.11.2010 which was granted and

extended by this Court by 10 days in W.P. (Crl.) 1667/2010. The petitioner duly fulfilled all the conditions on which he was granted parole

including regular presence at the Police Station as directed by this Court in W.P.(Crl.) 1667/2010. On each of the aforesaid occasions when the

petitioner was granted parole, he duly surrendered before the Jail authorities within the stipulated time-frame and no adverse remark has ever been

reported against the petitioner during the said period. The petitioner, in the month of September, 2010, filed an application for being released on

furlough. However, his application for furlough has not been considered because of the bar stipulated in Clause 26.4.

W.P.(C) 1229/2012: (Dinesh Kumar)

5. The petitioner is a convict who is undergoing life imprisonment in connection with case FIR No. 361/2001 u/s 363/364-A/120-B IPC, P.S.

Kotwali, New Delhi. The petitioner was sentenced by the ld. ASJ, Tis Hazari, Delhi on 11/13.10.2004. The petitioner has been in jail for about 11

years and 7 months i.e. since 19.6.2001. Adding the period of remission earned by the petitioner for his good conduct, the time period of the

petitioner"s incarceration is over 13 years. It is claimed that the petitioner"s conduct in jail has been unblemished and without any complaint

whatsoever. The petitioner has been released on parole on three occasions and was granted interim bail for 3 months by this Court vide order

dated 14.2.2006 in Crl. A. No. 181/2005. The petitioner duly surrendered after enjoying parole and interim bail that was granted by this Court. It

is submitted that the petitioner did not misuse his liberty in any manner whatsoever. The petitioner, recently, attempted to file an application for

being released on furlough. However, his application for furlough has not been considered because of the bar stipulated in Clause 26.4 in view of

his conviction u/s 364A IPC.

W.P.(C)1230/2012: (Ibrahim)

6. The petitioner is a convict who is undergoing life imprisonment having being convicted for the offences punishable u/s 392 & 302 IPC in

connection with case FIR No. 200/2002, P.S. Sultan Puri, Delhi. The petitioner was sentenced by the Ld. ASJ, Rohini on 18.12.2007. Initially the

case FIR against the petitioner was registered u/s 394 & 302 IPC. The relevant portion of the judgment of conviction of the petitioner is as

follows:-

Since it cannot be said definitely if the accused caused injuries to the deceased at the time of committing the robbery or later on, therefore, it is held

that the accused committed the offence punishable u/s 392 IPC, instead of 394 IPC. Both the charges have been established beyond shadow of

doubt. Hence, accused Ibrahim is convicted for the offences punishable u/s 392 and 302 IPC.

The petitioner has been languishing in jail for about 10 years since 3.3.2002. Adding the period of remission earned by the petitioner for his good

conduct, the time period of the petitioner''s incarceration is well over 11 years. It is submitted that the petitioner''s conduct in jail has been

unblemished and without any complaint. The petitioner, attempted to obtain furlough. However, his application for furlough has not been

considered because of the bar stipulated in Clause 26.4 in view of his conviction u/s 392 IPC.

W.P.(C) 1231/2012: (Luv Kush)

7. The petitioner is a convict who is undergoing rigorous imprisonment for 10 years and fine in connection with case FIR no. 214/2006 u/s 376

IPC, P.S. Anand Vihar, Delhi. The petitioner was sentenced by the ld. ASJ, Karkardooma Courts, Delhi on 12.10.2007. The petitioner is in Jail

for about 5 years and 8 months i.e. since 12.4.2006. Adding the period of remission earned by the petitioner for his good conduct, the time period

of the petitioner''s incarceration is about 7 years. The petitioner was released on parole by this Court for a period of 4 weeks in W.P.(Crl.)

994/2011. The petitioner duly surrendered after enjoying parole that was granted by this Court and the petitioner did not misuse his liberty in any

manner whatsoever. The petitioner''s application for furlough has not been considered because of the bar stipulated in Clause 26.4 in view of his

conviction u/s 376 IPC.

The Submissions:

8. Mr. Vivek Sood, Advocate appeared for all these petitioners. His submission was that Clause 26.4 does not only violate right to freedom and

liberty, it is unreasonable and discriminatory as well. He submitted that barring prisoners convicted for the offence stipulated in this Sub- Clause

26.4 was totally illogical and arbitrary when in more serious offences like murder or even multiple murder cases; furlough or parole could be

granted. He also submitted that those persons who are given parole and/or furlough, it becomes a good ground for them to review of sentences by

the Review Board which also would be denied in the event prisoner is denied furlough. He also submitted that there was solitary objective behind

grant of furlough namely the unification of the prisoner with his family members, friends and society and that purpose would be defeated in case the

prisoner is denied furlough altogether and is to suffer long incarceration by serving entire sentence before he is in a position to come out of the

prison. His submission was that good conduct in the prison should be the only relevant criteria.

9. Learned counsel for the State responded by pointing out that Rules in question were framed at the directions of this Court given in Writ Petition

(Crl.) 112/2009 and after framing of these Rules, the same were shown to the Court which would amply that the Court had imprimatur over these

guidelines and it was not permissible for the petitioners to challenge these guidelines now. It was further submitted that the Classification was made

on rational and intelligible differentia with a purpose behind it. It was argued that having regard to the serious nature of offences, these were rightly

excluded from the grant of furlough.

10. We had requested Mr. Pawan Sharma, Standing Counsel (Crl.) for Govt. of NCT of Delhi to assist us. He placed before us the judgment of

Gujarat High Court in Juvansingh Lakhubhai Jadeja Vs. State of Gujarat, and submitted that issue was squarely covered thereby. He also placed

reliance on the judgment of Supreme Court in Avtar Singh Vs. State of Haryana and Another, which drew distinction between parole and furlough

and Supreme Court recognized in that judgment that furlough cannot be claimed by certain classes of prisoners.

11. We have considered the respective submission of the learned counsel on either side.

Effect of the orders in W.P.(W) 1121/2009:

12. This Court had taken suo moto cognizance of the fact that the then existing guidelines for parole/furlough had not been reviewed or revised for

over 50 years. It was registered as W.P.(Crl.) 1121/2009. Pursuant thereto in consultation with Delhi Legal Services Authority, the

Parole/Furlough Guidelines-2010 were framed. These Guidelines were placed before the Court on 21.1.2010 and taking note thereof the petition

was disposed with the following order:-

A draft of guidelines for parole/furlough have been handed over in Court and is taken on record. The guidelines have been framed by the Delhi

Government in consultation with the Member Secretary, Delhi Legal Services Authority. Learned Counsel for the Delhi Government states that the

guidelines will be placed before the Lieutenant Governor for his approval and after taking the approval of the Lieutenant Governor will be

published within six weeks. The petition is accordingly disposed of."". After the approval of the Lt. Governor, orders dated 17.2.2010 were passed

approving these guidelines.

13. No doubt, the guidelines have been revised by the Government in consultation with the Member Secretary, DLSA and these were placed

before the Court in the aforesaid writ petition as well. However, there was no specific consideration to the validity of certain clauses of these

guidelines which is the issue raised in the present petition. Therefore, learned counsel for the respondent may not be right in submitting that even the

validity of these guidelines on merits was approved by this Court and, therefore, said guidelines cannot be challenged at all. We are of the opinion

that this Court would be entitled to examine the validity of portion of the guidelines relating to furlough as raised by the petitioners.

Parole and Furlough: Meaning and purpose:

14. Guidelines relate to parole as well as furlough. There is a subtle distinction between the two which has been explained by the Courts from time

to time. A parole can be defined as conditional release of prisoners i.e. an early release of a prisoner, conditional on good behaviour and regular

reporting to the authorities for a set period of time. It can also be defined as a form of conditional pardon by which the convict is released before

the expiration of his term. Thus, the parole is granted for good behaviour on the condition that parolee regularly reports to a supervising officer for

a specified period. Under the aforesaid guidelines, such a release of the prisoner is temporarily on some basic grounds. It is to be treated as mere

suspension of the sentence for time being, keeping the quantum of sentence intact. Release on parole is designed to afford some relief to the

prisoners in certain specified exigencies. Such paroles are normally granted in certain situations some of which may be as follows:-

(i) A member of the prisoner''s family has died or is seriously ill or the prisoner himself is seriously ill; or

(ii) The marriage of the prisoner himself, his son, daughter, grandson, grand daughter, brother, sister, sister''s son or daughter is to be celebrated;

or

(iii) The temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation o his land

or his father''s undivided land actually in possession of the prisoner; or

(iv) It is desirable to do so for any other sufficient cause

(v) Parole can be granted only after a portion of sentence is already served

(vi) If conditions of parole are not abided by the parolee he may be returned to serve his sentence in prison, such conditions may be such as those

of committing a new offence

(vii) Parole may also be granted on the basis of aspects related to health of convict himself.

15. In the Guidelines, 2010 two kinds of paroles are mentioned, namely, custody parole and regular parole. The circumstances in which custody

parole can be granted are stipulated in Clause 5 and the circumstances for grant of regular parole is stipulated in clause 9 which are as under:-

5. Custody Parole- ""'Custody parole"" would be granted in emergent circumstances as follows: 5.1 Death of a family member;

5.2 Marriage of a family member;

5.3 Serious illness of a family member; or

5.4 Any other emergent circumstances.

x x x

9. Regular Parole: it would be open to the Government to consider applications for parole on other grounds such as:-

9.1 Serious illness of a family member;

9.2 Critical conditions in the family on account of accident or death of a family member;

9.3 marriage of any member of the family of the convict;

9.4 Deliver of a child by the wife of the convict if there is no other family member to take care of the spouse at home;

9.5 Serious damage to life or property of the family of the convict including damage caused by natural calamities.

9.6 To maintain family and social ties

9.7 To pursue the filing of a SLP before the Supreme Court of India against a judgment delivered by the High Court convicting or upholding the

conviction, as the case may be.

16. Bail and parole have different connotation in law. Bail is granted to a person who has been arrested in a non-bailable offence and has been

convicted of an offence after trial. The effect of granting bail is to release the accused from interment custody though the Court would still retain

constructive control over him through sureties. Parole, on the other hand, is the release of a person from the detention of custody even though

substantial legal effect may be the same as bail. It is a temporary release from custody which does not suspend the sentence or period of detention.

17. Furlough, on the other hand, is a brief release from the prison. It is conditional and is given in case of long term imprisonment. The period of

sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct

remission. A convict literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this

context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family

problems but also to maintain his links with society. Convicts too must breathe fresh air for atleast some time provided they maintain good conduct

consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such

prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.

18. The Supreme Court through various pronouncements has laid down the difference between parole and furlough. Some of them are as follows:-

(i) Both parole and furlough are conditional release.

(ii) Parole can be granted in case of short term imprisonment whereas in furlough it is granted in case of long term imprisonment.

(iii) Duration of parole extends to one month where as in the case of furlough; it extends to 14 days maximum.

(iv) Parole is granted by Divisional Commissioner and furlough is granted by Deputy Inspector General Prison.

(v) For parole specific reason is required where as furlough is meant for breaking the monotony of imprisonment.

(vi) The term of imprisonment is not included in the computation of the term of parole, where as it is vice-versa in furlough.

(vii) Parole can be granted a number of times whereas there is limitation in the case of furlough.

(viii) Since furlough is not granted for any particular reason it can be denied in the interest of the society.

(See also State of Maharashtra and Another Vs. Suresh Pandurang Darvakar, , State of Haryana and Others Vs. Mohinder Singh,

19. Further, in the land mark judgment of Charanjit Lal Vs. State and Others, it was held:-

(i) The four main objectives which a state intends to achieve by punishing an offender are-Deterrence, prevention, Retribution and Reformation.

(ii) Life convicts? release from jail off and on for short periods has to be considered and opportunities have to be afforded to them not only to

solve their personal and family problems but also to maintain their links with society.

(iii) They must breathe fresh air for at least sometime provided, of course, they maintain good conduct consistently during incarceration and they

show a tendency to reform them and become good citizens.

(iv) Redemption and rehabilitation of such prisoners for the good of the society must receive due weight while they are undergoing sentence of

imprisonment.

Relevant Considerations governing grant of Furlough:

20. What follows from the above is that the four main objects which punishment of an offender by the state is intended to achieve are deterrence,

prevention, retribution and reformation. There has been substantial diversion from the previously existing popular concept of ""retribution"". Of late

the focus has shifted upon the ""reformation"". The earlier criminal law concept of an ""eye for eye"" and ""a tooth for tooth"" has been replaced by a

more humane concept which emphasizes upon the re-allocation of an accused into the society. The concept of parole and furlough are in fact a

step towards the accomplishment of this very purpose.

21. The provisions of parole and furlough provide for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to

afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with society. Even citizens of

this country have a vested interest in preparing offenders for successful re-entry into society. Those who leave prison without strong networks of

support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources,

stand a significantly higher chance of failure. When offenders revert to criminal activity upon release, they frequently do so because they lack hope

of merging into society as accepted citizens. Furloughs can help prepare offenders for success.

22. While on the one hand, the aforesaid reformative theory of sentencing is to be kept in mind, on the other hand, the interest of the society is also

a necessary concomitant. As already mentioned above, there are four main objects of punishment which includes even deterrence and prevention

as well. The other side of the coin is the experience that great number of crimes are committed by offenders who have been put back in the street

after conviction. Therefore, while exercising the discretion in granting furlough such aspects are to be kept in mind namely whether the convict is

such a person who has tendency to commit such a crime or he is showing tendency to reform himself to become good citizen.

23. Not all people in prison are appropriate for grant of furlough. Obviously, society must isolate those who show patterns of preying upon victims.

Yet administrators ought to encourage those offenders who demonstrate a commitment to reconcile with society and whose behaviour shows that

aspire to live as law-abiding citizens. Thus, furlough program should be used as a tool to shape such adjustments.

The Issue:

24. In order to maintain the balance between the aforesaid two competing and conflicting interest and in order to harmonize the same, what is the

yardstick to be adopted, is the poser. Whether the commission of a serious crime by itself be treated as an embargo to the grant of furlough, as is

done vide Clause 26.4 of the Guidelines, 2010 ? Or it should be the propensity of such a convict to commit a crime again which has to be judged

from some other standards like the good conduct of the prisoner in the prison?

Relevant case law on the issue revisited:

25. Before we answer these questions, it would be necessary to place on record that provisions like Clause 26.4 on furlough is framed by different

States. We may also record that such provisions have been noticed by the Courts earlier. In Avtar Singh (supra) the provisions of Haryana Good

Conduct Prisoners (Temporarily Release) Act, 1988 were the subject matter of discussion. Section 4 thereof provides for temporary release of

prisoners on furlough and excludes the categories of the habitual offenders as defined in Punjab Habitual Offenders (Control and Reform) Act,

1952 as well as those convicted of dacoity or such other offences as the State Government may by notification specifies. Comparing this provision

with Section 3 of the said Act which provides for parole, the Court observed that conditions for releasing a prisoner on furlough were more

rigorous than that of parole, which is clear from the following passage in the said judgment:-

As noted above, under this section any prisoner irrespective of his period of sentence of detention can be released on parole to meet such

problem, whereas the condition for releasing a prisoner on furlough u/s 4 is rigorous and such release on furlough cannot be claimed by certain

classes of prisoners as mentioned in the section. On close look at both the sections it would appear that these sections operate on different fields.

Section 3 has been enacted to meet certain situation of the prisoner but Section 4 has been enacted as a reformative measures as a prisoner has to

show good conduct while in incarceration. In our consideration opinion this classification is based on rational criteria and cannot be said to be

discriminatory in nature. We, therefore, find no force in the first contention of the learned counsel for the appellant.

26. We may record that these observations were made in the context of argument of the appellant that Section 3(3) of the said Act was

unconstitutional as the period of parole was not counted towards the sentence whereas in the case of furlough the benefit of that period was given.

Thus, the Court was not seized of and discussed the issue which has arisen in the present petition. However, this very issue is directly dealt with by

the Gujarat High Court in Juvan Singh Lakhubhai Jadeja (supra). The argument in that case was identical namely exclusion of certain classes of

convicts of particular offences was discriminatory. The Court while upholding the validity of such a provision remarked:-

But in introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be

unmindful of safeguarding the legitimate rights of the citizens in regard to their security in the matters of life and liberty. It is for this reason that in

introducing such reforms the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to

criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a

criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a

specified period. It is, therefore, understandable that while meting out humane treatment to the convicts care is taken to ensure that kindness to the

convicts does not result in cruelty to the society. Naturally enough the authorities would be anxious to ensure that the convict who is released on

furlough does not seize the opportunity to commit another crime when he is at large for the time-being under the furlough leave granted to him by

way of a measure of penal reform.

27. While dealing with the cases of ""habitual prisoners"" as exclusionary category the court justified their exclusion observing:-

This appears to be the object underlying Rule 4 which enjoins that prisoners of the specified categories shall not be enlarged on furlough. And that

is why Rule 4(1) provides that ""habitual prisoners"" should not be considered for furlough leave. If committing the offence has become a habit, a

prisoner is less likely to respond to the corrective treatment aimed at his reform while he is undergoing the sentence to the extent that he can safely

(safely for the society) be set at large before the expiration of his term of imprisonment. If released, he is more prone to the temptation to commit a

crime because in his case the crime is committed not merely under compulsion of circumstances or in a moment of passion but on account of his

having become habituated to that way of life. Until there is evidence that he has been able to break the chains of habit and master his habitual

impulses, it would not be safe from the point of view of the society to throw him in the midst of it thereby exposing the society to further crimes by

him.

28. In that case those convict of offence under the Bombay Prohibition Act were also made ineligible for grant of furlough under Rule 4 (3) and this

exclusion was justified in the following manner:-

The same idea appears to run through most of the clauses of Rule 4. For instance, Rule 4(3) concerns persons convicted of offences under the

Bombay Prohibition Act, 1949. Apparently persons who indulge in offences under the Prohibition Act either by consuming liquor or by trading in

liquor become slaves of the habit or way of life and find it difficult to free themselves from the bondage of habit. That appears to be the reason why

it is provided that they should not be considered for release on furlough because a break from the prison life will expose them to the same

temptation and the purpose of keeping them away from the habit for sufficient time to enable them loosen the hold of the habit would not be

served.

29. Rule 4 (5) of the Prisons (Bombay Furlough and Parole) Rules, 1959, rendered such convicts ineligible for grant of furlough who show a

tendency towards crime. This inclusion was also found justified in the following manner:

Similarly Clause (5) of Rule 4 provides that those who show a tendency towards crime should not be so released. The idea would appear to be

that in view of their manifest tendency it would not be advisable to expose them to the temptation and expose the society to the risk.

30. Insofar as those convicts whose conduct had not been found to be satisfactory and who had in the past escaped or attempted to escape from

lawful custody or who have defaulted in any way in surrendering themselves were as rightly excluded from the benefit of grant of furlough.

31. To this extent namely exclusion of the aforesaid categories may not pose a problem. Even in the Guidelines, 2010 same kind of provisions are

made in Clause 26 which inter alia lay down that in order to obtain the furlough, the petitioner should not be a habitual offender; the release of the

prisoner should not be considered dangerous or deleterious to the interest of national security or involvement in a pending investigation; in a case

involving serious crime; he should not be a person whose presence is considered highly dangerous or prejudicial to the public peace and tranquility

by the District Magistrate by his home district etc.

32. Coming to the exclusion of those convicted of robbery and dacoity (which is one of the offences made in Clause 26.4 of the Guidelines, 2010

as well) the Court held that even this was not discriminatory. A detailed discussion in this behalf is contained in para 9 of the said judgment.

9. Sections 392 to 402 occur in Chapter XVII of the Indian Penal Code and relate to offences of robbery and dacoity. The question is : is there

any rational basis for selecting this class of offences for being included in the list of the offences for which convicts should not be enlarged on

furlough ? Now, in robbery an element of violence is present along with theft or extortion. Violence is either actually used or attempted to be used

either for carrying away of the property or for making the victim part with the property. And when five or more persons conjointly commit or

attempt to commit robbery, the offence falls within the description of dacoity. It is obvious that in dacoity five or more persons come together with

the avowed object of obtaining property unlawfully by resort to violent means. When so many persons enter upon a life of crime and form a group

which is likely to become an organized gang, it is clear that there is great danger in letting them loose. In order to maintain themselves they take to

robbery in an organized fashion and it tends to become a habit or a way of life from which it is difficult to make a break. If one who has been found

guilty of such an offence is released on furlough, there is no guarantee that he will not indulge in similar activity as soon as he is let large. None of

the twin objects of punishment of imprisonment would then be served. Neither would he be reformed nor would the society remain immunized

from his criminal activity for the specified period. It would be dangerous to the society to release him on furlough merely out of considerations of

penal reform and humane treatment. As observed earlier, consideration of sympathy for him cannot be permitted to overshadow the consideration

regarding security of the society. Similarly with regard to the lesser offence of robbery, it would be extremely hazardous to let the prisoner loose

before the expiry of the term of imprisonment. It would be hazardous to do so because when one abandons honest labour for the career of theft or

intimidation coupled with violence (which brings easy money though at some risk) it tends to become a way of life and the temptation is too great

to resist when the prisoner is at large. The offences of robbery and dacoity, therefore, fall within a class by themselves. The classification is based

on the danger inherent in releasing on furlough those who are proved to have unhesitatingly committed crimes against person as well as property

and such crimes by their very nature are habit forming and repetitive. It is, therefore, not possible to say that the classification is irrelevant or that it

has no nexus with the objective sought to be achieved. It will be recalled that the object is two-fold (1) to enable the convict to break the shackles

of his habit and (2) to immunize the society atleast for a specified period. It was, however, argued by counsel that if a more serious crime like

murder was not included in the list, there was no rational basis for including the offences relating to robbery and dacoity within the fold. Here again,

the argument ignores the fact that by and large an offence of murder is committed by a person under some real or imagined provocation or in a

moment of passion and the perpetrator of the crime usually has a motive or animus against a particular individual or individuals and not against the

society at large. There is, therefore, less danger of his committing a similar crime when he is on leave on furlough. Robbery and dacoity are

offences which are directed against the entire society at large and the entire society is exposed to the danger emanating from them. In case of

murder only that person against whom the perpetrator has a motive or animus alone is exposed to danger from him and not others. So far as

robbery and dacoity are concerned, any victim is a good victim and the entire society is exposed to the risk. It is, therefore, clear that the offences

of robbery and dacoity fall in a different category. Whether or not the offence is more serious is not the relevant consideration for withholding

furlough. The relevant consideration is whether his release will hamper his reform or expose the society to the vary danger to shield from which the

criminal is imprisoned. Therefore, the fact that murder may be by and large considered to be a more serious crime is not a circumstance which in

any way impairs the reasoning underlying the selection of the offences falling under the specified class viz. the offences relating to robbery and

dacoity. Again, the mere fact that some other offences also deserve to be included in the list of offences in respect of which furlough should not be

granted (even if the argument is valid) is not a good ground for not including the offences of robbery and dacoity. By experimentation, and by

gaining experience the list may be enlarged or modified from time to time. A classification which is otherwise rational and purposeful and bears a

nexus with the underlying object of the legislation cannot be branded as obnoxious merely because another class also ought to be brought within

the sweep of the legislation. It is not true to say that all evils must be remedied by the same legislation in order to be immune from the charge of

discrimination. It is not a valid argument that the Legislature can legislate in respect of all evils or none. Legislation can be implemented by stages.

The mere circumstance, that other class of offences may also be included within the list will not render the class which is actually included devoid of

rational basis. Under the circumstances, it is not possible to uphold the contention that Rule 4(2) is discriminatory in character and is violative of

Article 14 of the Constitution of India. We are of the opinion that the classification has a rational basis and has a distinct nexus with the underlying

object of the legislation and that it does not introduce any element of hostile discrimination.

33. It becomes clear from the aforesaid that the Court treated the offences of robbery and dacoity in a different class altogether and this

classification was found justified i.e. rational and purposeful which bears a nexus with the underlying object sought to be achieved. The reason

given by the Court was that by very nature those who commit dacoity with objective of obtaining property unlawfully and resorting to violent

means, in an organized fashion, it tends to become a habit or a way of life from which it is difficult to take a break. Therefore, it would be

dangerous for the society to release such prisoners on furlough merely out of considerations of penal reform and human treatment. Even in respect

of the lesser offence of robbery the Court was of the opinion that these are the prisoners who objected to honest labour for the career of theft

coupled with violence which brings easy money though at some risk and that tends to become a way of life.

34. The moot question is as to whether there can be a presumption that for all such persons who have committed the offence of robbery and

dacoity and convicted thereof are to be treated as ""hardened criminals"" for whom it has become a habit or way of life and they would necessarily

tend to commit the same crime again and again.

35. Interestingly, while contrasting the cases of robbery and dacoity, with the offence of murder which is more heinous crime, the Court observed

that there was less danger of a convict committing similar crime of murder when he is on leave or on furlough as the offence of murder is committed

by a person under some real or imagined provocation or in a moment of passion and the perpetrator of the crime usually has a motive or animus

against a particular individual (s) and not against the society at large as in the case of dacoity and robbery. More interestingly, the justification for

inclusion of convicts for offence of murder for furlough was given by observing that:-

Whether or not the offence is more serious is not the relevant consideration for withholding furlough. The relevant consideration is whether his

release will hamper his reform or expose the society to the vary danger to shield from which the criminal is imprisoned. Therefore, the fact that

murder may be by and large considered to be a more serious crime is not a circumstance which in any way impairs the reasoning underlying the

selection of the offences falling under the specified class viz. the offences relating to robbery and dacoity.

Would this reasoning not apply in the case of dacoity and robbery as well?

It would be interest to note that Full Bench of Gujarat High Court itself in a later case titled Bhikhabhai Devshi Vs. State of Gujarat and Ors. AIR

1987 Guj 136 discussed the provisions of furlough though in that matter Rule 4 (10) was the subject matter of the discussion, which stipulated that

those 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 would not be granted furlough. The Full Bench held that such a provision was not

inconsistent with Section 48A of the Prisons Act, 1894. The Court held that as far as the first part of Rule 4(1) is concerned, in respect of

prisoners who have escaped or attempted to escape, such prisoners, a class by themselves, cannot be trusted for being released on furlough and,

therefore, in such cases, the prison authority would be justified in not considering their request for furlough.

However, in cases of late surrender, where there is no element of escape, but merely there is a delay in surrendering, the question will have to be

examined on the facts and circumstances and merits of each case. A given case of a prisoner defaulting in timely surrender, who is wanted by the

jail authorities and who is not available at the place where ordinarily he should be and who is apprehended by the police or who surrenders

because of the chase by the authority, may fall under the first part where he cannot be trusted to be released on furlough again. But such cases are

at the other extreme. The Court also opined that other cases of late surrender may be of voluntary surrenders and the lateness may not be unduly

long and not without sufficient cause or reason. In such cases sufficiency of such a cause related to time will certainly have to be considered by the

authority. The Court found this provision to be violative of Section 48A of the aforesaid Prisons Act, 1894.

36. This judgment of Full Bench was relied upon by the another Division Bench of Gujarat high Court in Govindbhai Mansing Dabhi Vs. State of

Gujarat 2005 (3) GLH 169. In this case the Court held that where a person had suffered incarceration for long time irrespective of the nature of

offence for which he was sentenced, he should be granted furlough. The Court, while taking this view, relied upon the judgment of a Division

Bench of Bombay High Court in Sharad Keshav Mehta Vs. State of Mahrasthra 1989 Crl. LJ 681 which was to the effect that right to be released

on furlough is a substantial and legal right of the prisoner and he cannot be denied the same if it is permissible under the law. The Court considering

the Scheme of Furlough Rules, in that State held as under:-

It is not open to the Home Department of the State Government to prescribe rules giving facility of release of the prisoner on furlough by one hand

and then providing that the prisoner has no legal right to be released on furlough. In our judgment, R. 17 cannot deprive the prisoner of the

substantial right to be released on furlough provided the requirements of the rule are complied with. The submission advanced on behalf of the

State Government overlooks the distinction between the right to be released on parole and the right to be released on furlough. Parole is granted

for certain emergency and release on parole is a discretionary right while release on furlough is a substantial right and accrues to a prisoner on

compliance with certain requirements. The idea of granting furlough to a prisoner is that the prisoner should have an opportunity to come out and

mix with the society and the prisoner should not be continuously kept in jail for a considerably long period. The interaction with the society helps

the prisoner in realising the folly which he has committed and the liberty which he is deprived of. In modern times the effort is to improve the

prisoner and the punishment is to be considered as an action for reformation of an individual. It is futile to suggest that a prisoner should be kept

behind the bars continuously and should not be permitted to come out on furlough unless the authorities think wise. In our judgment, the State

Government has framed rules in exercise of the powers conferred by Cl. (5) and (28) of Section 59 of the Prisons Act, 1894 and on framing of

such rules, R. 17 cannot deprive the prisoner of the right to be released on furlough. In spite of the enactment of R. 17, we hold that the right to be

released on furlough is a substantial and legal right conferred on the prisoner.

37. There can be no cavil in saying that a society that believes in the worth of the individuals can have the quality of its belief judged, at least in part,

by the quality of its prisons and services and recourses made available to the prisoners. Being in a civilized society organized with law and a system

as such, it is essential to ensure for every citizen a reasonably dignified life. If a person commits any crime, it does not mean that by committing a

crime, he ceases to be a human being and that he can be deprived of those aspects of life which constitutes human dignity. For a prisoner all

fundamental rights are an enforceable reality, though restricted by the fact of imprisonment.

38. In Sunil Batra Vs. Delhi Administration and Others etc., Justice D.A. Desai, speaking for himself, the Hon''ble Chief Justice of India and two

Hon''ble Judges observed that a convict is in prison under the order and direction of the Court and the Court has, therefore, to strike a just balance

between the dehumanizing prison atmosphere and the preservation of interval order and discipline, the maintenance of institutional security against

escape, and rehabilitation of the prisoners. Article 21 guarantees protection of life and personal liberty. Though couched in the negative it confers

the fundamental right to life and personal liberty.

39. In Maneka Gandhi versus Union of India, AIR 1978 SC 579, Justice Bhagwati observed that if a law depriving a person of personal liberty

and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights

conferred under Article 19, which may be applicable in a given situation, exhyopthesis it must also be liable to be tested with reference to Article

14.

40. Justice Charles Sobraj Vs. Supdt. Central Jail, Tihar, New Delhi, observed that imprisonment does not spell farewell to fundamental rights

although, by a realistic re-appraisal, Courts will refuse to recognize the full panoply of part III enjoyed by free citizens. Further, observed that the

axiom of prison justice is the Court''s continuing duty and authority to ensure that the judicial warrant which deprives a person of his life or liberty is

not exceeded, subverted or stultified. It is a sort of solemn covenant running with the power to sentence. Referring to the decision of Supreme

Court in Rustom Cowasjee Cooper Vs. Union of India (UOI), and Maneka Gandhi (Supra), it was observed that Prisoner''s retain all rights

enjoyed by free litigants except those lost necessary as an incident of confinement, the rights enjoyed by prisoner''s under Article 14, 19 and 21

though limited, are not static and will rise to human heights when challenging situation arise.

41. The Supreme Court in Sunil Batra versus Delhi Administration (Supra) observed ''''Prisons are built with stones of law'''', and sort behooves the

Court to insist that, in the eye of law, prisoners are persons, not animals and punish the deviant ''''guardians'''' of the prison system where they go

berserk and defile the dignity of the human inmate. Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by Jail

officials '''' dressed in a little, brief although when part III is invoked by a convict. For when a prisoner is traumatized, the constitution suffers a

shock. The Supreme Court further held that the Court has power and responsibility to intervene and protect the prisoner against may how, crude

behaviour.

Our Analysis:

42. The most relevant aspect which needs to be focused is as to whether offences specified n Clause 26.4 are to be treated per se ineligible for the

grant of furlough. As mentioned above, this exclusion presumes that the convict would have a tendency to commit such an offence again.

According to us, generalizing this underlying presumption may not be valid and it should be examined on case to case basis. By no means it is

suggested that convicts of the offences specified in Clause 26.4 are to be granted furlough. If this category is not excluded, at the most, they

become eligible for consideration. Still such persons will have to satisfy the conditions of furlough mentioned in other provisions of Clause 26. After

all the competent authority will still have discretion to deny furlough in particular cases. It would still be seen as to whether the prisoner depicted

good conduct and behaviour in the prison and continues to maintain good conduct. The furlough can also be denied if he is a habitual offender or is

involved in a pending investigation in a case involving serious crime. As per Clause 26.4 or 26.7 furlough can be denied even to that convict whose

presence is considered highly dangerous or prejudicial to the public peace and tranquility by the District Magistrate by his home district. Thus,

there are sufficient safeguards provided in clause 26, on an application of which a person can be denied furlough even if he is convicted of lesser

offences. While examining a particular case, the competent authority can definitely consider the matter as to whether a particular convict is on the

path of reformation or he still has the tendency to commit the crime if he is released on furlough. Reports from the Counselors ,psychiatrists and

other concerned officials of Jail who are closely monitoring him can always be obtained for this purpose. On the other hand what Clause 26.4 does

is to make convicts of such offences per se ineligible for furlough on the basis of farfetched and illogical presumption that they have become

habitual offenders"" and are incapable of being reformed.. There have been numerous instances of reformation of those prisoners convicted of the

offences of dacoity and robbery.

43. Furthermore, the competent authority while examining such cases can be well advised to have stricter standards in mind while judging their

cases on the parameters of good conduct, habitual offender or while judging whether he could be considered highly dangerous or prejudicial to the

public peace and tranquility etc. On the other hand, if such a convict is rendered totally ineligible for furlough, it would negate the very purpose of

grant of furlough viz affording him opportunity to maintain links with society; to solve personal and family problems; breath fresh air for at least

some time; and opportunity to become good citizen.

44. The aforesaid reasoning of ours applies with much force where conviction is for offence of rape as in such a case by no means there can be a

presumption that in all circumstance, the convict would repeat this crime. The prediction of criminal behaviour is ubiquitous. However, it is not very

difficult to comprehend. If the extent of criminal behaviour is predicted, then it can be prevented as well. Mainly there are two methods for the

prediction of criminal behaviour:

(i) Experience tables (statistical method); and

(ii) Clinical or intuitive method.

45. It is also to be kept in mind that by the time an application for furlough is moved by a prisoner, he would have spent some time in the Jail.

During this period, the various reformatory methods must have been applied. We can take judicial note of this fact, having regard such reformation

facilities available in Tihar Jail. One would know by this time as to whether there is a habit of relapsing into crime inspite of having administered

correctional treatment. This habit known as ""recidivism"" reflects the fact that the correctional therapy has not brought in the mind of the criminal. It

also shows that criminal is a hard core who is beyond correctional therapy. If the correctional therapy has not made in itself, in a particular case,

such a case can be rejected on the aforesaid ground i.e. on its merits.

46. We are not oblivious of the fact that there may be hard core criminals who by reason of their crime and the methods of dealing with the crime,

form associations, loyalties and attitudes which tend to persist. There may be even peer pressure when such convicts are out to commit those

crimes again. There may be pressure of ostracised from delinquent groups which may lead them to commit the crime again. Persistence in criminal

behaviour may also be due to personality traits, most frequently due to pathological traits of personality, such as mental defectiveness, emotional

instability, mental conflicts, ecocentrism and psychosis. In regard to relapse or recidivism, Frank Exner a noted criminologist and sociologist, points

out that the chances of repeating increase with the number of previous arrests and the interval between the last and the next offence becomes

shorted as the number of previous crimes progresses(Frank Exner. Kriminologie pp.115-120). The purpose of the criminological study is the

prognosis of the improvable occasional offenders and that of the irredeemable habitual offender and hard-core criminal. To differentiate the

recidivists from non-recidivists and dangerous and hard-core criminals from occasional criminals had been enumerated by Exner in the following

flow-sheet:-

1. Hereditary weaknesses in the family life.

2. Increasing tempo of criminality.

3. Bad conditions in the parental home.

4. Bad school progress (especially in deportment and industriousness)

5. Failure to complete studies once begun.

6. Irregular work(work shyness).

7. Onset of criminality before 18 years of age

8. More than four previous sentences.

9. Quick relapse into crime.

10. Interlocal criminality (mobility).

11. Psychopathic personality (diagnosis of institutional doctor).

12. Alcoholism

13. Release from institution before 36 years of age

14. Bad conduct in the institution.

15. Bad social and family relations during period of release.

At the same time, as criminality is the expression of the ""symptom"" of certain disorder in the offenders, they can be easily reformed if they are

rightly diagnosed and correct treatment is administered to them.

47. These are, thus, the parameters which can be looked into while denying the furlough in a particular case and particularly those convicted of the

offences mentioned in Clause 26.4. We may record that the authorities may be extra cautious in granting a furlough to an inmate convicted of a

serious crime against the person and/or whose presence in the community could attract undue public attention, create unusual concern, or

depreciate the seriousness of the offense. If the authority approves a furlough for such an inmate, it must place a statement of the reasons for this

action. However, their exclusion per se making them ineligible at the outset even from consideration to obtain furlough becomes discriminatory and

arbitrary and it cannot have any rational nexus. We find ourselves in difficulty to agree with the reasoning given by the Gujarat High Court in Juvan

Singh Lakhubhai Jadeja (supra).

48. To sum up, we hold that the provision contained in Clause 26.4 of Guidelines, 2010 in the present form does not stand judicial scrutiny which

makes persons ineligible for furlough merely on the basis of the nature of crime committed by them. It would amount to snatching their right to at

least consider their cases for grant of furlough. We thus, strike down this provision as unconstitutional and infringing the Article 14 as well as Article

21 of the Constitution. At the same time, having regard to the nature of offences specified therein, we are of the view that there may be strict and

stringent conditions attached for consideration of cases of such convicts for grant of furlough some of which have been outlined by us in the

preceding paragraphs. The appropriate authority shall, accordingly, make suitable amendments while redrafting Clause 26.4 of the Guidelines,

2010. This exercise shall be completed within a period of two months from today. Based on the amended provision, the cases of the petitioners

shall be considered for grant of furlough. These writ petitions stand disposed of in the aforesaid terms.