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(1971) 09 BOM CK 0012

Bombay High Court (Nagpur Bench)

Case No: Special Civil Application No. 1014 of 1971

Danial H. Walcott	APPELLANT
Vs	
Superintendent, Nagpur Central Prison	RESPONDENT

Date of Decision: Sept. 30, 1971

Acts Referred:

- Constitution of India, 1950 - Article 226, 227
- Prisons Act, 1894 - Section 12, 45, 46, 51, 59

Citation: (1972) 74 BOMLR 436

Hon'ble Judges: Khan, J; Chandurkar, J

Bench: Division Bench

Judgement

Chandurkar, J.
The petitioner in this petition is a prisoner who is serving jail sentences awarded to him by the Presidency Magistrate"s Court in Bombay as also by the Additional Sessions Judge, Greater Bombay.

2. The substantial grievance which is made by the petitioner in this petition relates to the legality of the punishment of thirty days" separate confinement awarded to him by the Superintendent of the Nagpur Central Jail on January 30, 1971 in respect of prison offence. It is the case of the petitioner that two other prisoners by name Mangalgiri and Damani are kept in the barrack in which the petitioner has been kept and that the petitioner has been punished for having quarreled without any reason with co-prisoner Madhukar Mangalgiri. The petitioner alleges that Mangalgiri was dissatisfied with his being associated with the petitioner because the petitioner was a non-vegetarian and Mangalgiri had objection to the petitioner"s consumption of meat in his presence. This averment appears to be supported by the respondent"s letter addressed to the Deputy Inspector General of Prison on January 5, 1971 in which he has stated that Mangalgiri has refused to take food as he did not relish the company of the petitioner. According to

the petitioner, on January 2, 1971 Mangalgiri got up early in the morning at about 4.00 or 4.30 a.m., as was usual with him, and commenced to make loud noise by spitting and blowing his nose on the wash-floor where the petitioner used to bathe. The petitioner alleges that he had asked Mangalgiri to spit through the bars but Mangalgiri would not do it and asked the petitioner as to how this was possible and on this the petitioner reached towards the partition separating them and turned Mangalgiri''s head towards the bars and demonstrated how he could spit out through the bars. According to the petitioner, a shouting match ensued and this incident was reported in writing by the petitioner himself to the Superintendent and the Superintendent was asked to observe the order of this Court passed earlier and have the two prisoners removed. On the same day, the petitioner alleges, he was called to the Superintendent''s office and was asked as to what had happened and he explained the circumstances to the Superintendent and the matter, according to the petitioner, was treated as closed. The petitioner alleges that about three weeks later the Superintendent appeared in the petitioner''s barrack and informed him that he was being punished for the incident by awarding him thirty days'' separate confinement on the charge of quarrelling with another prisoner. The positive case of the petitioner is that except for the explanation which he had given to the Superintendent nothing further was done in the matter by the Superintendent in his presence and that the action taken against him was the result of a communication received by the Superintendent from the Inspector General of Prisons when he was informed, that Mangalgiri had gone on a hunger strike. The petitioner alleges that it was Mangalgiri himself who had violated Rules 17, 29 and 30 of the Discipline Rules and no case could be made out to punish the petitioner and that the same was being done at the instigation of the Inspector General of Prisons.

3. Respondent No. 1 has filed a return in this petition and his case is that the petitioner had absolutely no business to manhandle the prisoner Madhukar Mangalgiri "for the customary and daily routine procedure to which the latter was accustomed and which he was observing." According to respondent No. 1, the petitioner had taken the law in his own hands with an intention to show his supremacy and respondent No. 1 has stated that after careful consideration and taking into account all the material and the written plea of prisoner Walcott himself it was found that he was guilty and had made himself liable for the punishment awarded to him under the Prisons Act. With regard to the averment that Mangalgiri was himself guilty of going on a hunger strike and he was allowed to go scot free, the Superintendent has stated that he found that prisoner Madhukar Mangalgiri was strictly a vegetarian and gets a nausea at the sight of non-vegetarian food like pork, beef etc. which was also one of the causes for his not eating food on the day of the incident. It is further alleged that the statement of prisoners Walcott, Madhukar Mangalgiri and Damani were taken into consideration and in the interest of maintaining the discipline and jail administration he had awarded this punishment which has been duly undergone by prisoner Walcott. He denied that ho was acting at the instance of the Inspector-General of Prisons. Along with this return respondent No. 1 has filed certain documents to which we shall make a reference, but one of the documents to which an immediate reference is

necessary is the entry from a register maintained in the Central Jail, called a Register of Punishment, provided by Section 51 of the Prisons Act, 1804. This section reads as follows:

51. Entries in punishment-books:

(1) In the punishment-book prescribed in Section 12 there shall be recorded, in respect of every punishment inflicted, the prisoner"s name, register number and the class (whether habitual or not) to which he belongs, the prison-offence of which he was guilty, the date on which such prison-offence was committed, the number of previous prison-offences recorded against the prisoner, and the date of his last prison-offence, the punishment awarded, and the date of infliction.

(2) In the case of every serious prison-offence, the names of the witnesses proving the offence shall be recorded, and, in the case of offences for which whipping is awarded, the Superintendent shall record the substance of the evidence of the witnesses, the defence of the prisoner, and the finding with the reasons therefor.

(3) Against the entries relating to each punishment the Jailor and Superintendent shall affix their initials as evidence of the correctness of the entries.

One of the records which is required to be kept by the Superintendent u/s 12 of the said Act is a punishment-book in which the entries of the punishments inflicted on prisoners for prison offences are to be made. Neither Section 51(1) nor the first part of Section 51(2) of the Prisons Act provide for the recording of any findings as is contemplated by the latter part of Section 51(2). The contention which the petitioner has now raised before us is that this entry which is made in the punishment book indicates that the witness who was examined by the Superintendent was one P.J. Shinde, who was the Jailor, but according to the petitioner, Shinde was never examined in his presence and in any case he was admittedly not present when the alleged quarrel took place in the early hours of the morning and could not have, therefore, been treated as a witness in support of the charge that the petitioner was guilty of a prison offence.

4. In order to decide this contention it is necessary to refer to the relevant provisions dealing with prison offences and the punishments therefor. The State Government in exercise of the powers conferred upon it by Clauses (1), (6), (10), (13) and (28) of Section 59 of the Prisons Act, 1804 and of all other powers enabling it in that behalf has made Rules which are known as Maharashtra Prisons (Discipline) Rules, 1963. It is not disputed that these Rules govern the case of the petitioner. Rule 19 of these Rules enumerates several acts which constitute prison offences within the meaning of Section 45 of the Prisons Act. Section 45 of the Prisons Act itself provides for prison offences and reading Rule 19 of the Maharashtra Prisons (Discipline) Rules with Section 45 of the Prisons Act the acts which are enumerated in Rule 19 would constitute prison offences. The present offence for which the petitioner is shown to have been punished in the

Punishment Register is at serial No. 2 and is stated as "quarrelling with any other prisoner." The return discloses that the Superintendent had taken the view that the petitioner had manhandled Mangalgiri and had taken law in his hands. The punishment awarded to him was therefore for this misconduct. The petitioner has invited our attention to the Items Nos. (17), (29) and (30) under Rule 19 in order to indicate that the acts of the co-prisoner Mangalgiri themselves amounted to a prison offence, but that while he has been allowed to go scot free, the petitioner has been unduly punished. These items; relate to refusing to eat food or the food prescribed by the prison diet scale; spitting on or otherwise soiling any floor, door, wall or other part of the prison building or any article in the prison; and wilfully befouling the walls, latrines, washing or bathing places. The petitioner''s case is that his co-prisoner Mangalgiri was himself guilty of these offences.

5. It is not for this Court to consider whether the Superintendent should have punished the co-prisoner Mangalgiri for any of the alleged offences and the only question which we have to consider in this petition is whether the petitioner has been rightly found guilty of the offence for which he has been punished. The petitioner has heavily relied on Section 46 of the Prisons Act which provides that the Superintendent may examine any person touching any such offence, and determine thereupon and punish such offence by awarding the punishments which are specified in that section. We are, however, not concerned with the punishments which are set out in Section 46 because the relevant provisions dealing with punishments are to be found in the Maharashtra Prisons (Punishments) Rules, 1963, which have been made by the State Government and have come into force on October 15, 1963. Rule 5 of these Rules classifies punishments into minor and major punishments and admittedly the punishment of separate confinement for a period of thirty days which was awarded to the petitioner was a major punishment under these Rules. It has also not been disputed that since major punishment was awarded to the petitioner, the names of the witnesses, who were found to have proved the offence of the petitioner, were required to be entered in column 10 of the Punishment Register.

6. The question which really falls for determination before us is whether the petitioner''s contention that he has been found guilty of a prison offence without complying with the provisions of Section 46 of the Prisons Act, and therefore, the punishment awarded to him is vitiated, is justified or not. The learned Assistant Government Pleader on behalf of respondent No. 1 contends that Section 46 of the Prisons Act by itself does not prescribe any definite procedure for making an enquiry and it was permissible for the Superintendent to decide what procedure should be adopted and according to the learned Counsel the statements of the two other co-prisoners had been recorded. According to the learned Counsel the petitioner had been told of the contents of these statements and the petitioner had also given an explanation and it is argued that if, after taking into account the statements of the two co-prisoners and the explanation of the petitioner, the Superintendent has come to the conclusion that the petitioner was guilty of the prison offence, the decision of the Superintendent cannot be said to be vitiated nor was there any failure to comply with the principles of natural justice. Out of the two

statements on which heavy reliance is placed on behalf of respondent No. 1 the first one is in the nature of a written-statement addressed by Badrinath Bhikamchand Damani to the Deputy Superintendent, Central Prison, Nagpur, and is dated January 2, 1971. The other statement is also a written statement signed by prisoner Madhukar Mangalgiri and is addressed to the Superintendent, Central Prison, Nagpur. This is also dated January 2, 1971 and both these statements, which are signed by the prisoners making them, bear an endorsement of the Jailor of the Nagpur Central Prison, Mr. Shinde, to the effect that the statements were made before him. Both these statements purport to be in respect of the incident which had taken place on January 2, 1971 at about 5.10 or 5.15 a.m.

7. Now, the learned Assistant Government Pleader contends that these statements were written out by the two prisoners in the presence of Jailor Shinde and it was Mr. Shinde who brought these statements to the Superintendent and after these statements were received by the Superintendent, the Superintendent sent for the petitioner to give his explanation after the contents of these statements were explained to him and it was thereafter that on January 3, 1971 the petitioner had furnished his explanation. This document which was not originally filed with the return has now been made available to us and it is strenuously contended that with the two statements of the two co-prisoners in possession of the Superintendent of the Prison and having got the explanation of the petitioner he was entitled to come to the conclusion that the petitioner had committed a prison offence.

8. It must be pointed out at this stage that there is no averment in the return that the two statements to which we have made a reference and which are alleged to have been made by the two co-prisoners were either supplied to the petitioner or that their contents were explained to him and that he was called upon to give an explanation. When the absence of this material averment was pointed out to the learned Assistant Government Pleader his contention was that such a grievance has not been made out in the petition itself, and therefore, time should be granted to respondent No. 1 to file a fresh affidavit. We have rejected this request. The cases of the petitioner in the petition was very clear and it is obvious from the averments in the petition that the respondent was being called upon to justify the legality of the order of punishment. The two material facts which the petitioner had averred in the petition were that he had made a complaint to the Superintendent and then later on he was called and nothing was thereafter done till after about three weeks when he was merely told that he has been punished for a prison offence. These averments, in our opinion, clearly imply that the petitioner was challenging the legality of the order of punishment. It was for respondent No. 1 to justify the order of punishment passed against the petitioner and if the respondent''s case was that a proper enquiry had been made and a proper opportunity had been given to the petitioner to meet the charge against him, then relevant averments should have been made in the affidavit filed in reply to the petition. Apart from this, having gone through the documents on which heavy reliance is placed by the learned Assistant Government Pleader, we are satisfied that the order of punishment passed in this case has been clearly made in violation of the

provisions of Section 46 of the Prisons Act, 1894 and that the order is vitiated as having been passed in violation of the principles of natural justice.

9. It is no doubt true that Section 46 of the Prisons Act does not in terms provide for an elaborate enquiry but it requires the Superintendent to examine any person touching any such offence and then there is a duty cast upon the Superintendent to determine upon such examination whether an offence has been committed or not. Now, the learned Assistant Government Pleader contends that recording of the statements by Shinde is sufficient compliance with Section 46 of the Prisons Act. It is difficult for us to accept this argument. We are unable to see how Shinde who was a Jailor could perform the function which is required to be performed by the Superintendent himself by Section 46 of the Prisons Act. Apart from that, there is not even an averment in the return that these statements were recorded by Shinde. The statements are written out by the prisoners themselves; they are under their signatures and they appear to us to be merely in the nature of a communication addressed by these prisoners to the Superintendent of jail. Writing out such a communication by the prisoner himself and addressed to the Superintendent cannot amount to examination by the Superintendent. In case the Superintendent desires to examine any person the duty to examine him is on the Superintendent alone and no provision has been brought to our notice which enables the Superintendent to have such an examination made by a subordinate authority. The word "examine", according to Chambers" and the Oxford Dictionary means "to question" and it is in that sense that the word is used in Section 46. Where a readymade written-statement is submitted by a person to the Superintendent, such a person cannot be said to have been examined by the Superintendent as required by Section 46. It is also significant to note that Section 46 requires the Superintendent to "determine" upon the examination of the person whether an offence has been committed or not. According to the Oxford Dictionary the word "determine" means : "ending of a controversy or suit by the decision of a judge or arbitrator; judicial or authoritative decision or settlement of the matter at issue; the settlement of a question by reasoning or argumentation." The word "determine" itself involves a judicial approach. Section 46 thus clearly required the Superintendent to apply his mind to the material which comes before him as a result of examining a person or persons and on the basis of that material ho has to come to the conclusion whether an offence has been committed or not. The process of determination implies the application of mind by the Superintendent to the material before him and he has to determine objectively whether the person charged with a prison offence has been proved to have committed that offence. The enquiry claimed to have been made by the Superintendent was, in our view, clearly in violation of the provisions of Section 46 of the Prisons Act.

10. The power to determine whether a person has committed an offence or not is essentially a judicial power though the person who exercises it u/s 46 of the Prisons Act is not a Court. The consequences of a finding given against the prisoner u/s 46 by the Superintendent are penal in nature in two ways. The prisoner found guilty of the prison

offence has to suffer the punishment which is awarded to him and it is not disputed that this punishment also adversely affects the remission to which he is otherwise entitled under the Prison Rules for good conduct. In the instant case it is not disputed that the petitioner himself will be deprived of a remission which he would have otherwise earned because an adverse entry in the Punishment Register has been made against him. It is difficult to appreciate how with the penal consequences that follow the determination by the Superintendent that the prisoner is guilty of a prison offence it is possible for the Superintendent to say that an enquiry into the prison offence could be made behind the back of the prisoner who is sought to be punished for such a prison offence. The enquiry contemplated by Section 46 of the Prisons Act, 1894 is clearly of quasi-judicial nature and must therefore be made according to the principle of natural justice. The right to be heard is an essential characteristic of natural justice. The concept of right to be heard was explained by Lord Denning in Kanda v. Govt. of Malaya [1962] A.C. 322 in the following words (p. 337):

If the right to be heard is to be a real light which is worth anything, it must carry with it a right in the accused man to know the case, which is made against him. He must know what evidence has been given and what statements have been made affecting him : and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Lorebirn L.C. in Board of Education v. Rice [1911] A.C. 179 down to the decision of their Lordships" Board in University of Ceylon v. Fernando [1960] 1 All E.R. 631 It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.

From the above observations it is clear that the principles of natural justice require that where a question of fact has to be determined on oral evidence the determination must be made after giving an opportunity to the person against whom the evidence is sought to be used to test the veracity of the witnesses by their cross-examination and he must be given an opportunity to meet the case which is sought to be made out against him on the evidence so recorded. Admittedly no statements of the co-prisoners were recorded in the presence of the petitioner nor is there any material to show that the petitioner was informed of those statements at any time. There is not even an averment to that effect in the return filed on behalf of the respondent. If the enquiry regarding the commission of the alleged prison offence would have been made in the presence of the petitioner, the petitioner would have had an opportunity to show by cross-examination of the persons on whose statements the Superintendent wanted to rely that those statements could not be accepted as true or that they did not make out the alleged prison offence. Such an opportunity has been denied to the petitioner and the enquiry was therefore in violation of the principles of natural justice.

11. The learned Counsel for respondent No. 1 has referred us to the decision of the Supreme Court in Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, and the observations relied upon are to be found in para. 17 of the judgment. These observations are (p. 409):

The next ground of attack against the order of the High Court, under appeal, was that the High Court had erred in coming to the conclusion that there had been a failure of natural justice. In this connection, the High Court has made reference to the several affidavits filed on either side, and the order in which they had been filed, and the use made of those affidavits or counter-affidavits. As already indicated, the rules make no provisions for the reception of evidence oral or documentary, or the hearing of oral arguments, or even for the issue of notice of the hearing to the parties concerned. The entire proceedings are marked by a complete lack of formality. The several authorities have been left to their own resources to make the best selection. In this connection, reference may be made to the observations of this Court in the case of New Prakash Transport Co. Ltd. Vs. New Suwarna Transport Co. Ltd., . In that case, this Court has laid down that the rules of natural justice vary with the varying constitution of statutory bodies and the rules prescribed by the Act under which they function; and the question whether or not any rules of natural justice had been contravened, should be decided not under any pre-conceived notions, but in the light of the statutory rules and provisions. In the instant case, no such rules have been brought to our notice, which could be said to have been contravened by the Appellate Authority. Simply because it viewed a case in a particular light which may not be acceptable to another independent tribunal, is no ground for interference either under Article 226 or Article 227 of the Constitution.

On the basis of these observations it is contended that the Superintendent was competent to devise his own procedure and since he has followed the established procedure there could not be said to be any violation of the principles of natural justice. We have already observed that Section 46 of the Prisons Act by itself does not provide any detailed procedure in the matter of determination of the prison offence. Neither are there any rules dealing with this question. But that does not mean that the Superintendent is absolved from the duty to make an enquiry according to the principles of natural justice. The Supreme Court has observed in the above mentioned case that the question whether or not any rules of natural justice had been contravened should be decided in the light of the statutory rules and the provisions but on the facts in that case the Court took the view that no rules have been pointed out to them which could be said to have been contravened by the appellate authority. The argument which is canvassed before us is not that we should roach a different conclusion on facts but what is argued is that there was no enquiry at all as contemplated by Section 46 of the Prisons Act, 1894 or that if any enquiry was made it was in violation of the principles of natural justice. The decision relied upon on behalf of the respondent is therefore of no assistance to him. It cannot be disputed that in the absence of any definite rules or guidance as to how an enquiry is to be made except the provision regarding examination of a person in Section 46 of the

Prisons Act the actual procedure to be adopted for such an enquiry could be decided by the Superintendent but, in our view, such an enquiry which we; have held is of a quasi-judicial nature, and the determination of the question whether the petitioner was guilty of a prison offence must be made according to the well established rules of natural justice. We might refer to a decision of the Supreme Court in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, in which their Lordships have made the following observations:

The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. In a welfare State like India which is regulated and controlled by the rule of law it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which arc considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

These observations clearly bring out the concept that the instrumentalities of the State who are charged with a duty must discharge their function, in a fair and just manner. While it cannot be disputed that disciplined behaviour by a prisoner must no doubt be enforced it is also clear he must be dealt with fairly and justly. Fair and just treatment to the prisoner who is said to be charged with a prison offence and the punishment for which has serious consequences can be ensured only if the enquiry u/s 46(1) of the Prisons Act is made by the Superintendent in accordance with the principles of natural justice.

12. We may also observe that though the provisions of Section 46 of the Prisons Act do not in terms require the Superintendent to state the reasons for finding the prisoner guilty of the prison offence, it is necessary that the reasons for finding the prisoner guilty are stated by him. An order which does not give reasons does not fulfil the elementary requirements of a quasi-judicial process. See Sardar Govindrao and Others Vs. State of Madhya Pradesh, . As observed by the Supreme Court in S.S. Darshan Vs. State of Karnataka and others, :

...The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals

within bounds. A reasoned order is a desirable condition of judicial disposal.

The order passed by the Superintendent u/s 46 of the Prisons Act can be challenged by the person concerned by a petition under Article 226 of the Constitution of India and it is necessary, therefore, that the order of the Superintendent must disclose how he arrived at the conclusion that the prisoner was guilty of the prison offence.

13. We have already pointed out above that there is nothing on this record to disclose that the two statements of the co-prisoners were recorded by the Superintendent himself. There is also nothing on record to show that the petitioner was present when those statements were recorded or that he was called upon to give an explanation or was given an opportunity to show that the statements made by the two co-prisoners were not true. The petitioner was admittedly punished by awarding a major punishment and as already observed the names of witnesses on whose statements the conclusion of guilt was reached should have found place in column 10 of that entry. If the names of the two co-prisoners are not to be found in this column, we see no reason why the necessary inference which must follow, namely, that these two co-prisoners were never examined at all should not be drawn on the basis of the document filed by respondent No. 1 himself. The entry of Shinde"s name is justified only on the ground that Shinde brought the written-statements of the two co-prisoners to the Superintendent. That would hardly make Shinde a person who can be said to have been examined within the meaning of Section 46(1) of the Prisons Act.

14. Having heard the learned Counsel for respondent No. 1 at some length we are not satisfied that there was any material as contemplated by Section 46 of the Prisons Act, 1894 before the Superintendent on the basis of which he could arrive at a conclusion that the petitioner had committed a prison offence with which ho was charged, apart from the fact that the enquiry, if any was made, was vitiated by non-compliance with the principle of natural justice and therefore the punishment awarded to the petitioner is liable to be quashed.

15. We may usefully refer to a decision of the Madhya Pradesh High Court in Hemchand Vs. State, in which a Division Bench of that Court held that where punishments awarded u/s 46 of the Prisons Act, 1894, were not based on proper evidence there was miscarriage of justice and the punishments were liable to be quashed. We, therefore, quash the order of punishment made by respondent No. 1 by which the petitioner was punished with separate confinement for a period of thirty days and we also quash the consequent entry made in the Punishment Register by the Superintendent.

16. The petition is thus partly allowed. There will, however, be no order as to costs.