
(2011) 11 BOM CK 0079

In the Bombay High Court

Case No : Criminal Writ Petition No. 1695 of 2011

Anil Vishwanath Pathwe, Convict No. 14796, presently lodged
at Yerwada Central Prison, Circle I/6, Yerwada, Pune 411 006

APPELLANT

Vs

D.I.G. Prison, Western Region, Pune and State of
Maharashtra

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

Parole and Furlough Rules, 1959 — Rule 10, 6
Penal Code, 1860 (IPC) — Section 302, 498

Citation : (2012) BomCR(Cri) 219

Hon'ble Judges : P.D. Kode, J;A.M. Khanwilkar, J

Bench : Division Bench

**Advocate : Arfan Sait, Amicus Curiae, for the Appellant; M.H. Mhatre, Assistant
Public Prosecutor, for the State, for the Respondent**

Judgement

A.M. Khanwilkar, J.—Heard learned amicus curiae as well as learned A.P.P.

2. Rule. Rule is made returnable forthwith by consent. The learned A.P.P. waives service for the State.

3. As short question is involved, the petition is taken up forthwith for final disposal.

4. This letter-petition is received through jail.

5. The petitioner has been convicted and sentenced to undergo life imprisonment in connection with offence punishable under Sections 302 and 498 of the Indian Penal Code. The petitioner was arrested on 17th November, 2005 in connection with the said case, and is in jail since then. It is stated that, in 2007, the petitioner had applied for furlough leave. That application was granted on condition that the petitioner must furnish cash security and surety of Rs.10,000/- each. The petitioner filed Writ Petition, being Criminal Writ Petition No. 2581 of 2008, for dispensing with the condition so imposed for release on furlough leave.

In the said Writ Petition, it was ordered that the petitioner be released on offering personal bond of Rs.10,000/-and a surety in the like amount by two persons vide order dated 2nd February, 2009. It is stated that, at the relevant time, the uncle of the petitioner was willing to stand as his surety. He, however, expired in the year 2009. The petitioner does not have any other relative, who can stand surety for him. His father and mother are also lodged in jail in connection with the same offence. In this backdrop, the petitioner has prayed that he be released on furnishing cash surety of amount of Rs. 5,000/-, which he has earned while working in prison. The petitioner has asserted that other prisoners involved in similar offences have been released on offering cash surety. The petitioner has given undertaking that he would return to prison as soon as his furlough period is over. According to the petitioner, considering the fact that his parents are lodged in jail, there is no likelihood of the petitioner absconding and fleeing from the ends of justice.

6. As the petition was received through jail, Mr. Arfan Sait was appointed as amicus curiae to assist the Court as well as to espouse the cause of the petitioner. The learned amicus curiae submits that the request made by the petitioner is very reasonable, and ought to be granted. To buttress his submissions, he has relied on the decisions of Single Judges of this Court in the cases of Bhimrao Nathuji Bhoyar v. Superintendent, Amravati Central Prison - 2003 Bom.C.R. (Cri.) 477, Dipak Hari Kivkalwar v. State of Maharashtra & Anr. -2003 Bom.CR. (Cri.) 480, unreported orders of the Division Benches of this Court in Ramnath Rambachan Gupta v. State of Maharashtra, being Writ Petition No. 2515 of 2004, decided on 7th March, 2006, Rahul Damu Salve & 2 Ors. v. The Deputy Inspector General of Prison, Pune, & 2 Ors., being Criminal Writ Petition No. 1225 of 2007, decided on 7th September, 2007, Harichandra Gajaba Ingle v. Superintendent, Central Prison, Aurangabad (through State), being Criminal Writ Petition No. 461 of 2008 (Aurangabad Bench), decided on 20th August, 2008, Sominath S/o. Harishchandra Ingle, v. The State of Maharashtra & Ors., being Criminal Writ Petition No. 837 of 2008, and connected petitions (Aurangabad Bench), decided on 5th January, 2009. In addition, reliance is placed on the decision of Full Bench of the Gujarat High Court in the case of Natia Jiria v. State of Gujarat & Ors. -1984 Cri.L.J. 936. The dictum in this judgment has been followed by the learned Single Judge of our Court in Bhimrao Nathuji Bhoyar's case (supra).

7. The respondents have resisted this petition by filing reply -affidavit of Sharad Wamanrao Khatavkar, Superintendent, Yerwada Central Prison, Pune, dated 9th August, 2011. The facts asserted by the petitioner have been reiterated by the respondents in the reply-affidavit. The relief prayed by the petitioner is resisted on the sole point that Rule 6 of the Parole and Furlough Rules, 1959 (hereinafter referred to as "the said Rules") mandates that the prisoner must provide surety as one of the conditions for being released on furlough leave. For that reason, it is not possible to dispense with the condition of furnishing surety. In addition, the learned A.P.P. brought to our notice that the cash amount standing to the credit

of the petitioner for the work done by him while in jail is only Rs.1,700/-. That is a very meagre amount to release the petitioner on furlough leave without any other security or surety. The respondents have expressed apprehension that the experience shows that large number of prisoners, who are released on grant of parole and furlough, have gone absconding, and have not returned to jail. From the figures furnished by the Office of the Additional Director General of Police and Inspector General of Police (Prisons), Maharashtra State, Pune, it appears that 410 prisoners released on parole and 409 prisoners released on furlough did not return to jail, and these numbers are not only fluctuating but also on the rise. In that view of the matter, it is submitted that merely offering cash security, that, too, of meagre amount of Rs.1,700/-and personal bond will not be sufficient.

8. After having gone through the documents on record and the rival submissions, it is not in dispute that the Appropriate Authority has had ordered release of the petitioner on furlough leave vide order dated 10th July, 2008 on condition of furnishing cash security and surety. As the petitioner was not in a position to comply with the condition, he filed Writ Petition in this Court, being Criminal Writ Petition No. 2581 of 2008. The said Writ Petition was disposed of on 2nd February, 2009 by directing release of petitioner on furnishing surety of personal bond of Rs.10,000/-and surety in the like amount by two persons. However, the petitioner was not in a position to even fulfil this stipulation. Accordingly, the petitioner has again approached this Court by way of this Letter Petition through jail, praying for relaxation of requirement of furnishing two sureties and instead accepted cash surety of Rs.5,000/-. Indeed, the respondents, relying on Rule 6 of the said Rules, may be justified in contending that furnishing surety as condition for release on furlough is indispensable.

9. However, the learned amicus curiae has invited our attention to the exposition of the Full Bench of Gujarat High Court, which had occasion to interpret this very rule. The Full Bench of the Gujarat High Court in Natia Jiria's case has opined that the requirement of Rule 6 is also embodied in Rule 10. Rule 10 bestows discretion in the Sanctioning Authority to grant furlough to prisoner, subject to his executing a personal bond or giving cash security in Form C appended to the said Rules and also subject to a surety executing a bond in Form A appended to the said Rules, if so required. This has been construed to mean that two things that have to be done under Rule 10 to enable release to be ordered are (a) personal bond or cash security in Form C and (b) surety bond in Form A. It is held that the former requirement can be fulfilled by the prisoner by executing a personal bond, but, in respect of a prisoner, who is expected to furnish cash security, the Sanctioning Authority insists upon such cash security, it will be an erroneous, improper and unfair exercise by it. It went on to observe that it will be equally unfair if, despite the circumstances eloquently speaking to the impecunious situation of the prisoner, the Sanctioning Authority insists on proof of it. It held that the person in prison is under a great disadvantage, and particularly so, if he has no friends or competent relatives to help him out. It went on to observe that in that case there is no reason why when the prisoner

pleads his poverty, and if there is no material to disbelieve his case of poverty, the Sanctioning Authority should not accept it in the normal course and release him on his personal bond. The Court went to the extent of observing that the words occurring in Rule 10 "if so required" cast a duty and obligation on the Sanctioning Authority to consider whether the case requires waiver of the insistence of the execution of a surety bond. Further, the appropriate justification for such waiver would be where a person is, by reason of his penury and his absence of influence in society, unable to furnish a surety bond.

10. The Single Judge of our High Court, in the case of Bhimrao Nathuji Bhoyar (*supra*), has followed the dictum of the Full Bench of the Gujarat High Court. The other decision of our High Court of Single Judge has also followed the same principle. The other unreported orders of the Division Bench of our High Court have not adverted to the Gujarat High Court decision though granted relief to the petitioners before them.

11. Be that as it may, we are in agreement with the opinion of the Full Bench of the High Court. There is no difficulty in accepting the principle that harmonious construction of Rules 6 and 10 is necessary. If done, it would appear that the Sanctioning Authority has discretion to impose such conditions as it may deem it appropriate to be fulfilled by the prisoner for availing the furlough leave. As discretion is bestowed on the Competent Authority to dispense with the requirement of furnishing of surety in exceptional cases, in our opinion, however, that discretion will have to be exercised, keeping in mind not only the welfare of the prisoner but also the larger public interest. The discretion to be exercised by the Sanctioning Authority of dispensing with the requirement of furnishing surety by the prisoner can, however, be only in exceptional cases and not as a rule. Even in those exceptional cases, the Sanctioning Authority has to be satisfied and must record reasons as to why in its opinion the requirement of furnishing surety deserves to be dispensed with in the facts and circumstances of that case and secondly, whether the other conditions imposed on the prisoner for release will be sufficient to secure his return to jail for undergoing the remaining sentence, and that he would not abscond or flee from the ends of justice and defeat the order of conviction and sentence passed by the Court of competent jurisdiction operating against him. Thus, the fact that the prisoner is unable to furnish surety, *per se*, cannot be the sole basis to exercise discretion in favour of the prisoner. It is well-established position that the individual rights must yield to the interest of the community.

12. Even though the learned *amicus curiae* may be justified in pointing out that, in the past, the Single Judges as well as Division Benches of this Court have ordered release of the concerned prisoners, we are not inclined to do so, as, in our considered opinion, if it is the discretion of the Competent Authority to dispense with any condition specified by the Rules in a given case, it is for that Authority to examine all aspects of the matter, and record its satisfaction in that behalf by a speaking order. More so because under the Rules, that order will be

amenable to appeal, where, the prisoner will get opportunity to assail the correctness of the reasons recorded by the Authority, if required. Besides, it will ensure that, if the Competent Authority exercises discretion in favour of any prisoner, it would be obliged to record reasons, firstly, as to the justification for treating the case on hand as falling under excepted category and, secondly, to note as to how the conditions specified in the order would ensure that the prisoner would return to jail for undergoing his remaining sentence and would not impair the public interest in any manner.

13. As aforesaid, the learned amicus curiae has invited our attention to couple of orders passed by learned Single Judges as well as the Division Benches of this Court where the Court itself directed release of the concerned prisoners. We are not inclined to follow that course. In our considered opinion, it is for the Sanctioning Authority to record satisfaction on material aspects, and in particular, on issues noted by us hitherto.

14. As a result, even though the petition may succeed, the operative order would be limited to setting aside the order of the Competent Authority imposing condition to furnish surety as condition for release on furlough. Instead, the petitioner will be relegated before the Competent Authority for re-consideration of that issue on its own merits, taking into account all aspects of the matter in the light of observations made by us in this decision. All questions are left open to be considered on their own merits, in accordance with law. The Competent Authority shall re-consider the proposal of the petitioner regarding the conditions to be imposed on the petitioner for his release on furlough leave. That issue be decided as expeditiously as possible, and decision be taken, which shall be communicated to the petitioner not later than four weeks from today.

15. The Writ Petition is disposed of on the above terms.

16. The Court expresses a word of gratitude for able assistance given by the learned amicus curiae.

17. Copy of this order be forwarded to the petitioner, who is in jail, for information.