

(2017) 11 BOM CK 0187
In the Bombay High Court
Case No : 1396 of 2017

Avinash Shashikant Sawant

APPELLANT

Vs

The State of Maharashtra, Through Additional Director
General of Prison and Inspector General of Prison, & Ors.

RESPONDENT

Date of Decision : 22-11-2017

Acts Referred:

Indian Penal Code, 1860, Section 302,
Section 397, Section 34, Section 392, Section 452 -
Prisons (Bombay Furlough and Pa

Citation : (2017) 11 BOM CK 0187

Hon'ble Judges : S.S.Shinde, Mangesh S.Patil

Bench : DIVISON BENCH

Advocate : Sanket N.Suryawanshi, P.V.Diggikar

Judgement

1. Heard.

2. Rule. Rule made returnable forthwith, and heard finally with the consent of the parties.

3. It is the case of the petitioner that the petitioner is undergoing life imprisonment at Nashik Road Central Prison, Nashik. The petitioner was convicted for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and sentenced to suffer life imprisonment and fine of Rs. 10,000/. The punishment was also imposed for the offence punishable under Section 392 r/w. 397 and the petitioner was sentenced to suffer seven years of imprisonment and fine of Rs.10,000/. The punishment under Section 452 r/w. 34 of the IPC of one year imprisonment and fine of Rs.2,000/is also imposed on the petitioner. The petitioner was arrested on 09.10.2009, and since then he is in jail. On 04.08.2012, the petitioner was released on furlough, and on completion of 14 days period of furlough, the petitioner on his own surrendered in the Nashik Road Central Prison on 19.08.2012. Again with effect from 11.09.2015 till 12.10.2015,

the petitioner was released on parole, and after completion of said period, the petitioner himself surrendered in prison.

4. It is further the case of the petitioner that he has challenged his conviction by filing an appeal at the principal seat at Bombay High Court, and same is pending for adjudication. In the year 2016, the petitioner applied for furlough. Thereafter, the police report was called from the Police Sub Inspector, Wakola, Mumbai. It appears that the police report was adverse, and it was stated in the police report that the petitioner had threatened the complainant and witnesses that he will see them. The police report mentioned that if the petitioner is released on furlough; he may cause trouble to the complainant, witnesses and their families. There is also possibility of commission of serious offence/offences if released on parole/furlough. Respondent no.3 also did not recommend the case of the petitioner for furlough. In the light of adverse police report, the request of the petitioner for furlough was rejected by respondent no.2, vide order dated 22.02.2017.

5. It is further the case of the petitioner that thereafter the petitioner filed an appeal to respondent no.1 challenging the order of refusal of furlough. The appeal came to be rejected by respondent no.1 vide order dated 21.07.2017. It is mentioned in the said order that the police report is adverse to the petitioner, the appeal filed by the petitioner is pending in the High Court, and the petitioner had threatened the complainant and witnesses that he will see them, if he is released on furlough. He may likely to cause danger to the life of the family members of the witnesses and panchas, and also may involve in the commission of serious offences against human body. It is also mentioned in the impugned order that the petitioner is convicted for the offence punishable under Section 392 r/w. 397, and hence under Rule 4 [2] of the Prisons [Bombay Furlough and Parole] Rules, 1959, the petitioner is not entitled for furlough leave.

6. The learned counsel appearing for the petitioner submits that the entire approach on the part of respondent in refusing furlough to the petitioner is arbitrary and unreasonable. The respondents have misread the Rules and have erroneously placed reliance on the adverse report. It is a matter of record that the petitioner was earlier released in the year 2012 on furlough and in the year 2015 on parole, no any untoward incident has been happened during the said leave period. The petitioner has surrendered in the jail within time. In this view of the matter the reliance placed by the respondent on the adverse report from Wakola Police Station is unwarranted and unreasonable and the same is unsustainable in law and facts of the case. The petitioner has already undergone 7 years imprisonment till date. The petitioner has not committed any prison offence, or he has not committed any offence while he was either on parole or furlough. Therefore, the impugned orders passed by the authorities thereby refusing furlough to the petitioner are unsustainable, and the same are liable to be quashed and set aside. The impugned order refusing to grant furlough to the petitioner in the peculiar facts and circumstances is arbitrary and the same is contrary to the Prisons [Bombay Furlough and Parole] Rules, 1959. Non

application of mind on the part of respondent no.1 is writ large on face of record and the relevant considerations have been ignored by the respondents while refusing furlough. The approach on the part of respondent no.3 in not recommending the case of the petitioner for furlough is therefore arbitrary and unreasonable.

7. In support of the contentions raised in the Petition, the learned counsel appearing for the petitioner placed reliance on the ratio laid down in the cases of Sanjay Kisan Kadse Vs. State of Maharashtra & others, 2004 [1] Bom.C.R. [Cri.] 758, Balu Rangnath Chintamani Vs. The State of Maharashtra in Criminal Writ Petition No.787 of 2017 with connected Criminal Writ Petition decided on 28.07.2017 and Ishwarsinh M.Rajput Vs. State of Gujarat, [1990] 2 GLR 1365.

8. On the other hand, learned APP appearing for the respondentState, relying upon the reasons assigned in the impugned order passed by respondent no.2, submits that it is mentioned in the police report received from the Police Inspector, Wakola Police Station, Mumbai that the petitioner has given threats to the witnesses. Therefore, in case the petitioner is released on furlough, he may commit serious offences. The petitioner is convicted of the offences punishable under Sections 392 r/w.397 of the Indian Penal Code, and therefore, he cannot be released on furlough / parole.

9. We have considered the submissions of the learned counsel appearing for the petitioner and the learned APP appearing for the respondentState. With their able assistance, we have perused the pleadings in the Petition, annexures thereto, the reasons assigned by respondent no.2 in the impugned order and the relevant record in respect of the release of the petitioner in past on furlough / parole. Upon careful perusal of the information furnished by the Superintendent, Nashik Road Central Prison, Nashik, it appears that the petitioner has undergone 7 years, 10 months and 8 days imprisonment as on 24th August, 2017. It further appears that he was released on furlough on 4th August, 2012 for 14 days and on his own, he reported back to the Jail on 19th August, 2012 within time. The petitioner was again released on 11th September, 2015 on furlough, and he reported back to the jail on his own on 12th October, 2015 within time. The respondents have not placed any incriminating material on record to show that in case the petitioner is released on furlough / parole, he may indulge in commission of some offences or there is danger to the life of the witnesses. As already observed, when the petitioner was released twice in part, there was no any untoward incident, and also the petitioner did not misuse the liberty, secondly, the petitioner has undergone more than 7 years imprisonment. He was convicted for the offence punishable under Sections 392 r/w. 397 of the IPC for 7 years and fine amount of Rs.10,000/and in default to undergo one month imprisonment. Since the petitioner has already undergone more than 7 years imprisonment/sentence, which was ordered for commission of the offence under Section 392 r/w.397 of the IPC, in view of the judgment of the Division Bench of the Bombay High Court at Principal Seat in the case of Gorakh @ Baba Patole Vs.

Government of Maharashtra and others, [1993] 2 Mh.L.J. 1423, the petitioner's prayer to release him on furlough / parole could not have been turned down. Para 3 of the said judgment reads as under:

3. It will be seen from the above Rule that while the prisoner convicted of an offence of robbery under section 397 of the Indian Penal Code is debarred from getting furlough, the prisoner convicted of an offence of murder under section 302 of the Indian Penal Code is not. The two offences are quite distinct for which different punishments have been prescribed. Only because these two offences have been committed in one incident and, therefore, tried in one case, they do not cease to be distinct. Section 31 of Criminal Procedure Code provides that when a person is convicted at one trial of two or more offences, the Court can sentence him for such offences to the different punishments prescribed therefor. Such punishments when consisting of imprisonment commence consecutively i.e. one after the expiry of the other. But the Court has discretion to order them to run concurrently. Only because the court exercised the discretion of ordering the sentences to run concurrently, the independent character of those sentences does not disappear. On undergoing the imprisonment of seven years, the petitioner would cease to be a convict under section 397, Indian Penal Code. Had he been convicted only of offence under section 397, he would have been a free bird. His continuation in the portals of jail is because of sentence under section 302, Indian Penal Code. He does not continue to be prisoner falling under category (2) of Rule 4 only because of concurrent nature of the other sentence undergoing which does not disqualify him from furlough leave. Contrary interpretation of Rule 4 (2) would be against the letter as well as spirit of the Rules. Thus, in our view, the furlough cannot be denied to the petitioner only on the ground that he continues to be in jail as a result of concurrent sentence for other offence.

[Underlines added]

10. In that view of the matter and keeping in view the fact that when the petitioner was released twice on furlough/parole in the year 2012 and 2015 respectively, he reported back to the jail on his own within time, we are inclined to allow this Petition. Accordingly, the Petition is allowed in terms of prayer (b) and (c). Rule is made absolute on above terms. The respondents to release the petitioner on furlough on completion of procedural formalities, as expeditiously as possible, however, within two weeks from the receipt of this order.

11. The registry to send the copy of this order to the Superintendent, Nashik Road Central Prison, Nashik.

12. In addition to that, the learned APP assures this Court that copy of this order will be sent to the Superintendent, Nashik Road Central Prison, Nashik forthwith.

13. We appreciate the sincere efforts taken and able assistance rendered by Mr.Sanket N. Suryawanshi, learned counsel appointed for the petitioner. Since, Mr.Sanket N. Suryawanshi, the learned counsel is appointed to prosecute the

cause of the petitioner, his fees be paid as per the schedule of fees maintained by the High Court Legal Services SubCommittee, Aurangabad.