
(2016) 12 BOM CK 0090

In the Bombay High Court

Case No : Criminal Writ Petition No. 2310 of 2014

Baig Salim Abdul Razzak

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-12-2016

Acts Referred:

Constitution of India, 1950 — Article 20(2)

Criminal Procedure Code, 1973 (CrPC) — Section 300 Prisons Act, 1894, Section 48A

Citation : (2017) 1 AIRBomRCri 672 : (2017) ALLMRCri 1862

Hon'ble Judges : Smt. V.K. Tahilramani and A.M. Badar, JJ.

Bench : Division Bench

Advocate : Ms. Nasreen Ayubi,(appointed), Advocate, for the Petitioner; Mr. H.J. Dedia, APP, for the State

Final Decision : Dismissed

Judgement

Smt. V.K. Tahilramani, J.—Heard both sides.

2. The case of the petitioner is that on 17.12.2012, when he was released on parole from 18.12.2012 for 30 days, he did not report back in time. As the petitioner did not surrender in time, case came to be registered against him on 16.11.2013 under Section 224 of IPC vide C.R. No. 248/13 of Byculia Police Station, Mumbai. On account of overstay, he was permanently removed from the remission register. It may be stated that as the petitioner did not report back in time, ultimately he was arrested by police and brought back to prison on 26.11.2013. Thus, there was overstay of parole by 259 days. The prayer of the petitioner is that the second punishment i.e of permanently removing him from the remission register be quashed as it amounts to double jeopardy.

3. Thus, the petitioner has no grievance in respect of C.R. No. 248/13 which is pending trial but his only prayer is that the order of removing him from remission register be set aside. The case of the petitioner is that as he has overstayed his parole leave on account of which C.R. No. 248/13 was registered against him, in such case, he cannot be punished against for the overstay by removing him from

the remission register.

4. Ms. Nasreen Ayubi, the learned Advocate for the petitioner also submitted that the petitioner is being punished twice which cannot be allowed. She claimed that it is a case of double jeopardy under Article 20(2) of the Constitution of India. She submitted that on account of overstay, C.R. No. 248/2013 was registered against the petitioner and in addition thereto, punishment has been imposed on the petitioner of removing him from the remission register, hence, according to her, it is clearly a case of double punishment i.e double jeopardy as visualized by Article 20(2) of the Constitution of India. She also relied upon Section 300 of Code of Criminal Procedure.

5. The argument advanced on behalf of the petitioner is that it is a case of double punishment in the sense that for the overstay, C.R. No. 248/2013 was registered against him and in addition, punishment was imposed of removing him from remission register. Thus, the petitioner has been doubly punished which is in violation of Article 20(2) of the Constitution of India and which cannot be allowed under Section 300 of Code of Criminal Procedure.

6. Double jeopardy is a concept which would amount to violation of Article 20(2) of the Constitution of India and it is also barred under Section 300 of the Code of Criminal Procedure. On going through the provisions of Article 20(2), as well as Section 300, we find that the accused cannot derive any benefit therefrom. We are of the opinion that it is not a case of double jeopardy. The only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. Article 20(2) reads as under:-

" 20. Protection in respect of conviction for offences :-

(1)

(2) No person shall be prosecuted and punished for the same offence more than once;

(3) "

The Apex Court in the case of *Maqbool Hussain v. State of Bombay*, 1953 (Cri. L.J. 1432 : 2010 ALL SCR (O.C.C.) 294 held that the words "before a Court of law or judicial tribunal" are not to be found in Article 20(2), yet in order to invoke the protection of Article 20(2), there must have been a prosecution and punishment in respect of the same offence before a Court of Law or Tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer. The Article contemplates proceedings of criminal nature before a Court of law in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. It was also held that Article 20(2) incorporates within its scope the plea of "autrefois convict" as known to British Jurisprudence or the plea of "double jeopardy" as known to the American Constitution but circumscribes it by

providing that there should not only be a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.

7. Article 20(2) would become operative in a case where the second prosecution and punishment is for the same offence for which the person concerned has already been prosecuted and punished. Moreover, the principle is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. The rule against double jeopardy is stated in the maxim *Nemo debet bis vexari pro una et eadem causa*. It is only when the offence has been the subject of judicial adjudication and it ended in acquittal or conviction, the criminal justice system would not allow repetition of the adjudication in a separate trial on the very same facts. In the present case, the petitioner is only being prosecuted in relation to C.R. No. 248/2013. There is no other proceeding of criminal nature "before a Court of law" in accordance with the procedure prescribed in the statute which creates offences and regulates procedure for punishment, therefore, it is clearly not a case of double jeopardy.

8. The only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. No other ingredient could be added. Both, Article 20(2) and Section 300, Cr.P.C. are not attracted in the instant case. Only one case is pending against the petitioner in a Court of law in relation to not surrendering in time. The petitioner is not being prosecuted in respect of the same offence before a Court of law or Tribunal. Thus, in view of the above, the doctrine of "double jeopardy" contained in Article 20(2) or even the bar of Section 300, Cr.P.C. could not be applied to the case of the petitioner.

9. Section 300 of Code of Criminal Procedure would not be attracted because it covers cases of persons convicted or acquitted earlier and states the situations where under, the person can be tried again. In the present case, the petitioner is only being tried by a competent Court in relation to C.R. No. 248/2013, hence, he cannot claim any benefit. This is in view of the fact that Section 300 states that such person ought to have been convicted or acquitted by a competent Court earlier, he cannot be tried again by a competent Court for the same offence. While dealing with Section 300 of Criminal Procedure Code, it is necessary to take note of the exceptions provided under the sub-section to Section 300 and also the explanation thereunder. Sub-section (4) of Section 300 of the Code provides that a person acquitted or convicted of any offence constituted by any acts, may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. The explanation thereto provides that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purpose of the said Section.

10. It is, therefore, clear that to attract the provisions of Section 300 (1) of the

Code, it must be established that :

1.(a) A person has once been actually tried by a competent Court for the same offence charged in the second trial; or

(b) Though not actually tried for the same offence charged in the second trial, the person could have been on the same facts charged with it under Sections 221(1) or convicted of it under Section 221(2).

2. The person has been convicted or acquitted in the earlier trial. Dismissal or discharge is not acquittal.

3. Conviction or acquittal is in force i.e it has not been set aside by a superior Court.

The said Section 300 of the Code corresponds to Section 403 of the Code of Criminal Procedure, 1903.

11. Thus, in our view, so far as the constitutional provision is concerned, the prohibition is against the prisoner being "prosecuted" and "punished" for the same offence more than once. The action taken against him of removing him from the remission register is only a disciplinary action taken against the prisoner for which there was no prosecution launched against him nor there was any order of conviction and sentence awarded as contemplated under Article 20(2) of the Constitution. It would be relevant to refer to two other judgments of the Apex Court in this connection.

The first case is of *Thomas Dana v. State of Punjab*, AIR 1959 SC 375 decided by the Constitution Bench of the Supreme Court. In that case, the Supreme Court was considering the principle of double jeopardy laid down in Article 20(2) of the Constitution. The question before the Supreme Court was whether prosecution under the Penal Code and the action taken under the provisions of Section 167 of the Sea Customs Act were hit by Article 20(2) of the Constitution. It was held that the proceeding before the Sea Customs authorities under Section 167 of the Sea Customs Act was not a prosecution within the meaning of Article 20(2) of the Constitution observing that "prosecution" means a proceeding either by way of indictment or information in the criminal courts in order to put an offender upon his trial.

Thus, in the present case, the imposition of penalty under the rules framed under the Prison Act would not amount to prosecution as contemplated under Article 20(2) of the Constitution.

12. Another judgment of the Supreme Court is in the case of *Union of India and Ors. v. Sunil Kumar Sarkar*, (2001) 3 SCC 414. That was a case where the delinquent was found guilty and sentenced by the General Court Martial to R.I. for 6 months under Army Act. The disciplinary authorities had punished him by dismissing him from service under the rules for his misconduct. It was held that Court Martial proceedings and disciplinary proceedings deal with different aspects

i.e. one under the Army Act and another under the Service law i.e. Central Civil Services (CCA) Rules under which disciplinary action was taken and therefore, the concurrent proceedings under the two i.e. Army Act and CCS (CCA) Rules would not amount to double jeopardy within the meaning of Article 20(2) of the Constitution.

13. In our view, applying the above principle in the present case, two actions taken against the prisoner, one of lodging C.R. under Section 224 of IPC for not surrendering back to the prison in time and of removing him from the remission register do not amount to double jeopardy within the meaning of Article 20(2) of the Constitution. This is in view of the clear dicta of the Supreme Court given by the Supreme Court as far back as the year 1953 in the case of Maqbool Hussain (supra) and thereafter in 1958 by the Constitution Bench of the Supreme Court in the case of Thomas Dana (Supra) and thereafter, in the judgment of the Supreme Court in Sunil Kumar's case (Supra) in the year 2001. So also, for the reasons stated earlier, the case of the petitioner is not covered by Section 300 of Cr.P.C.

14. This Court in four decisions to which one of us was a party (V.K. Tahilramani, J.) took the same view in similar circumstances. The four decisions are :- 1. Anil Lala Saundade v. State of Maharashtra, 2003 ALL MR (Cri) 433, 2. Niyaj Ahamad Abdul Jabbar v. State of Maharashtra, 2011 ALL MR (Cri) 2509. 3. Akash @ Vijay Kumar Khandekar v. State of Maharashtra & Anr, 2011 ALL MR (Cri) 3831. Buwaji Sahadeo Hazare v. The State of Maharashtra Cri. W.P. No. 2477 of 2015 decided on 24.6.2016

15. In the case of Anil Saundade (supra), the petitioner had escaped from lawful custody. On account of this, he was prosecuted under Section 224 of IPC and sentenced to one year of imprisonment and in addition his remission was deducted. In the said case also, the argument of double jeopardy was raised, however, the Court negated the said contention and rejected the petition. In the case of Niyaj Ahamad (supra), the grievance of the petitioner was that on account of not doing work properly in prison and disobeying the orders of the Jail Authorities, he was transferred to special prison and in addition thereto, a period of 15 days was deducted from his remission which according to the petitioner therein amounted to double jeopardy. This Court relying on the decision in the case of Maqbool Hussain (supra) held that it was not a case of double jeopardy. In the case of Akash Khandekar (supra), the argument advanced on behalf of the petitioner was that it is a case of double jeopardy in the sense that apart from punishment of cutting of remission being imposed for overstay, the petitioner's application for parole was rejected. In the case of Akash (supra), relying on the decision of the Supreme Court in the case of Maqbool Hussain (supra), the contention of double jeopardy was negated. In Buwaji Sahadeo Hazare, it was contended that on account of overstay, his parole and furlough applications were rejected and in addition, his remission was cut, therefore, it was contended that it was a case of double jeopardy. This Court relying on Maqbool Hussain turned

down the said contention. The case of the petitioner is identical to the case of Anil Saundade, hence, no benefit can be given to the petitioner.

16. We would also like to add that punishment for jail offence by the Jail Superintendent would not even bar the prosecution and punishment in a Court for the same offence because the powers of Jail Superintendent are in the nature of administrative authority for maintenance of discipline and to inflict summary punishment for breach of discipline and those proceedings are not judicial proceedings.

17. As far as the provisions of law comprised under Section 48-A of the Prisons Act are concerned, the same relate to punishment for breach of conditions when furlough or parole is granted. Clause (3) thereof provides that if any prisoner fails without sufficient cause to observe any of the conditions on which the furlough/parole leave was granted to him, he shall be deemed to have committed a prison offence and the Superintendent may, after obtaining his explanation, punish him for such offence by curtailing the privileges admissible under the remission or furlough or parole system. Undisputedly, in the case in hand, on account of overstay by the petitioner after availing the parole leave, he was punished under the said provision of law.

18. The provisions relating to cutting of remission or removing from remission register do not relate to penal action on the part of the authorities. Besides, punishment for jail offence by the Jail Superintendent would not even bar the prosecution and punishment in a Court for the same offence because the powers of the jail superintendent are in the nature of administrative authority for maintenance of discipline and to inflict summary punishment for breach of discipline and those proceedings are not judicial proceedings.

19. It would also be relevant to point out that proviso to Rule 26 of Chapter XXVII of the Maharashtra Prison Manual Rules clearly lays down that any measure taken for security and safe custody of a refractory or dangerous prisoner, or for preventing him from committing mischief, and exclusion from a privilege which is otherwise admissible only to a well behaved prisoner shall not be deemed to be a punishment for the purpose of Prison Rules. Thus, even if the petitioner was removed from remission register on account of overstay, it cannot be deemed to be a punishment. Thus, in view of this fact and all the above facts, we are of the considered opinion that this is not a case of double jeopardy. There is no violation of Article 20(2) of the Constitution or Section 300 of Cr.P.C. Thus, there is no merit in this petition.

20. In view of above, Rule is discharged.

21. Office to communicate this order to the petitioner who is in Kolhapur Central Prison, Kalamba.