
(1993) 04 BOM CK 0018

In the Bombay High Court

Case No : Criminal Writ Petition No. 1230 of 1992

Bhagwan Anna Arbune

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 16-04-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Penal Code, 1860 (IPC) — Section 302, 307, 327, 34
Prisons Act, 1894 — Section 11, 39, 45, 46, 47

Citation : (1994) CriLJ 1477 : (1994) 1 MhLj 383

Hon'ble Judges : V.A. Mohta, J;Ajit P. Shah, J

Bench : Division Bench

Advocate : N.N. Gawankar, for the Appellant; Smt. S.J. Pingulkar, Assistant Public Prosecutor, for the Respondent

Judgement

A.P. Shah, J.—This is a petition by a life convict for his premature release from the prison.

2. Before we proceed to examine the questions of law of somewhat importance raised in the present petition, it is necessary to state briefly the factual background of the case. The petitioner was tried along with three others for the offences under sections 302, 307, 327 read with S. 34 of the Indian Penal Code. The Sessions Court, recording conviction under sections 302 and 307 read with S. 34, sentenced the petitioner to life imprisonment. The petitioner is presently undergoing life imprisonment in the Yerawada Central Prison.

3. The petitioner was released on parole on, in all, five occasions. On two occasions, the Petitioner surrendered to the jail authority within the prescribed time but serious defaults were committed by him in respect of the remaining occasions when he was released on parole, firstly in 1980, secondly in 1981 and thirdly in 1984. On the first occasion, the petitioner reported late by 11 days. For this breach of the condition a punishment of forfeiture of 33 days earned remission was imposed. On the second occasion the Petitioner reported late by

92 days. The prison authorities imposed a punishment of - forfeiture of 165 days of earned remission and further removal from remission system for a period of two years and ten months. Subsequently, however, this punishment was reduced to forfeiture of remission of 60 days as the previous permission of the Inspector General was not obtained. On the third occasion, when the Petitioner was released on parole, he did not surrender at all and finally he was arrested by the police after the expiry of 449 days. As regards the said prison offence, the jail authorities have imposed punishment of forfeiture of earned remission of 156 days and further penalty of removal from the remission system for the period of 10 years and 8 months. Having regard to the punishment imposed on the Petitioner, and more particularly the last punishment of forfeiture of earned remission of 156 days and removed from the remission system for the period of 10 years and 8 months, the period of total imprisonment to the credit of the Petitioner is 14 years 9 months and 19 days as on 30th October, 1992. There is no dispute that the Petitioner is liable to be released on completion of 18 years under the Guidelines framed by the - State Government on 18th November, 1978.

4. Mr. Gawankar, learned Counsel for the Petitioner, submitted that neither in the Prisons Act, 1894, nor in the Rules is there any classification made of the offences with which the punishment is to be given. The State Government, has, therefore, in exercise of the powers u/s 59(3) classified the punishment into major and minor punishment, but the State Government has not exercised this power of making classification of the prison offences. Mr. Gawankar submitted that the prison offences have not been classified as "major" and "minor" and there is no guidance available for the - classification of the punishment into "major" and "minor" punishment as to which of the offences are to be visited with which of the punishment. The classification which is made by the State Government, in the submission of Mr. Gawankar, is totally arbitrary, devoid of any guiding principles, and therefore, violative of Article 14. Mr. Gawankar, therefore, submitted that the punishment imposed by the jail authorities in respect of the over-staying of 449 days is illegal and without jurisdiction. Mr. Gawankar further submitted that if the said punishment is ignored, the total period of sentence undergone by the Petitioner is more than 18 years, and therefore, he is liable to be released from the prison under the Old Guidelines framed by the State Government on 18th November 1978. Mr. Gawankar heavily relied upon the observations made by the Division Bench of this Court (Jahagirdar & Tipnis, JJ.) in the case of Yusuf Badshah Abdul Hamid v. State of Maharashtra, in Criminal Writ Petition No. 990 of 1988, decided 21st October 1988, in support of his submissions. Mr. Gawankar also challenged the punishment imposed on the Petitioner on certain other ground which, we will consider later on.

5. In order to appreciate the submissions raised by Mr. Gawankar, it will be necessary to refer to the relevant provisions of the Prisons Act. Chapter XI of the Prisons Act deals with the Prison offences, Section 45 says that the acts mentioned in that section are the prison offences. They are several in number.

Clause (1) of Section 45 says that wilful disobedience to any Regulation of the prison as shall have been declared by Rules made u/s 59 to be a prison offence shall be a prison offence. So, the acts mentioned in the Rules made by the State Government u/s 59 and several other acts may be designated as prison offences. Section 46 of the Prisons Act empowers the Superintendent of Prison to examine any person touching any such offence determined and punish such offence by the several modes of punishments given in the said Section. Certain restrictions on the execution of the punishment have been mentioned in Section 47. Section 48 says that the Superintendent shall have the power to award any of the punishment enumerated in Sections 46 and 47, subject, in the - case of separate confinement for a period exceeding one month, to the previous confirmation of the Inspector General of the prison.

6. While we are examining the provisions dealing with the prison offences, we may refer to Section 48A which is of somewhat importance. This section deals with failure of the prisoner to observe the conditions on which his sentence was suspended or remitted or the condition on which the prisoner was released on furlough or parole. Section 48A reads as follows :-

"48A. If any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough or release on parole was granted to him, he shall be deemed to have committed a prison offence and the Superintendent may, after obtaining his explanation, punish such offence by

- (1) a formal warning as provided in clause (1) of Section 46;
- (2) reduction in grade if such prisoner has been appointed an officer of prison;
- (3) loss of privileges admissible under the remission or furlough or parole system; or
- (4) loss of such other privileges as the State Government may by a general or special order direct".

7. Another relevant provision of the Prisons Act is Section 11 which provides that subject to the order of the Inspector General, the Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control.

8. While we are on the provisions of the Prisons Act, we may also notice the provisions contained in Section 59 of the said Act which deal with the power to make Rules. The said Section says that the State Government may make Rules consistent with the said Act defining the act which shall constitute the prison offences determining the classification of prison offences into "serious" and "minor" offences; fixing punishment admissible under the said Act which shall be awardable for commission of prison offences or classes thereof; and declaring the circumstances in which acts constituting both the prison offence and an offence under the Indian Penal Code may or may not be dealt with as a prison

offence. It is therefore seen that the State Government has been given power to define some more acts to constitute prison offences which are otherwise not covered by Prisons Act as prison Offences. There will be the Acts which are defined as "prison offences" by the Rules which are contemplated u/s 45(1). It may also be noted that the State Government has been empowered to make Rules classifying the prison offences into "serious" and "minor" offences. The State Government is also empowered to fix the punishment under the Act which can be awarded for commission of prison offences or classes thereof.

9. We may indicate that pursuant to the powers vested in it by Section 59(2), the State Government has classified the offences into "major" and "minor" offences. By a notification issued by the Home Department on 26th September 1963, the State Government has framed Rules which are called "The Maharashtra Prison (Punishment) Rules, 1963". We may also indicate that in exercise of the powers conferred by clause (5) and (28) of Section 59 of the Prisons Act, the then Government of Bombay has framed the Prisons (Bombay Furlough and Parole) Rules, 1959. Then there are also Rules called "the Maharashtra prison (Remission System) Rules, 1962." Under both these systems, viz., the furlough and parole systems on the one hand and the remission system on the other hand, certain benefits are conferred upon the prisoner for certain acts of good conduct or abstinence from bad conduct. These Rules also provide for the suspension of the benefit if such acts of mis-conduct are committed by the inmate of the prison. Rule 23 of the remission system Rules provides that the Superintendent may punish any prison offence u/s 46 of the Prisons Act either by forfeiting any ordinary or special remission for a period not exceeding 60 days or by removing any prisoner from the remission system for a period not exceeding one year. In a case where the Superintendent is of the opinion that higher punishment by way of forfeiture or remission or removal from the remission system is warranted, then he may impose such higher punishment but with the previous sanction of the Inspector General of Prison.

10. We may also state that the State Government has framed Rules in exercise of powers u/s 11(1) of the Prisons Act conferring certain powers on the Superintendent for imposing punishment on the prisoner for the prison offence with the prior approval of the Inspector General of Prison. Rule 2 of the said Rules says that in each case of late surrender from furlough or breach of conditions of the parole, the punishment mentioned in that Rule or specified in Section 48-A of the Prisons Act may be awarded by the Superintendent at his discretion with due regard to the circumstances of the case and after obtaining prisoner's explanation and the prior approval of the Inspector General or the Deputy Inspector General if required. Clause (a) of the said Rule 2 which is of importance in the present case reads as follows :-

"(a) A maximum out of 5 days" remission for each day of overstay provided that, where the prisoner has not sufficient remission to his credit he shall cease to earn remission for such period as the Superintendent may direct."

10A. The provisions of the Prisons Act and the Rules framed thereunder are subject matter of number of judicial pronouncements by this Court. We may make a brief reference to some relevant decisions of this Court. In *Nagesh Ganpat v. State of Maharashtra* (Criminal Writ Petition No. 1207 of 1986 decided on 22nd July 1987), the Division Bench of this Court (Mehta & Daud JJ.) dealt with the - requirement of obtaining the previous approval of the Inspector General in respect of the higher punishment. The Division Bench held that under Rules 23, the previous approval, viz., approval before imposing higher punishment is necessary. The Division Bench also held that requirement of the Rules is not met by obtaining the approval post facto. In such a case one must necessarily hold that any action which is taken by the Superintendent under the proviso to Rule 23, without the previous sanction of the Inspector General of Prisons, is invalid. The Division Bench of *Jahagirdar & Tipnis, JJ.*, in *Yusuf Badshah A. Hamid v. State of Maharashtra* (supra) followed the view taken by the Bench of *Mohta and Daud, JJ.* Another Bench of this Court, in *Danial H. Walcott J. Prisoner Vs. Superintendent, Nagpur Central Prison*, , held that Section 46 of the Prisons Act, by very nature of the things to be performed under that Section necessarily contemplates an inquiry into the prison offence. It has been stated that the enquiry contemplated under the said Section is of a quasi judicial nature and the same cannot be delegated to - subordinate authorities. It has also been mentioned that if there is any material which is going to be used against the prisoner against whom action is to be taken, that material must be disclosed to that person who is also ready to cross-examine the witness whose statement might have been put in the enquiry. It has also been held in that case that the order imposing a punishment must be a speaking order - in that sense - it must contain reasons. In *Leo Anthony Carlos v. State of Maharashtra* (Criminal Writ Petitioner No. 1149 of 1987, decided on 4th April 1988), the Division Bench of *Mehta and Agarwal JJ.*, pointed that the ratio of the two decisions viz., *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, and *D. H. Walcott v. Nagpur Central Prison*, (supra) is that a quasi-judicial inquiry like the one conducted by the Superintendent of Prisons must also follow the principles of natural justice and one such principle is that the authority passing the order must give a reasoned order. The Division Bench proceeded to further hold that failure to give a reasoned order would mean that the failure to give a reasoned order would mean that the requirements of a quasi-judicial process had not been adhered to. To sum up, the jail authorities, before imposing punishment for a jail offence, are required to hold an inquiry in consonance with the principle of natural justice; to state reasons for imposition of the punishment, and to obtain previous approval of the Inspector General of Prison if required.

11. Now, we proceed to examine the submissions of Mr. Gawankar, in the light of the various provisions of the Prison Act discussed by us. According to Mr. Gawankar, in the absence of the Rules for making classification of the prison offences, there is no guidance available for deciding as to which of the offences are to be visited with which of the punishments, and therefore, the classification

which is made by the State Government classifying the punishment into "major" and "minor" punishments is liable to be struck down as violative of Article 14. Mr. Gawankar submitted that till the appropriate Rules are framed by the State Government in this behalf, the only way to retain the system of - punishment is to direct that for whatever offence the major punishment shall not be awarded by the Superintendent. Mr. Gawankar relied upon the observations made by the Division Bench in Yusuf Badshah A. Hamid v. State of Maharashtra (supra), particularly, in paragraphs 17 and 18 of the said judgment which are as follows :-

"17. It has been argued by Mr. Pradhan that neither in the Prisons Act nor in the Rules is there any classification made of the offences with which the punishment is to be given. The State Government has in exercise of its power u/s 59(3) classified the punishments into major and minor punishments, but the State Government has not exercised its power of making classification of the prison offences. The prison offences have not been classified as major and minor and there is no guidance available for the classification of the punishments into major and minor punishments as to which of the offences are to be visited with which of the punishments. The classification which is made by the State government, therefore, is totally arbitrary, devoid of any guiding principles. This arbitrariness invites the wrath of Article 14 of the Constitution because it is now well-settled that any action or rule which is arbitrary can be struck down as violative of Article 14. It is violative of Article 14 of the Constitution because there is no guidelines in the - acquisition made by the State government the punishments as major and minor. The classification of the offences vis-a-vis the punishments provided in the Act and classified by the State Government into major and minor punishments is absolutely necessary in order to remove the possible misuse or abuse, either by design or by accident, of awarding punishments which are out of proportion to the offences committed by a prisoner. It is possible that a minor prison offence may be visited with a major punishment or a major offence may be visited with a minor punishment. The very absence of classification of offences in respect of which the punishments classified by the State Government into major and minor are to be awarded make the whole system of punishing arbitrary.

18. The only way to retain the system of punishment in the absence of corresponding classification of offences is to direct that for whatever offence the major punishment shall not be awarded by the Superintendent. This anomaly can easily removed by the State Government by exercising its power u/s 39(2) by making classification of the offences so that if there are any major prison offences they may not be inadequately dealt with by the direction which we have given. However, this question does not directly arise in this petition, but this question has been discussed by us so that in other petitions where this question may directly arise, we may be able to give appropriate directions."

12. We find ourselves unable to agree with the observations of the Division bench quoted above. We may also hasten to add that the observations of the

Division Bench are in the nature of obiter as the learned Judges have categorically observed that the question did not directly arise before them. Further, it is seen that the provisions of Section 48A and the Rules framed by the State Government u/s 11 of the Act were not brought to the notice of the learned Judges. The Bench proceeded on the assumption that there are no Rules laying down guide-lines or principles in the matter of imposing punishment in the cases of breaches of conditions of parole or furlough. It was not brought to the notice of the Bench that breach of conditions of parole or furlough is declared as an offence u/s 48 A, and appropriate Rules laying down the criterion for punishment for the offences u/s 48A have been framed. The observations of the Bench are thus rendered pre-incurium.

13. In the aforesaid case, the bench came to the conclusion that the prison authorities imposed the punishment for over-staying beyond the period of parole, without observing principles of natural justice and without obtaining the previous approval of the Inspector General of Prison. The Bench, therefore, rightly quashed the sentence imposed by the jail authorities. However, the observations made by the Bench in paragraphs 17 and 18 of the said decision quoted above, are clearly obiter. So far as the breaches of conditions for suspension of sentence of parole or furlough, they are declared as prison offence u/s 48 A. In case of any such breach, the Superintendent is empowered to punish such offence by imposing various punishments mentioned in the said Section. One of the punishments is loss of privilege admissible under the remission of furlough or parole system. The State Government has framed Rules u/s 11(1) by a notification dated 2nd July 1964. We have seen that Clause (a) of Rule 2 of the said Rules provides a maximum cut of 5 days" remission for each day of over-stay. The discretion conferred upon the Superintendent is not arbitrary and unguided as contended by Mr. Gawankar. The Superintendent is required to follow principles of natural justice before imposing the punishment. He is also obliged to state reasons for the imposition of the punishment. If the punishment is forfeiture of ordinary or special remission for more than 60 days or for removing the prisoner from the remission system for a period exceeding one year, Previous approval of the - Inspector General is necessary. We do not find any arbitrariness in the scheme laid down by the provisions of the Act and the Rules framed by the State Government. It is therefore not possible for us to accept the submission of Mr. Gawankar that the punishment imposed upon the Petitioner for overstay of 449 days after the parole period was illegal or violative of Article 14 of the Constitution.

14. In the present case we are not concerned with the prison offences as defined u/s 45 of the Prisons Act. We, however, make it clear that prima facie we do not agree with the observations made by the Bench in Yusuf Badshah A. Hamid v. State of Maharashtra (supra) that the classification of the offences vis-a-vis the punishment provided under the Act and classified by the State Government into major and minor punishment is absolutely necessary, and the absence of such classification of offences make the whole system of punishment arbitrary. We do

not wish to express final opinion on this subject but we indicate our reservation about the view taken by the Bench in Yusuf Badshah A. Hamid v. State of Maharashtra (supra).

15. Mr. Gawankar next submitted that the Rules contemplate a previous approval of the Additional Inspector General of Prisons, but, in the facts of the present case, the approval is actually ex-post facto, and not the previous approval. The submission of Mr. Gawankar is without any substance. On perusal of the record, it appears that the Superintendent of Yerawada Jail submitted a reasoned proposal for imposing punishment on the Petitioner of forfeiture of earned remission of 126 days and for the removal of the Petitioner's name from the remission system for a period of 10 years and 3 months. The Superintendent recommended this punishment on application of ratio of cancellation of 3 days' remission for each day of over-stay. Punishment proposed by the Superintendent was approved by the Session Court on 27-5-1988. The Deputy Inspector General of Prisons has accorded his approval under order dated 14-8-1990. While granting the approval, the Deputy Inspector General of Prisons directed that the punishment shall operate from the date of grant of approval by the Sessions Court on 28-5-1988. The Additional Inspector General of Prisons has only fixed the date from which the punishment imposed upon the Petitioner was to operate. The submission of Mr. Gawankar that fixing a date for operation of the punishment by the Competent Authority amounts to ex-post facto sanction is liable to be rejected.

16. Mr. Gawankar lastly submitted that the punishment imposed on the Petitioner is disproportionate. After going through the record, we are satisfied that the Jail Authority was justified in imposing the punishment having regard to the repeated defaults committed by the Petitioner. It is not possible to interfere with the discretion exercised by the Jail Authority in the Petition under Article 226 of the Constitution.

17. In the result, the Petition fails and the same is dismissed. Rule stands discharged.

18. Petition dismissed.