
(2019) 01 BOM CK 0064

In the Bombay High Court

Case No : Criminal Writ Petition No. 215 Of 2018

Bhau Valve

APPELLANT

Vs

Inspector General Of Prisons And Ors

RESPONDENT

Date of Decision : 16-01-2019

Acts Referred:

Goa Childrens Act, 2003 — Section 8(2)
Goa Prison Rules, 2006 — Rule 315, 315(2), 316(3)
Gujarat Rules, — Rule 6, 7, 10

Citation : (2019) 2 BCR(Cri) 196

Hon'ble Judges : M.S. Sonak, J; Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : T. George John, P. Faldessai

Final Decision : Allowed

Judgement

M. S. Sonak, J

Heard Mr. T. George John, learned counsel for the Petitioner and Mr. P. Faldessai, learned Additional Public Prosecutor for the Respondents.

2. Rule. Rule returnable forthwith. Heard finally with the consent of the learned counsel for the parties. Mr. P. Faldessai, learned Additional Public Prosecutor waives notice on behalf of the Respondents.

3. The challenge in this petition is to the order dated 8th November, 2018 made by the Inspector General of Prisons rejecting the Petitioner's application for furlough. The Petitioner in the present case has been convicted under Section 8(2) of Goa Childrens Act, 2003 and sentenced to undergo life imprisonment for having committed a grave sexual assault on his own daughter. As on 28th September, 2018, the Petitioner had completed almost eleven years of imprisonment.

4. The Petitioner, by his application dated 28th September, 2018 applied for release on furlough for 28 days by stating that he intends to spend furlough

period with Fr. Maverick Fernandes at St. Xavier's Academy, Centre for the handicapped at Old Goa. The Petitioner further stated that Fr. Maverick Fernandes associated with yet another institution by name "CARITAS" which, amongst other activities, attends to prisoners who do not have any relative/family members to support them.

5. By the impugned order dated 8th November, 2018, the Inspector General of Prisons has rejected the Petitioner's application dated 28th September, 2018 on the ground that Rule 316 (3) of the Goa Prison Rules, 2006 permits the release on furlough only if the prisoner has a relative willing to receive him whilst on furlough and ready to enter into a surety bond for such amount as may be fixed by the Sanctioning Authority. The impugned order reasoned that since Fr. Maverick Fernandes is not a relative of the Petitioner, he cannot be released on furlough.

6. The aforesaid reasoning is reflected in the following para of the impugned order.

"AND WHEREAS having carefully gone through the police report on record viz-a-vis the provision of Sub Rule (3) of Rule 316 of the Goa Prison Rules, 2006, I am satisfied that the request of said prisoner cannot be granted, since provision of said rule provides that only the relatives has to show the relationship with the concern prisoner and such relatives should be willing to keep the prisoner while on furlough and such relatives should be willing to enter into surety bond. In the present case Fr. Meverick Fernandes is not a relative of said prisoner, thus does not make him eligible for release on furlough."

7. Mr. T. George John submits that the Petitioner, has been released on furlough on at least nine occasions in past in order to spend time with Fr. Maverick Fernandes at St. Xavier's Academy and CARITAS. He submits that on all these occasions, there was not even any allegation that the Petitioner has breached the terms and conditions subject to which he was released on furlough. He submits that in the peculiar facts and circumstances of the present case, Fr. Maverick Fernandes is required to be construed as a relative of the Petitioner. He submits that Rules relating to furlough have to be liberally construed taking into consideration the object of furlough. For all these reasons, Mr. T. George John submits that the impugned order may be set aside and the Petitioner be released on furlough for a period of 28 days.

7. Mr. P. Faldessai, learned Public Prosecutor submits that though the impugned order quotes the incorrect Rule, the correct Rule is Rule 315 of the Prison Rules and the same provides that the prisoner shall not be granted furlough unless he has a relative willing to receive him while on furlough and remedy to enter into a surety bond. He submits that in the present case, there is no question of releasing the Petitioner on furlough or permitting him to stay in his own house, taking into consideration the nature of offence for which the Petitioner came to be convicted. He submits that the impugned order is quite consistent with the

Rule 315 of the Prison Rules and therefore, the petition may be dismissed.

8. The Petitioner, as noted earlier, was convicted under Section 8(2) of the Goa Childrens Act, 2003 for having committed a grave sexual assault on his own daughter. In these circumstances, it is only natural that the immediate relatives of the Petitioner do not wish to either spend time with him or take responsibility for his good behaviour and return to prison after the expiry of furlough period. This means that virtually the Petitioner has no relative who is willing to receive him whilst on furlough and ready to enter into a surety bond in order to ensure Petitioner's good behaviour whilst on furlough and return to the prison upon completion of furlough period of 28 days.

10. Rule 315 of the Goa Prisons Rules, 2006 reads thus : "315. Furlough not to be granted without security.-

(1) Surety bond.- A prisoner shall not be granted furlough unless he has a relative willing to receive him while on furlough and ready to enter into a surety bond in Form I for such amount as may be fixed by the Sanctioning Authority.

(2) Personal bond or cash security.- Every prisoner desirous of release on furlough shall be required to give a personal bond or cash security of the required amount in Form II or Form III as may be relevant."

11. The provisions in Rule 315 of the Prisons Rules will have to be interpreted keeping in mind the objective for which the Prisons Rules make provision for grant of furlough. The expression "relative" has not been defined either under the Prisons Act, 1894 or the Goa Prisons Rules, 2006. The expression, will, therefore, have to take its colour from the context as well as the purposes of the enactment.

12. In *Asfaq Vs State of Rajasthan and others* (2017) 15 SCC 55, the Hon'ble Apex Court has held that the furlough is a brief release from prison. It is conditional and is given in case of long-term imprisonment. The period of sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct remission. A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment. For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment. Since furlough is not granted for any particular reason, it can be denied in the interest of the society.

13. The Hon'ble Apex Court in Asfaq (supra) proceeded to observe that the provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with society. Even citizens of this country have a vested interest in preparing offenders for successful re-entry into society. Those who leave prison without strong networks of support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources, stand a significantly higher chance of failure. When offenders revert to criminal activity upon release, they frequently do so because they lack hope of merging into society as accepted citizens. Furloughs or parole can help prepare offenders for success.

14. In Asfaq (supra), the Hon'ble Apex Court has held that having noted the aforesaid public purpose in granting parole or furlough, ingrained in the reformation theory of sentencing, other competing public interest has also to be kept in mind while deciding as to whether in a particular case parole or furlough is to be granted or not. This public interest also demands that those who are habitual offenders and may have the tendency to commit the crime again after their release on parole or have the tendency to become a threat to the law and order of the society, should not be released on parole. This aspect takes care of other objectives of sentencing, namely, deterrence and prevention. This side of the coin is the experience that great number of crimes are committed by the offenders who have been put back in the street after conviction. Therefore, while deciding as to whether a particular prisoner deserves to be released on parole or not, the aforesaid aspects have also to be kept in mind. To put it tersely, the authorities are supposed to address the question as to whether the convict is such a person who has the tendency to commit such a crime or he is showing tendency to reform himself to become a good citizen. Thus, not all people in prison are appropriate for grant of furlough or parole. Obviously, society must isolate those who show patterns of preying upon victims. Yet administrators ought to encourage those offenders who demonstrate a commitment to reconcile with society and whose behaviour shows that they aspire to live as law-abiding citizens. Thus, parole programme should be used as a tool to shape such adjustments.

15. In fact, in Asfaq (supra) the Hon'ble Apex Court has held that there cannot be any presumption that a person who is convicted of serious or heinous crime is to be, ipso facto, treated as a hardened criminal. Hardened criminal would be a person for whom it has become a habit or way of life and such a person would necessarily tend to commit crimes again and again. Obviously, if a person has committed a serious offence for which he is convicted, but at the same time it is also found that it is the only crime he has committed, he cannot be categorised as a hardened criminal. In his case consideration should be as to whether he is showing the signs to reform himself and become a good citizen or there are circumstances which would indicate that he has a tendency to commit the crime

again or that he would be a threat to the society. Mere nature of the offence committed by him should not be a factor to deny the parole outrightly. Wherever a person convicted has suffered incarceration for a long time, he can be granted temporary parole, irrespective of the nature of offence for which he was sentenced.

16. Finally, in *Asfaq* (*supra*), the Apex Court observed that there can be no cavil in saying that a society that believes in the worth of the individuals can have the quality of its belief judged, at least in part, by the quality of its prisons and services and recourse made available to the prisoners. Being in a civilized society organized with law and a system as such, it is essential to ensure for every citizen a reasonably dignified life. If a person commits any crime, it does not mean that by committing a crime, he ceases to be a human being and that he can be deprived of those aspects of life which constitute human dignity. For a prisoner all fundamental rights are an enforceable reality, though restricted by the fact of imprisonment.

17. Therefore, the provisions in the Prisons Rules relating to grant of furlough will have to be interpreted in the backdrop of the aforesaid principles explained by the Hon'ble Apex Court as well as the objective behind the very concept of furlough to prisoners incarcerated for long prison term. It is these principles and these objectives, that will have to be adverted to while interpreting the expression "relative" in Rule 315 of the Prisons Rules.

18. If the expression "relative" is literally or pedantically construed, then, it is possible that the person who has no relative willing to receive him whilst on furlough, will invariably be disentitled to be so released on furlough. This is despite the fact that his need to be released on furlough, is in no manner lesser than the need of prisoners who have relatives to be released on furlough. This is despite that fact more efforts are necessary to encourage such convicts to live as law abiding citizens in the society. The efforts of such convicts to reform themselves and reconcile with the society deserves encouragement. According to us, therefore, the expression "relative" has to be construed in the context of fact situation in each case. In a given case, even a close friend or the head of a organization like CARITAS or St. Xavier's Academy Centre like Fr. Maverick Fernandes, can be regarded as a relative of a prisoner, who has no relative or who is unwilling to be received by any relative for variety of reasons. Though it is not possible to lay down any general rules in this regard, depending upon the fact situation, and taking into consideration the objective behind the release of a prisoner on furlough, such a construction will have to be put on the Prisons Rules relating to grant of furlough.

19. The Prison Authorities, in a situation where no relative is willing to receive a prisoner whilst on furlough, will no doubt, have to be circumspect and extra cautious in determining whether such a prisoner can be released on furlough in order to stay with a close friend or with some organization, which caters to needs of the prisoners who have no means or no blood relative to support them. This

extra cautious is necessary because the apprehension that the friend or the so called close friend may not be serious in assuming responsibility for the prisoner during the furlough. This extra cautious is also necessary to avoid any person, say for commercial gains posing as a friend to enable a prisoner to secure furlough. The Prison Authorities will therefore, have to verify the credentials of such close friend or organization where the prisoner proposes to spend his furlough time. This is necessary because it will be quite unsafe to release the prisoner on furlough without such verification exercise being seriously undertaken.

20. Besides, the Prison Authorities, have also to require such close friend or head of the organization to enter into a surety bond for some substantial amount as may be determined by the Sanctioning Authority. No doubt, the Sanctioning Authority must exercise discretion in a fair and judicious manner as otherwise insistence of the surety bond of very high amount will virtually amounts to denial of furlough to the prisoner concerned. All that we say is that there cannot be any wholesale rejection of application for furlough by observing that there is no relative willing to receive the prisoner whilst on furlough, even though, there may be some very close friends or some organizations which are willing to receive such prisoner whilst on furlough and further willing to enter into a surety bond for such amount as may be fixed by the Sanctioning Authority.

21. Similar issue arose before the Full Bench of Gujarat High Court in the case of Natia Jiria Vs State of Gujarat and others 1984 CrLJ 936. The issue that fell for consideration before the Gujarat High Court related to the plight of prisoner too poor to furnish any surety bond and availability of any relative or friend to receive such prisoner whilst on furlough. The Division Bench of Gujarat High Court dealing with Special Criminal Application No.954 of 1983 was confronted with Rules very similar to Rule 315 of the Goa Prisons Rules which had provided that a prisoner cannot be granted furlough unless he has relative willing to receive him whilst on furlough and ready to enter into a surety bond in Form A and the prisoner gives personal bond in Form B or cash security in Form C appended to the Rules. The Division Bench took a view that there was no provision in the Rules which enabled the Sanctioning Authority to waive any such conditions and therefore, the Division Bench felt helpless in granting relief to the prisoner. Another the Division Bench, however disagreed with this view and this is what led to a reference before the Full Bench of Gujarat High Court.

22. The Full Bench, posed and answered certain questions in relation to interpretation of Rules 6, 7 and 10 of the Gujarat Rules, scheme of which is more or less similar to Rule 315 of the Goa Prisons Rules. The paras 6, 7 and 8 read thus :

"6. Is it possible to understand the rules as enabling a competent authority to permit availing of furlough leave even without insistence of either cash security or a surety bond? If that is not possible, could the rule be read down so as to avoid insistence on these? If that too is not possible, could the rules be struck

down as violating the right of equality? The last of these courses need be considered only if the Court is compelled to read the rules as calling for insistence on a surety bond or cash security in all cases and that rule is not capable of being read down in the manner indicated. It is always the function of the Court to construe a rule reasonably and if the provision could be upheld even by reading it down to attempt to do so rather than demolish the same by holding it as unconstitutional.

7. This country has since long awakened to the need for a considerate approach in matters where weaker sections of the society are involved so as to make the guarantee of equal opportunity a reality. Provisions of statutes and rules leaving on arena for exercise of discretion to authorities have always been understood as calling for such exercise on the part of the authorities as will render their functioning constitutional. If discretion is conferred on an authority to waive the requirements of the rules such waiver would be justified to promote the concept of constitutional protection more than anything else. Rule 6 of the furlough rules envisages the availability of a relative willing to receive the prisoner while on furlough and his readiness to enter into a surety bond in Form A for such amount as may be fixed by the Sanctioning Authority. Rule 10 contemplates execution of a personal bond by the prisoner or giving cash security in Form C and also execution of a surety bond in Form A which is the bond referred to in Rule 6, Therefore the requirement of Rule 6 is also embodied in Rule 10. While Rule 6 refers to the readiness to enter into a surety bond in Form A Rule 10 deals with the actual furnishing of the surety bond in Form A. Therefore the 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. The first of these a prisoner may be able to do by executing a personal bond. Of course if in respect of a prisoner who is unable to furnish cash security the Sanctioning Authority insists upon such cash security it will be an erroneous, improper and unfair exercise by him. 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. A person in prison is under a great disadvantage and particularly so if he has no friends or competent relatives to help him out. There is no reason why when he 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. In other words where the Sanctioning Authority has no reason or no materials to positively assume that the man could furnish cash security the sanctioning Authority would be obliged to release him on his personal bond. That is how Rule 10 must be understood as to the first requirement. In the case before us there is no insistence upon cash security. The prisoner has been permitted either to give cash security or personal bond. He could execute the personal bond, but what he is worried about and concerned with is the second requirement, viz. the execution of a surety bond in Form A. He has none to stand surety.

8. Rule 10, it may be noticed, qualifies the conditions under which the

Sanctioning Authority is to grant furlough by the words "if so required". This is quite significant and evidently the relevance of this was not brought to the notice of the learned Judges of the Division Bench on the earlier occasion. The words "if so required" cast a duty and obligation on the Sanctioning Authority to consider whether the case requires waiver of the insistence on the execution of a surety bond. The appropriate justification for such waiver would be where, as in this case, a person is, by reason of his penury and his absence of influence in society, unable to furnish a surety bond. As Krishna Iyer, J. said, though in a different context, in the context of bail, in *Moti Ram v. State of Madhya Pradesh* (AIR 1978 SC 1594): (1978 Cri.L.J.1703) "affluents do not befriend indigents". Hence Rule 10 has to be read and understood as justifying the Sanctioning Authority in waiving the insistence upon a surety bond in cases such as that of the prisoner here."

(emphasis supplied)

23. The Full Bench also referred to the decision of the Hon'ble Apex Court in the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81 in order to highlight disadvantage position of poor prisoners, who have no family support. The Full Bench in fact quoted para 3 of the Apex Court's judgment to highlight the plight of the poor people in our judicial system dealing with prisoners right.

24. In the facts of the present case, the nominal roll furnished by the Superintendent of Central Jail, Colvale indicates that the Petitioner had been released on furlough on at least nine occasions in the past. The details of such releases are as follows.

- "1. Furlough from 18/09/2012 to 08/10/2012,
2. Furlough from 21/08/2013 to 17/09/2013,
3. Furlough from 17/04/2014 to 14/05/2014,
4. Furlough from 25/11/2014 to 22/12/2014,
5. Furlough from 10/07/2015 to 06/08/2015,
6. Furlough from 09/03/2016 to 05/04/2016,
7. Furlough from 08/10/2016 to 04/11/2016,
8. Furlough from 14/09/2017 to 11/10/2017,
9. Furlough from 20/04/2018 to 17/05/2018."

25. The Petitioner contends and it is not disputed by the Respondents that on all the aforesaid occasions the Petitioner has stayed with Fr. Maverick Fernandes and Fr. Maverick Fernandes entered into a surety bond in the amount fixed by the Sanctioning Authority. There is no allegation that the Petitioner breached any of the terms and conditions subject to which he was released on furlough. The

impugned order itself indicates that the Superintendent of Police, North Goa, upon inquiries had reported that Fr. Maverick Fernandes was aware that the Petitioner had applied for furlough in order to stay with him and Fr. Maverick Fernandes was perfectly willing to receive the Petitioner whilst on furlough. The inquiries further reveal that many prisoners have spent their furlough period in CARITAS institute which is involved in attending to prisoners who do not have any support in their life from any person/family members. The inquiries also reveal that CARITAS institute is teaching vocational subjects to the prisoners at Central Jail, Colvale.

26. Based upon all these material, we are satisfied that the Petitioner was required to be released on furlough subject to no doubt, Fr. Maverick Fernandes willing to receive him whilst on furlough and ready to enter into a surety bond for such amount as may be fixed by the Sanctioning Authority. Besides in terms of Rule 315(2) of the Goa Prisons Rules, 2006, the Sanctioning Authority as well require the Petitioner to give a personal bond or cash surety as may be relevant.

However, the wholesale rejection by means of impugned order was not proper in the facts and circumstances of the present case.

27. Accordingly, we allow this petition, set aside the impugned order dated 8th November, 2018 and direct the Respondents to release the Petitioner on furlough subject to usual conditions by treating Fr. Maverick Fernandes as a relative of the Petitioner for the purposes of Rule 315 of the Goa Prisons Rules, 2006. The formal orders, consequent to this judgment and order to be passed by the Respondents within two weeks from today.

28. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

29. All concerned to act on the basis of the authenticated copy of this order.