

(2016) 06 BOM CK 0187

In the Bombay High Court

Case No : Criminal Writ Petition No. 2477 of 2015

Buwaji Sahadeo Hazare

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:

Constitution of India, 1950 — Article 20(2), 226
Criminal Procedure Code, 1973 (CrPC) — Section 300
Prisons (Bombay Furlough and Parole) Rules, 1959 — Rule 4 (10)
Prisons Act, 1894 — Section 59

Citation : (2016) 3 AIRBomRCri 30 : (2016) ALLMRCri 4539 : (2017) 2 BomCR(Cri) 640 : (2016) CriLJ 4849 : (2016) 5 MhLJCrI 653 : (2017) 1 RCRCriminal 359

Hon'ble Judges : Smt. V.K. Tahilramani and Mrs. Mridula Bhatkar, JJ.

Bench : Division Bench

Advocate : Ms. Rohini Dandekar, Advocate (appointed), for the Petitioner; Mrs. A.S. Pai, APP, for the State

Final Decision : Dismissed

Judgement

Smt. V.K. Tahilramani, J.(Oral)—Heard both sides.

2. Rule. By consent, Rule is made returnable forthwith.

3. The case of the petitioner is that in the year 2007 when he was released on furlough, he overstayed his furlough leave by 132 days. On account of this, three days of remission was cut off for each day of overstay. Thereafter, in the year 2012, the petitioner was released on furlough on 3.12.2012. On that occasion, he overstayed his furlough leave by 31 days. Due to this overstay, four days of remission was cut off for each day of overstay. The prayer of the petitioner is that the prison punishment be waived or reduced to cutting of remission of one day for each day of overstay.

4. Further case of the petitioner is that thereafter, he preferred two applications for parole and furlough which came to be rejected. As far as his case that on two

occasions, his parole and furlough applications were rejected is concerned, the petitioner has stated that he has no grievance in this respect and he has accepted the decisions whereby his parole and furlough applications were rejected. Thus, his only prayer is that the orders of cutting his remission be set aside. The case of the petitioner is that he has accepted the punishment of rejection of his parole and furlough applications on account of overstaying when he was released on furlough earlier, in such case, he cannot be punished again for the overstay by cutting his remission on account of overstay.

5. 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, his two applications for furlough and parole came to be rejected and in addition thereto, punishment has been imposed on the petitioner of cutting remission, hence, according to her, it is clearly a case of double punishment i.e double jeopardy. She also relied upon Section 300 of Code of Criminal Procedure.

6. The argument advanced on behalf of the petitioner is that it is a case of double punishment in the sense that for the overstay, punishment was imposed of not being released on parole and furlough and in addition, remission was cut. 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.

7. 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.

8. The petitioner in this case cannot get any benefit, because he has not been prosecuted earlier. 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 has not been prosecuted before any Court of law or Tribunal. There were no proceedings 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.

9. 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. The petitioner has not been convicted or acquitted earlier for an offence based on the same facts. 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.

10. 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 has not been tried by a competent Court for any of his misdeeds, 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. While dealing with Section 300 of Criminal Procedure Code, it is necessary to take note of the exceptions provided under the said sub-section 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.

11. 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.

12. 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 cutting of remission 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.

13. 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.

14. In our view, applying the above principle in the present case, two actions taken against the prisoner, one of deducting the remission earned by him and the second of rejecting his applications for parole and furlough 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.

15. This Court in three decisions to which one of us was a party (V.K. Tahilramani, J.) took the same view in similar circumstances. The three decisions are :- Anil Lala Saundade v. State of Maharashtra, 2003 ALL MR (Cri) 433. ; Niyaj Ahamad Abdul Jabbar v. State of Maharashtra, 2011 ALL MR (Cri) 2509 ; Akash @ Vijay Kumar Khandekar v. State of Maharashtra & Anr., 2011 ALL MR (Cri) 3831.

16. 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. 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 was negated.

17. Thereafter, after referring to Section 48-A of the Prisons Act, 1894, it was sought to be contended that the petitioner having been already punished under the said provision of the Prisons Act by cutting his remission on account of the period for which he had overstayed, the petitioner could not be again penalised by applying Rule 4(10) as it amounts to double jeopardy.

Section 48-A of The Prisons Act, 1894 reads as under:-

" 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 be a general or special order direct.]"

The provisions relating to entitlement or dis-entitlement of furlough leave 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 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. The contention that on account of the punishment having been imposed under Section 48-A of the Prisons Act, the respondents would not be entitled to deny the furlough or parole leave by taking resort to the provisions of law comprised under Rule 4(10) of the Furlough Rules is devoid of substance.

17A. Rule 4(10) of the Prisons (Bombay Furlough and Parole) Rules, 1959 reads as under:-

4. When prisoners shall not be granted furlough:- The following categories of prisoners shall not be considered for release on furlough:-

(1)

(10) Prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough."

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 on which either the sentence is suspended or remitted or furlough or release on parole is

granted. The Clause (3) thereof provides that if any prisoner fails without sufficient cause to observe any of the conditions on which the furlough 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 furlough leave, he was punished under the said provision of law comprised under Section 48A of the Prisons Act. However, Rule 4(10) of the Furlough Rules does not speak of any punishment as such. It merely curtails the entitlement of the benefit of furlough leave to the prisoner. In cases where a prisoner continues to commit default in the matter of surrender on expiry of the furlough leave, once having availed the same, Rule 4(10) provides that prisoners who had at any time escaped or attempted to escape from the lawful custody or defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough, shall not be released on furlough. Obviously, this does not speak of any punishment as such. It is well-settled that any entitlement prescribed under the statute can be availed within the parameters prescribed under the statute. If the statute imposes conditions to claim any such benefit under the statute, the same are to be availed on compliance of the conditions and not otherwise. The provisions regarding the entitlement of benefit has to be read along with conditions attached to the same. Being so, the entitlement has to be read along with the conditions provided for the same. The entitlement of leave would be to the extent it is permissible and would not be available in cases where it is sought to be curtailed by specific provisions in that regard.

17B. The rules make elaborate provisions regarding entitlement as well as dis-entitlement of furlough leave to the prisoner. Merely because under certain circumstances the rule provides that a prisoner would not be entitled to furlough leave, that does not amount to a penal provision so as to contend that the implementation of such provision would amount to double jeopardy in the case of a prisoner who is punished under Section 48A of the Prisons Act. The provisions relating to entitlement or dis-entitlement of furlough leave 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.

18. 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 remission was cut 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.

19. As far as the prayer relating to setting aside or reducing prison punishment imposed of cutting of remission on account of overstay of furlough is concerned, it is seen that in the year 2007 on 15.2.2007, when the petitioner was granted furlough, he did not report back to the prison in time. It is seen that the petitioner was arrested by Police and brought back to prison. Thus, it is not a case of the petitioner surrendering on his own to prison. The reason given by the petitioner for overstay in the year 2007 is that his son met with an accident on 15.2.2007 and thereafter, one of his daughters got married on 14.5.2007 and second daughter got married on 24.6.2007. However, it is seen that on 15.2.2007 when the petitioner was granted furlough for 14 days, he had to surrender back within 14 days from 15.12.2007. The marriage of the daughters of the petitioner took place in May and June 2007. The petitioner, in such case, ought to have surrendered on his own to prison and thereafter ought to have applied for parole but the petitioner did not do so. Moreover, it is seen that the petitioner did not even prefer an application for extension of furlough. However, looking to the facts and circumstances of the case, the Prison Authorities have not imposed the maximum punishment on the petitioner of cutting off of remission of five days for each day of overstay and they have only imposed punishment of cutting of remission of three days for each day of overstay. Looking to the fact that the petitioner had to be arrested and brought back by the Police to the prison, it cannot be said that the prison punishment is harsh. Moreover, it is seen that the marriage of second daughter of the petitioner was on 24.6.2004, in such case, the petitioner ought to have surrendered back to prison on his own immediately after the marriage but he has not done so and ultimately, Police arrested him and brought him back to prison. Had the petitioner surrendered on his own, a lenient view may have been taken by us but looking to the above facts, we are of the opinion that the appropriate prison punishment has been imposed on the petitioner for overstay of 132 days of furlough.

20. The second occasion that the remission was cut was when on 3.12.2012 when the petitioner was released on furlough, he had to surrender back within 14 days, however, the petitioner surrendered back to prison only after 31 days. During this period of overstay also, the petitioner did not prefer an application for extension of furlough. Moreover, we find no reason stated in the present petition for overstay of 31 days. It is seen that the Prison Authorities have not imposed the maximum sentence of prison punishment on the petitioner of cutting of remission of five days for each day of overstay but instead they have only cut off remission of four days for each day of overstay. It is seen that the maximum punishment which could have been imposed, has not been imposed on the

petitioner. Looking to the fact that no cogent and convincing reason has been furnished by the petitioner for overstay of 31 days when he was granted furlough, we are not inclined to reduce the prison punishment.

21. We also want to express that the cases of late surrender by the prisoners are on increase. It is, therefore, necessary that the tendency to disrespect the rule of law by the prisoner needs to be curbed. It is pertinent to note that the Authorities, on the earlier occasion when the petitioner overstayed had not imposed maximum punishment i.e cut of five days" remission for each day of overstay, but in spite of that, the petitioner did not improve his conduct and continued to either abscond or report late after expiry of period of furlough leave or parole leave.

22. In view of above, Rule is discharged.

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