

(2005) 06 GUJ CK 0020
In the Gujarat High Court

Case No : Letters Patent Appeal No. 498 of 2005

Govindbhai Mansing Dabhi

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 149, 302
Prisons (Bombay Furlough and Parole) Rules, 1959 — Rule 17, 3, 3(1), 3(2), 4
Prisons Act, 1894 — Section 28, 48A, 59

Citation : (2005) 06 GUJ CK 0020

Hon'ble Judges : G.S. Singhvi, J; Anant S. Dave, J

Bench : Division Bench

Advocate : Bhushan B. Oza, for the Appellant; A.Y. Khogje, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

G.S. Singhvi, J.—Whether the period during which an accused person remains in detention before his conviction falls within the ambit of the expression actual imprisonment appearing in Rule 3(1) and (2) of the Prisons (Bombay Furlough and Parole) Rules, 1959 (hereinafter referred to as the Rules) as applicable to the State of Gujarat is the question which arises for determination in these appeals filed under Clause 15 of the Letters Patent.

2. For the sake of convenience, we have taken the facts from Letters Patent Appeal No. 498 of 2005.

3. The appellant was arrested on 8.3.2002 in connection with the criminal case registered against him u/s 302 read with Section 149 of the Indian Penal Code vide F.I.R No. 55 of 2002 dated 8.3.2002. He was tried in the Court of Additional Sessions Judge (5th Fast Track Court), Nadiad. He was convicted and sentenced to life imprisonment vide judgement dated April 1, 2004. After some time, he

filed Special Criminal Application No. 1206 of 2004 in this Court for his release on furlough. The same was disposed of by the learned Single Judge on 26.11.2004 with the observation that he may file an application before the competent authority. The latter was directed to decide the same within 10 days. Thereafter, the appellant filed an application under Rule 3(2) of the Rules for grant of furlough by claiming that he was an agriculturist of village Juni Akol, Tal. Khambhat, and there was none to look after his family. The concerned authority rejected the application on the ground that his case is not covered by Rule 3(2) of the Rules, inasmuch as, on the date of filing of application he had not undergone 2 years imprisonment after conviction. The decision of the competent authority was conveyed to the appellant by the office of the Public Prosecutor vide letter dated 6.12.2004.

4. The appellant challenged the aforementioned decision in Special Civil Application No. 1386 of 2004. He relied on the judgement of the Division Bench of the Bombay High Court in Prahlad Dnyanoba Gajbhiye Vs. State of Maharashtra and another, and pleaded that he is entitled to furlough as of right because he had already undergone more than 2 years actual imprisonment. The learned Single Judge relied on order dated 14.9.2001 passed by a coordinate Bench in Special Criminal Application No. 837 of 2000 and dismissed the Special Civil Application.

5. Shri Bhushan Oza, argued that the expression actual imprisonment occurring in Sub-rules (1) and (2) of Rule 3 of the Rules is not synonyms with imprisonment after conviction and sentence and the learned Single Judge committed a serious error by declining the appellants' prayer for grant of furlough. He then submitted that the detention suffered by an accused person before imposition of sentence as a consequence of his conviction for a criminal offence is required to be computed for deciding the issue relating to his entitlement to be released on furlough in terms of Sub-rule (1) and (2) of Rule 3. Shri Oza relied on the judgement of the Full Bench of this Court in Bhikhabhai Devshi Vs. State of Gujarat and Others, and of the Division Bench of Bombay High Court in P.D. Gajbhiye v. State of Maharashtra (supra) to support his contention that the appellants are entitled to furlough after completing the actual imprisonment of two years including the period during which they remained in detention before the date of conviction. He then submitted that the view expressed by the learned Single Judge in Special Criminal Application No. 837 of 2000 - Abdul Wahab Abdul Majid Bloch v. State of Gujarat which constitutes the foundation of the orders under challenge does not reflect the correct legal position and the contrary view expressed by the Division Bench of the Bombay High Court in P.D. Gajbhiye's case should be accepted as representing correct legal position.

6. Shri A.Y. Khogje, learned Additional Public Prosecutor argued that the expression actual imprisonment used in Sub-rules (1) and (2) of Rule 3 should be interpreted as imprisonment undergone after conviction and the period of pre-

conviction detention cannot take into consideration for determining the entitlement of the prisoner to be released on furlough. He further argued that the provisions contained u/s 428 of the Criminal Procedure (Cr.P.C) cannot be pressed into service for the purpose of interpreting the expression actual imprisonment used in Sub-rules (1) and (2) of Rule 3 and the length of period during which an accused person may have remained in custody or jail before his conviction by the competent Court cannot be taken into consideration for extending him the benefit of furlough.

7. We have given serious thought to the entire matter. Rule 3 of the Rules reads as under:-

3. When Prisoner may be granted furlough.-

(1) A Prisoner, who is sentenced to imprisonment for a period exceeding one year but not exceeding five years, may be released on furlough for a period of two weeks at a time for every year of actual imprisonment undergone.

(2) A Prisoner, who is sentenced to imprisonment for a period exceeding five years may be released on furlough for a period of two weeks at a time for every two years of actual imprisonment undergone:

Provided that a prisoner sentenced to imprisonment for more than five years but not to imprisonment for life may be released on furlough every year instead of every two years during the last five years of his unexpired period of sentence:

Provided further that a prisoner sentenced to life imprisonment may be released on furlough every year instead of every two years after he completes seven years actual imprisonment.

Note 1:- The period of imprisonment in this rule includes the sentence or sentences awarded in lieu of fine in case the amount of fine is not paid.

Provided that if fine is paid during the period of imprisonment and the total sentence thereby reduced to a term not exceeding 5 years he shall thereafter be eligible for release every year in accordance with Sub-rule (1) instead of every two years under Sub-rule (2).

Note 2.- For the purposes of this rule, the period of imprisonment shall be computed as the total period for which a prisoner is sentenced even though one or more sentences be concurrent.

Note 3:- If at any time a prisoner who could have been granted furlough is either not granted or is refused the same the same period for which he could have been granted the furlough shall not be carried forward but shall lapse.

Note 4.- The period of two weeks may be initially extended up to three weeks in the case of prisoners desiring to spend the furlough outside the State of Bombay.

Note 5.- An order sanctioning the release of a prisoner on furlough shall cease to be valid if not given effect to within a period of two months of the date thereof.

8. A reading of the above reproduced provision makes it clear that Sub-rule (1) consists of 3 parts. The first part refers to the prisoner who is sentenced to imprisonment for a period exceeding one year but not exceeding five years. The second part contemplates release of such a prisoner and the third part prescribes the condition which must be fulfilled before a prisoner referred to in the first part can be released on furlough for a period of two weeks. Likewise, Sub-rule (2) consists of three parts and provides for release of the prisoner on furlough who is sentenced to imprisonment for a period exceeding five years. The only difference between Sub-rules (1) and (2) is that while under Sub-rule (1) the prisoner is entitled to be released on furlough for a period of two weeks at a time for every year of actual imprisonment undergone, under Sub-rule (2) he is entitled to be released on furlough for a period of two weeks at a time for every two years of actual imprisonment undergone. The important feature which is common to both the Sub-rules and which deserves to be noticed, is that the rule making authority has used the expression sentenced to imprisonment in the first part of both the rules, whereas the expression actual imprisonment undergone has been used in the third part of both the rules. The use of different expressions in different parts of the same rule is clearly indicative of the legislative intentment not to treat the expression `actual imprisonment' as synonymus with the expression sentenced to imprisonment. If the intention of the rule making authority was that a prisoner should be released on furlough only after undergoing imprisonment for a particular period as a sequel to his conviction by the competent Court, then it would not have used the word "actual" before the word "imprisonment" in the last part of the two Sub-rules.

9. In our opinion, Sub-rules (1) and (2) of Rule 3 deserve to be interpreted keeping in view the object and purpose of the delegated legislation, namely to provide an opportunity to the prisoner to get in touch with his family so that he may not become a stranger to his near and dear and the society after coming out from the prison. If the elements of reformatory theory, which are inherent in the scheme of the rules are kept in view, then there is no escape from the conclusion that for the purpose of computation of the period of actual imprisonment envisaged under Sub-rules (1) and (2) of Rule 3, the time during which the prisoner may have remained under detention prior to his conviction by the competent court should be taken into consideration.

10. In *Bhikhabhai v. State of Gujarat* (supra) the Full Bench of this Court while interpreting the provisions of Sections 28, 48A and 59 of the Prisons Act and Rule 4(1) of the Rules, highlighted the distinction between furlough and parole in the following words:

11. Furlough and parole have two different purposes. Furlough is a matter of right, parole is not so. Furlough is to be granted periodically under Rule 3 irrespective of any particular reason merely with a view to enable the prisoner to have family and social ties and to void ill effects of continuous prison life, and the period of furlough is treated as remission of sentence. Since furlough is to be

granted for no particular reason, it can be denied in the interest of Society; whereas parole is to be granted only on a sufficient cause (R.19) such as cases of severe illness or death of any member of the prisoner's family or of his nearest relative or for other sufficient cause. Therefore, parole is not a matter of right and only when there is a sufficient and serious cause, the Society and the jail administration may, sometimes, have to take some risk to release the prisoner on parole, but that would be no ground for releasing the prisoner on routine furlough irrespective of his past conduct and performance. Parole may be denied to a prisoner even when he makes out sufficient cause for release on parole if the competent authority is satisfied on valid grounds that release of a prisoner on parole would be against the interest of the society or the prison administration. For example, a prisoner who has once escaped or attempted to escape or who is likely to escape or has such means and resources, may be denied parole because under Rule 19, the competent authority has discretion may to grant or not to grant parole even when cause is shown. Therefore, comparison of release on parole and furlough is absolutely uncalled for. Hence it could not be contended that prisoners released on parole and surrendering late are disqualified for furlough only under Rule 4(1) and that they are not disqualified for parole. (Underlining is ours)

12. In *Sharad Keshav Mehta v. State of Maharashtra* - 1989 Cri LJ 681, a Division Bench of the Bombay High Court held that the right to be released on furlough is a substantial and legal right of the prisoner and he cannot be denied of the same except when it is permissible under law. Some of the observations made in that case are extracted below:-

13. The right to be released on furlough is a substantial and legal right conferred on the prisoner. Rule 17 cannot deprive the prisoner of the substantial right to be released on furlough provided the requirements of the rule are complied with. It is not open to the Home Department of the State Government to prescribe rules giving facility of release of the prisoner on furlough by one hand and then providing that the prisoner has no legal right to be released on furlough. The view that even if the conditions prescribed by the rules are satisfied the Government is not bound to release the prisoner on furlough overlooks the distinction between the right to be released on parole and the right to be released on furlough. Parole is granted for certain emergency and release on parole is discretionary right while release on furlough is a substantial right and accrues to a prisoner on compliance with certain requirements. The idea of granting furlough to a prisoner is that the prisoner should have an opportunity to come out and mix with the society and the prisoner should not be continuously kept in jail for a considerable long time.

14. Another Division Bench of the Bombay High Court considered the same issue in *Sharad Bhiku Marchande Vs. State of Maharashtra and others*, and observed:

15. With respect we agree with the view taken by the Division Bench in the case of *Sharad Keshav Mehta* - 1989 Cri LJ 681 (Bombay) (supra). It must, therefore,

follow that under the Furlough Rules the prisoner has got a substantial and legal right subject to Rule 17 and whenever the prisoner makes an application for furlough under the Furlough Rules, the authority must consider the said application on merits and pass appropriate orders.?

16. In P.D. Gajbhiye's case (supra), the Division Bench of the Bombay High Court interpreted the expression 'actual imprisonment' appearing in Sub-rules (1) and (2) of Rule 3. After making reference to the Full Bench judgement of this Court in Bhikhabhai v. State of Gujarat (supra), the Bombay High Court observed as under:-

It is now well settled that furlough and parole have two different purposes. Furlough is a matter of right whereas parole cannot be claimed as a matter of right. Furlough is to be granted periodically under Rule 3 of the Furlough Rules and the principal object of grant of furlough is to enable the prisoner to have family association and to avoid ill-effects of continuous prison life. While undergoing sentence, in accordance with the Furlough Rules, a prisoner is accorded social inter-action, man being a social animal. Social life is brought into existence periodically for a prisoner by providing furlough. Furlough is not provided or granted for any particular reason and if he is not ineligible under Rule 4 of the Furlough Rules, furlough has to be granted and even if a disqualification is there under Rule 4, still it is not necessary that grant of furlough shall be refused.

17. The scheme of grant of furlough is that after a convict has been sentenced, on completion of a particular period of imprisonment undergone, he should be provided to have a social inter-action with an intention that he forgets bitterness and sufferings for a while.

18. The Division Bench then referred to Section 428 Cr.P.C and held that the term 'actual imprisonment' includes period of detention of an accused before his conviction. Paragraphs 9, 10, 11, 13 and 16 of the judgement which contains discussion on this topic are reproduced below:

9. It is thus well settled that grant of furlough is a substantial legal right which a prisoner is entitled on fulfilment of the conditions provided in Furlough Rules. The question, however, is whether in the case of a prisoner who is sentenced to imprisonment for life, can be released on furlough for a period of two weeks at the time of every two years of actual imprisonment undergone. Whether the two years of actual imprisonment undergone has to be computed only from the date he is sentenced to suffer imprisonment or while computing actual imprisonment undergone, benefit could be given to him for the imprisonment he suffered as an under-trial prisoner. To answer this question, it would be advantageous to advert to the provisions of Section 428 of the Code of Criminal Procedure at this stage, which reads as under:-

428. Where an accused person has, on conviction, been sentenced to imprisonment for a term (not being imprisonment in default of payment of fine),

the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

10. The provisions of Section 428 Cr.P.C were inserted and enacted for the first time in the Code of 1973 and this new provision was made on the recommendation of the Joint Committee of Parliament which was of the view that in many cases an accused person is made to suffer jail life for a period out of all proportion to the gravity of the offence, or to the punishment provided by a statute, or imposed on him. In some cases the sentence imposed is a fraction of the time spent by the accused as under-trial prisoner. This new provision, allowing setting-off of the period of detention undergone as an under-trial prisoner against the sentence of imprisonment, is meant of mitigate the evils.

The period of detention undergone by the accused as an undertrial prisoner is set off against the sentence of imprisonment awarded on conviction. The Legislative intent, thus, would be clear that for any period of imprisonment undergone as an undertrial prisoner, the prisoner must be awarded set-off against the sentence of imprisonment on conviction.

Furlough Rules were framed in the year 1959 i.e. Much before the provision of Section 428 was enacted in the Code of Criminal Procedure, 1973. If a prisoner is entitled to set-off the imprisonment undergone as an under-trial prisoner after he is convicted, there is no reason, much less justification, for not computing the period of actual imprisonment undergone provided in Rule 3 of the Furlough Rules including the period of imprisonment undergone as an under-trial prisoner. It is true that question of computing this period would only arise after a prisoner is sentenced to imprisonment for a period exceeding one year and not during the imprisonment as an under-trial prisoner.

11. Prisoner includes under-trial prisoner and it is not confined to prisoners after conviction. The imprisonment has been stated as the restraint of a man's liberty under the custody of another; and extends not only to a goal, but to a house, stocks, or where a man is held in the street, etc; for in all these cases the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go about his busienss as at other times.(Tomlin).

Imprisonment is one of the forms of punishment provided in the Indian Penal Code. It is of two kinds: (a) rigorous, and (b) simple. In the case of rigorous imprisonment, the offender is put to hard labour, such as grinding corn, digging earth, drawing water, cutting firewood, bowing wool, etc. In the case of simple imprisonment, the offender is confined to jail and is not put to any kind of work. (Aiyer's Judicial Dictionary, Eleventh Edition, 586).

13. Giving the word Imprisonment a wider meaning, every confinement of the person is an imprisonment and every restraint of the liberty of a free man will be

an imprisonment and the under-trial detention of a prisoner is undoubtedly an imprisonment.

16. The aims and objects of framing of the Furlough Rules and the legal position that the furlough is a substantial and legal right of the prisoner and the legislative intent by enacting Section 428 of the Cr.P.C providing the period of detention undergone by the accused to be set-off against the sentence of imprisonment, we are of the firm view that the words actual imprisonment undergone mean and include the period of detention undergone by the accused as an under-trial prisoner. By interpreting the words actual imprisonment undergone in such manner, the purpose and object of grant of furlough are achieved. As observed above, furlough is claimed by a prisoner as a right and the purpose is that, he should not continue to remain in jail for a longer period. If the argument of the Assistant Government Pleader that actual imprisonment undergone would only mean actual imprisonment undergone after the sentence and the prisoner cannot be given benefit of detention or imprisonment as an undertrial prisoner is accepted, then the prisoner/convict would have to remain in jail for a much longer period before he can be entitled to furlough. Criminal Jurisprudence demands that graver the offence, larger the punishment and larger the punishment, more the set-off, remission and grant of furlough. After all punishment is not retributory, but reformatory and a prisoner should be permitted grant of furlough after he has been sentenced to imprisonment by including the detention or imprisonment he has suffered as undertrial prisoner. That advances the cause of justice, objective of Furlough Rules and in conformity and in consonance with the right of liberty provided under Article 21 of the Constitution of India.

19. We respectfully agree with the views expressed by the Division Bench of the Bombay High Court and are of the considered opinion that the same represents the correct interpretation of the expression actual imprisonment? used in Sub-rules (1) and (2) of Rule 3 of the Rules. This is also in consonance with the rule of purposive interpretation.

20. We are further of the view that Section 428 Cr.P.C was rightly relied upon by the Division Bench of the Bombay High Court for interpreting expression actual imprisonment.

21. In Abdul Wahab Abdul Majid Bloch's case the learned Single Judge distinguished the judgement of the Bombay High Court in P.D. Gajbhiye's case by observing that the same has only persuasive value and is not binding on this Court. This may be so but in view of the interpretation placed by us on the plain language of Sub-rules (1) and (2) of Rule 3, there is no escape from the conclusion that the contrary view expressed by the learned Single Judge cannot be treated as laying down correct law.

22. Before concluding we may mention that Shri A.Y. Khogje had half-heartedly raised an objection to the maintainability of the Letters Patent Appeal, but did

not seriously press the same in view of the two judgements of this Court in State of Gujarat v. Jayantilal M. Patel - 1995 (2) G.L.H 260 and Ramjibhai Dayarambhai Joshi Vs. State of Gujarat and Another, wherein similar objection was overruled.

23. In the result, the appeals are allowed. The orders passed by the learned Single Judge are set aside. Consequently the Special Civil Applications filed by the appellants shall stand allowed. The competent authority shall now consider the applications of the petitioners for release on furlough afresh and pass appropriate order keeping in view the observations contained in this judgement. The concerned authority shall pass appropriate orders within one month from the date of receipt/submission of the certified copy of this order.