

(1990) 11 GUJ CK 0038
In the Gujarat High Court

Hyderkhan Lalkhan Pathan

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 07-11-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 401, 402
Prisons Act, 1894 — Section 11, 46, 46(4), 52, 59
Transfer of Prisoners Act, 1950 — Section 3

Citation : (1992) 1 GLR 61

Hon'ble Judges : R.A. Mehta, J;K.G. Shah, J

Bench : Division Bench

Judgement

R.A. Mehta, J.—The petitioner-Prisoner challenges the order of punishment imposed by respondent No. 3-Superintendent of Sabarmati Central Jail and confirmed by Inspector General of Prisons. The petitioner had absconded and was apprehended by Police after 799 days and he thereby committed prison offence.

2. The petitioner was involved in a murder case in 1974 and was arrested on 5-8-1974. He was tried and convicted by the Sessions Court, Bombay and was awarded death sentence subject to the confirmation by High Court. That judgment was pronounced on 16-10-1975. The High Court of Bombay confirmed the conviction, but awarded the sentence of life imprisonment. Thereafter on 15-4-1977, the petitioner was transferred from Central Jail, Yeravada (Maharashtra) to Sabarmati Central Jail in Gujarat.

3. On 8-4-1985, the petitioner was released on parole for seven days and he overstayed by 116 days unauthorisedly and surrendered on 10-8-1985.

4. The petitioner was thereafter released by the High Court on parole on 28-6-1986 for seven days and that parole was subsequently extended upto 20-7-1986. However, the petitioner did not surrender at all and overstayed and ultimately he was arrested by Police on 26-9-1988. After his arrest, he was tried for the other offences said to have been committed by him while he was

absconding. They are Sessions Cases Nos. 114 and 115 of 1989, Criminal Case No. 3907 of 1988 and Terrorist Criminal Cases Nos. 7 and 8 of 1989. In all these cases, he has been acquitted.

5. In respect of the prison offence of not surrendering for 799 days, a Jail Khatla was held and the Superintendent of Jail had passed an order punishing the petitioner-Prisoner for the prison offence of late surrender by 799 days by imposing punishment of cut of remission (excluding state remission) for four days per day of late surrender and if the present remission was not sufficient, it was directed to be recovered from remissions likely to be earned by the said convict in future. Total cut of remission was of $799 \times 4 = 3196$ days and punishment of forfeiture of surety amount of Rs. 500/- and recovery of amount of Rs. 500/- of personal bond was also imposed.

6. As per Rule 1285 of the Bombay Jail Manual, punishment of forfeiture of remission in excess of 15 days is required is to be confirmed by the Inspector General of Prisons and the Inspector General of Prisons had confirmed the same by his order dated 22-2-1989 with a modification and the punishment for overstay of 799 days was reduced from 3196 days to 906 days etc. and this order came to be challenged by way of Special Criminal Application No. 347 of 1989 which was allowed by the Division Bench by its judgment dated 9-2-1990 on the ground that the Inspector General of Prisons, while confirming the order, had not given an opportunity of hearing to the petitioner and the Inspector General of Prisons was directed to proceed further with the proposal of punishment made by the Superintendent of Jail in accordance with law and the decision was to be taken before March 16, 1990.

7. Thereupon, the petitioner was heard by the Inspector General of Prisons and ultimately he passed the order dated March 16, 1990 (Annexure "G" to the petition) and did not confirm the cut of remission of 3196 days reducing it to the cut of 906 days which was the remission earned by the petitioner upto that date and he also further directed that the petitioner shall be debarred from getting any remission in future and also confirmed the order of forfeiture of deposit and the surety amount.

8. The learned Counsel for the petitioner has challenged this order on the following grounds:

(i) That the petitioner is a convict of Maharashtra and the Government of Maharashtra has passed the order of release of the petitioner on completion of 16 years imprisonment including all remissions on 15-1-1987 at Annexure "C" and the petitioner is governed by Maharashtra Prisons Rules and Maharashtra Jail Manual and the only competent authority is the authority in Maharashtra and not in Gujarat.

(ii) That the punishment is illegal and beyond the maximum punishment provided under Sections 51A and 52 of the Prisons Act.

(iii) That the punishment is otherwise also arbitrary, excessive and maximum that could have been imposed by the prison authority, and

(iv) That the order is in violation of the principles of natural justice as the petitioner was not given show cause notice and was not disclosed the material on which the Inspector General of Prisons relied while passing the order and the petitioner was not allowed to be represented by a lawyer.

9. Section 3 of the Transfer of Prisoners Act, 1950 provides that where any person is confined in a prison in a State, the Government of that State may, with the consent of the Government of any other State, may by an order provide for the removal of the prisoner from that prison to any prison in the other State. There are reciprocal arrangements for transfer of prisoners between the State of Gujarat and State of Maharashtra. The heading "Removal of Prisoners" at page 527 of the Maharashtra Prison Manual contains nonstatutory rules. Rule 10 is regarding transfer of prisoners under reciprocal arrangement and it says that transfer under reciprocal arrangement is the transfer of a prisoner convicted in a State which is not his home State to his home State. It is also noted that Maharashtra State has entered into reciprocal arrangements with State of Gujarat and other States and the following Rules are framed under the reciprocal arrangements. Rule 9 of the Reciprocal Arrangement reads as follows;

9. A prisoner transferred under reciprocal arrangement shall be governed by the Prison Rules of the State to which he has been transferred. The appropriate Government, as defined in Section 402 of Criminal Procedure Code, will be an authority to order premature release of such prisoners u/s 401 of Criminal Procedure Code.

10. As far as the prison offences are concerned the authority competent to punish the prison offender is the Superintendent of Prison as per Sections 46, 48A and 52 of the Prisons Act and the Inspector General of Prisons is the appellate authority. Section 6 provides that for every prison, there shall be Superintendent and Section 11 provides that subject to the orders of the Inspector General the Superintendent shall manage the prison in all matters relating to discipline, labour, expenditure, punishment and control. Thus, there can be no manner of doubt that in respect of prison offences, it is the Superintendent of that prison alone who is competent to deal with the prison offences and punishment of the prison offenders. In the present case, the petitioner is a prisoner in Ahmedabad Central Jail duly transferred to that Jail and, therefore, the prisoner is subject to the discipline of that Jail and if he commits any prison offence, he is subjected to be dealt with and punished by the Superintendent of that Jail subject to the orders of the Inspector General of Prisons of that State. Therefore, the contention that only Maharashtra authorities are competent to deal with the prisoner must fail.

11. The learned Counsel for the petitioner next submitted that under Sections 51 B and 52, the maximum punishment for breach of condition of parole is two

years and for other prison offences, the maximum punishment is one year on conviction by a judicial forum and, therefore, the prison authorities could not have imposed larger punishment than what could have been imposed at a regular trial by a judicial forum. As against that, the learned Counsel for the respondents has submitted that u/s 48A read with Rule 1287 of the Jail Manual, the Jail authorities are empowered to impose punishment of forfeiture and loss of privilege admissible under remission system. Rule 1287 puts a ceiling of maximum cut of five days of remission for each day of overstay. Section 48A and Rule 1287 read as follows:

48A. Punishment for breach of conditions of suspension or remission of sentence or of grant of furlough:

If any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough 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 or privileges admissible under the remission or furlough system, or
- (4) loss of such other privileges as the State Government may by general or special order, direct.

Rule 1287:

In each case of late surrender or breach of any of the conditions of furlough or parole, the necessary punishment or punishments should be awarded by the Superintendent of Prison with due regard to the circumstances of each case. All the punishments mentioned below or in Section 48A of the Prisons Act, 1894 need not necessarily be awarded in each case but it is left to the discretion of the Superintendent to decide which particular punishment or punishments should be awarded. If, in certain cases, the Superintendent is satisfied that the overstay was for good or sufficient reasons, he may excuse the prisoner. However, before awarding any punishment, the Superintendent should invariably obtain a prisoner's explanation in each case of overstay of period or breach of any conditions of furlough or parole.

- (1) A maximum cut 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 in future for such period as the Superintendent may direct;

- (2) Stoppage of canteen concession for a period of not less than one month and not more than three months;
- (3) Withholding concession of either interviews or letters or both, for a maximum

period of three months.

(4) In cases of furlough, the furlough period not to be counted towards sentence.

Section 51B deals with the offence of breach of conditions of release on parole or furlough. One of the conditions of such release is that he shall surrender on expiry of the period of parole or furlough and on his failure to surrender that time, there is breach of condition and the offence is complete and for that breach, he can be prosecuted in a Criminal Court and there the maximum punishment would be two years. However, this Section 51B does not take that situation anywhere where the breach is committed and the prisoner has overstayed for a long period. Section 59 of the Prisons Act enables the State Government to make Rules consistent with the Act.

(1) defining the acts which shall constitute prison offences;

(2) fixing the punishment admissible under this Act which shall be awardable for commission of prison offences or classes thereof.

In exercise of these powers, Rule 1287 quoted earlier is enacted. It specifically prescribes that in a case of late surrender, necessary punishments should be awarded by the Superintendent of Prison with due regard to the circumstances of each case and it is left to the discretion of the Superintendent of Jail to decide as to which particular punishment mentioned in the Rule or Section 48A of the Act shall be imposed and it specifically provides that the punishment of cut in remission can be a maximum cut of five days remission for each day of overstay. Therefore, under this provision, the prison authorities have the power to impose punishment of cut of remission of five days for each day of overstay. In respect of overstay, the Criminal Court cannot deal with u/s 51B and cannot punish the prisoner for that act. Therefore, the maximum punishment of two years u/s 51B is in respect of the offence which is committed and completed on breach of the condition of parole whereas Rule 1287 deals with the situation of late surrender and provides for punishment. Therefore, it cannot be said that the maximum punishment prescribed by Section 51B is in any way related or relevant for the purpose of punishment under Rule 1287.

12. Section 52 deals with an entirely different situation, i.e., where the Superintendent of the Jail is of the opinion that having regard to the frequency or otherwise of the offence committed, the prisoner is not adequately punishable by infliction of punishment which he has power under this Act to award. It is under these circumstances that the Superintendent may order such prisoner for judicial trial and upon conviction, he may be sentenced to a term of imprisonment which may extend to one year or he may sentence him to any other punishment enumerated in Section 46. Therefore, u/s 52, even the judicial Court is empowered to impose the punishment enumerated u/s 46(4). Section 46(4) includes the punishment of loss of privileges admissible under remission system. Therefore, this cannot be any guide to limit the powers of the Jail authorities to impose punishment. Moreover, such criminal prosecution is to be resorted only

when the Jail Superintendent is of the opinion that he himself does not have that power to adequately punish the prisoner-offender. In a given case of short sentence of say one year, if the prisoner does not surrender after the expiry of parole or furlough and overstays by a year or two, no punishment of forfeiture of remission and furlough would adequately punish such prisoner. In such a case, the Jail Superintendent may form an opinion that it is not possible for him to adequately punish the offender and, therefore, he may prosecute such offender u/s 52 of the Act and additional imprisonment can be awarded.

13. There is nothing inconsistent between Section 48A and Rule 1287 on one hand and Section 51B or Section 52 on the other hand. Therefore, the contention that the punishment is beyond these provisions has no merit and it must fail.

14. The learned Counsel for the petitioner has also submitted that the punishment is excessive, arbitrary and maximum and would shock judicial conscience. The petitioner had been released on parole and he had to report back on 20-7-1986. However, he did not surrender on that day and was absconding and not available. It was only about after two years that he was apprehended and arrested by Police on 26-9-1988 and, thus, there is an admitted position that he overstayed by 799 days. He submitted before the Superintendent of Jail that due to illness of his mother, he could not surrender in time, but that explanation is not accepted. Before the Inspector General of Prisons, he has submitted that due to his family circumstances, he could not surrender early. That explanation is also not accepted. In view of the admitted facts, it cannot be said that the punishment is excessive or arbitrary. In fact, the maximum punishment to be imposed under the law is not possible to be imposed on this petitioner because maximum cut of five days remission would mean that maximum punishment could be loss of 3996 days. However, the Superintendent of Jail has imposed the punishment of four days of cut for each day of overstay. Even that was incapable of implementation because the future possible remissions would not be so much. Therefore, the only punishment that could be imposed in the circumstances was that the petitioner was made to forfeit all the past remissions earned by him (except State remission) and also to forfeit his future remissions. This is permissible and provided in Rule 1287. The punishment cannot be said to be excessive and arbitrary.

15. The learned Counsel for the petitioner has submitted that there is breach of principles of natural justice and, therefore, the impugned order is bad. The learned Counsel for the petitioner has submitted that after the High Court set aside the order of Inspector General of Prisons and remanded the matter back to decide afresh after affording an opportunity of hearing to the petitioner, the petitioner's advocate had made a written request on 19-2-1990 that the petitioner desired to be heard through advocate and that the advocate be informed about the date of hearing. The petitioner also made his written representation dated 11-3-1990 (Annexure "F" to the petition) which is obviously drafted by a lawyer. Therein, the grievance is made that his advocate has not

been informed about the date of hearing and, therefore, he could not remain present in the proceedings. The petitioner was informed about the date of hearing and he has made a written representation and that representation is drafted by a lawyer. In these circumstances, it cannot be said that there is any denial of reasonable opportunity of hearing and making effective representation. After the petitioner was heard by the Inspector General of Prisons, the petitioner himself has given a writing (Annexure "III" to the affidavit-in-reply at page 79) wherein he has stated that he has been given sufficient opportunity to defend and to make representation. The lawyer's personal representation in such domestic proceeding is ordinarily not contemplated. Therefore, there is no breach of principles of natural justice merely because the petitioner was not heard through his lawyer. It is not his case that the lawyer was present on the date of hearing and the authority had refused to hear him.

16. The learned Counsel for the petitioner has also submitted that there is violation of the principles of natural justice because the Inspector General of Prisons had relied on the material which is irrelevant and even if it is relevant, it is not disclosed to the petitioner. It is submitted that the order shows that the authority has taken into consideration the past history of late surrender by 116 days and he was punished for the same and that while he had overstayed, he was involved in other criminal offences. These facts have been found from the order of Superintendent of Jail wherein it is mentioned that the prisoner is habitual of late surrender and had surrendered late by 116 days and that he had also committed offences during the period of his absconding. Therefore, when this order was for confirmation before the Inspector General of Prisons, the petitioner had to his notice all these facts and it was open to him to make his submissions and on this count, there is no infirmity in the impugned order.

17. These were the only points raised and all of them fail. Hence the petition is dismissed. Rule discharged.

The learned Counsel for the petitioner requests that the parole which is granted till today may be extended further to enable the petitioner to obtain further orders from the higher forum. In the facts and circumstances of the case, the request is rejected. It is open to the petitioner to approach the higher forum and obtain appropriate orders.