

(2011) 04 BOM CK 0142

In the Bombay High Court

Case No : Criminal Writ Petition No. 217 of 2011

Imran Khan Sardar Khan

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Constitution of India, 1950 — Article 20(2)

Criminal Procedure Code, 1973 (CrPC) — Section 221(1), 221(2), 300, 300(1), 300(4)

Maharashtra Prisons Manual, 1979 — Rule 26

Citation : (2012) BomCR(Cri) 815 : (2012) CriLJ 1367

Hon'ble Judges : V. K. Tahilramani, J;M. L. Tahauyani, J

Bench : Division Bench

Advocate : Neerja Choube, for the Appellant; Nandita Tripathi, APP, for the Respondent

Judgement

Mrs. V.K. Tahilramani, J.—Heard Ms. Choube, learned counsel for the petitioner and Mrs. Tripathi, APP for the respondents. Rule. By consent, rule is made returnable forthwith and the matter is heard finally. The petitioner was released on parole on 29-10-2010, however, he did not return back to the prison in time. There is overstay of 45 days on his part. The grievance of the petitioner is that on account of this overstay, remission of 4 days has been cut for each day of overstay. In addition thereto he is not appointed as Night Watchman. Hence, he has claimed that it is a case of double jeopardy.

2. The petitioner claims that for this act of overstay he cannot be punished twice for the same offence i.e. for 45 days of his overstay 180 days remission has been deducted and in addition he has not been appointed to the post of Night Watchman.

3. From the perusal of the record pertaining to the petitioner, it is noticed that the petitioner was released on 6-4-2010 on furlough for two weeks which was extended by another two weeks. He failed to surrender in time and was late by 3 days. Thereafter, the petitioner was released on parole on 29-10-2010 for 30

days. He was further granted extension of 30 days, however, the petitioner did not surrender in time and was late by 45 days.

4. As far as cutting of remission of four days for each day of overstay is concerned, the maximum punishment has not been imposed and in fact lesser punishment has been imposed on him. Looking to the previous record of the petitioner, we do not find any fault with the authority in imposing this punishment.

5. The claim of the petitioner is that in addition he is not being appointed as a Night Watchman, therefore, it is a case of double jeopardy i.e. he has been awarded two punishments for his overstay. It is noticed that the petitioner was never appointed as Night Watchman. Promotion of a prisoner as Night Watchman does not come under the jail punishment under Chapter XXVII of the Prison Manual but appointment of Night Watchman is the discretion of the jail authority.

6. As far as the appointment of Night Watchman is concerned, the prisoners are produced before the Night Watchman Selection Committee. The committee looks into various aspects of the matter including conduct and behaviour of the convict and thereafter the person is appointed as Night Watchman. It is not the right of a convict to be appointed as Night Watchman but it is at sole discretion of the jail authority. It is also noticed that the petitioner has never made any request to promote him as Night Watchman, hence, the question of promoting him as Night Watchman does not arise. The habit of the petitioner of surrendering late from leave shows that he is irresponsible towards his duty, such a person cannot be thought to be suitable to be appointed as Night Watchman in the prison. Therefore, we cannot find any fault with the authority for not appointing him as Night Watchman.

7. As observed earlier by us, the conduct of the petitioner is such that he cannot lay any claim to be appointed as Night Watchman.

8. The argument advanced on behalf of the petitioner is that it is a case of double punishment in the sense that apart from his remission being deducted for the overstay, he is not being appointed as Night Watchman and thus the petitioner has been doubly punished which is violative of Article 20(2) of the Constitution of India.

9. The Apex Court in *Maqbool Hussain Vs. The State of Bombay*, 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.

10. The accused in this case cannot get any benefit, because he has not been punished 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.

11. 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. The stand taken on behalf of the State by the learned A.P.P. is that 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.

12. Section 300 of Criminal Procedure Code also would not be attracted because it covers cases of persons convicted or acquitted earlier and states the situations whereunder, 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 stages 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 as also the explanation thereunder. Subsection (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 purposes of the said section.

13. 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 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 u/s 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.

14. As the necessary ingredients are absent, Section 300 of the Code of Criminal Procedure, 1903 also would not be attracted. Moreover, the principle which is sought to be incorporated into Section 300, Cr. P.C. 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. Though Article 20(2) embodies protection against second trial after conviction for the same offence, its ambit is narrower than the protection afforded by Section 300, Cr. P.C. If there is no punishment for the offence as a result of prosecution, Article 20(2) has no application. However, Section 300 has further widened the protective wings by barring second trial against the same accused on the same facts even for different offence. However, both Article 20(2) and Section 300 do not apply in this case, as it is not a case of second trial.

15. We have already observed that the act of not appointing the petitioner as Night Watchman does not amount to punishment, hence, there is no case of double jeopardy.

16. 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 purposes of the Prison Rules. In the result, we find no merit in this petition. Rule discharged. The fees of the Advocate appointed for the petitioner are quantified at Rs. 750/-. Office to communicate this order to the petitioner, who is in Central Prison, Nagpur.