

(2017) 04 BOM CK 0124
In the Bombay High Court
Case No : 308 of 2017

Javed Bashir Bagwan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-04-2017

Acts Referred:

Indian Penal Code, 1860, Section 302,
Section 498A -
Prisons (Bombay Furlough and Parole) Rules, 1959, Rule 13, Rule 10(5)

Citation : (2017) 04 BOM CK 0124

Hon'ble Judges : S.S.Shinde, K.K.Sonawane

Bench : DIVISON BENCH

Advocate : Shantanu N. Udhan, ?P.V.Diggikar

Final Decision : Disposed off

Judgement

1. Heard.

2. Rule. Rule made returnable

forthwith, and heard finally with the consent
of the parties.

3. The relevant facts of the case as

disclosed in the memo of Petition are as
under:

The petitioner is convicted by the

Sessions Court at Ahmednagar for the offences

punishable under Sections 302 and 498-A of

the Indian Penal Code. He is sentenced to

undergo life imprisonment.

4. In the year 2012, the petitioner had applied for furlough leave to respondent no.2 i.e. Dy. Inspector General, Western Region, Pune. Respondent no.2 was pleased to sanction / approve such leave to the petitioner on 17th August, 2012. After completing the requisite formalities, the petitioner came to be released from Yerwada Central Prison, Pune, on 16th October, 2012 for a period of 14 days. However, it is transpired that, during the said period, the petitioner's father became ill, and the petitioner was required to cater to him and nurse him. Therefore, the petitioner applied for another 14 days leave extension to respondent no.2. Upon conducting the requisite enquiries, respondent no.2 - Dy. Inspector General Prisons, Western Region, Yerwada, Pune-6, approved extension of furlough leave to the petitioner for further period of 14 days. Thus, the petitioner was to surrender on 14th November, 2012.

5. On 14th November, 2012, the petitioner had left his house early. However, on account of the agitation by the sugarcane farmers, he could reach the prison only at 3.00 p.m. on 14th November, 2012. However, the concerned employees of the Jail, who were on duty at main gate of the Yerwada

Prison, did not permit the petitioner to surrender, as the prison gates were closed for the day on account of there being a holiday owing to "Moharam" festival. An authorities concerned directed the petitioner to surrender on the next day i.e. on 15th November, 2012. On account of these transpirations, the petitioner was forced to surrender on 15th November, 2012. Once having so surrendered, the petitioner also applied to respondent no.2 - Dy. Inspector General Prisons, Western Region, Yerwada, Pune-6 to grant him one day leave extension. However, without at all considering the facts and circumstances involved, respondent no.2 - Dy. Inspector General Prisons, Western Region, Yerwada, Pune-6, confiscated/forfeited the petitioner's deposit amount of Rs.10,000/- by holding that, he was late by one day. This was done by respondent no.2 - Dy. Superintendent of Prisons by taking aid of the provisions of the Maharashtra Prison Rules, 1979, particularly, sub-rule (5) of Rule 10 of the Prisons [Bombay Furlough and Parole] Rules, 1959, chapter 37.

6. The petitioner has also made a written representation dated 31st December, 2016, to the High Court, inter alia, praying that respondent no.2 be directed to grant one day leave extension or in the alternative, to

set aside the confiscation of his cash surety amount of Rs.10,000/-. The Superintendent of Visapur Open District Prison forwarded the petitioner's representation to the Registrar of this Court, vide his communication dated 16th January, 2017.

7. The petitioner was prevented from approaching the Prison on the scheduled date on account of genuine reason. The petitioner had left his house early on 14th November, 2012, however, on account of the agitation by the sugarcane farmers, the petitioner was late in reaching the prison on 14th November, 2012. However, the petitioner, on account of aforesaid genuine reason, could reach the prison only at 3.00 p.m. Thus, the petitioner was late by a mere matter of four and half hours. That apart, on reaching the prison, the authorities concerned informed the petitioner that, the prison gates had been closed early on account of "Moharam" holiday on that day i.e. on 14th November, 2012.

These authorities directed the petitioner to come on the next day i.e. on 15th November, 2012. Thus, it is crystal clear that, the petitioner had made every attempt to reach and to surrender himself on 14th November, 2012. On account of the certain unavoidable circumstances, which were beyond the petitioner's control, he could make it to the

prison only by 3.00 p.m. on 14th November, 2012. The prison gates were closed early on account of there being a "Moharam" holiday on 14th November, 2012. Hence, the petitioner cannot be blamed for the said delay in surrendering, and consequently, cannot be punished for the same.

8. Perusal of the impugned order

itself, would reveal that, the petitioner had been to surrender on 14th November, 2012, itself. The statements of Shri Rathod and Shri Zopale would reveal that, the petitioner was not permitted to surrender and was directed to surrender on the next day i.e. on 15th November, 2012. The impugned order also reveals that, the statements of these two persons depict the prison gate was closed early on account of "Moharam" holiday.

9. The learned counsel appearing for the petitioner invites our attention to Rule 13 of the Prisons [Bombay Furlough and Parole] Rules, 1959, and submits that, the said provision provides for extension of leave. However, respondent no.2 has given more importance to the Circular/Notification, dated 2nd December, 2003, issued by the Home Department, Government of Maharashtra, Mumbai. It is submitted that, the said Circular/Notification cannot prevail over the statutory Rules. It is submitted that, when

the authority has discretion to extend the period of furlough, keeping in view the reasons stated by the petitioner in his application for not reporting back immediately in the morning hours on 14th November, 2012 to the Jail, after completion of 14 days leave. Therefore, in view of unavoidable difficulties/ circumstances faced by the petitioner to reach to the Yerwada Central Prison, Pune, respondent no.2 ought to have extended period of furlough leave by one day.

10. The learned counsel appearing for the petitioner further invites our attention to the judgments of the Bombay High Court at Principal Seat in the case of Nandkishor Kaluram Dudhne Vs. The Superintendent, Yerwada Central Prison, Pune & anr. in Writ Petition No.3101 of 2013, decided on 17th December, 2013, and in the case of Sanjay Jaiwant Kamble Vs. The State of Maharashtra in Criminal Writ Petition No.2965 of 2009, decided on 15th February, 2010, and submits that, in the similar fact situation, in afore-mentioned cases, the High Court allowed the Petition, observing that, there was no any willful or deliberate breach on the part of the petitioner therein in reporting back to the Jail after availing of furlough and allowed the Writ Petition thereby holding

that, there was no justification for forfeiting the cash security amount of Rs.8,000/-. He submits that, in the case of Sanjay Jaiwant Kamble [supra], the petitioner therein surrendered to the prison 7 days late, since he was admitted in Hospital at Alibag, and keeping in view the reasons for not reporting back to the Jail, the High Court allowed his Petition and set aside the order of forfeiture of surety amount.

Therefore, the learned counsel appearing for the petitioner submits that, in the peculiar facts and circumstances of this case, this Court may allow the petition by setting aside the impugned order passed by respondent no.2 - Dy. Inspector General of Prisons, Western Region, Yerwada, Pune-6.

11. On the other hand, the learned APP appearing for the respondent-State, relying upon the affidavit-in-reply, submits that, respondent no.2 - Dy. Inspector General of Prisons, Pune, after considering the relevant Rules and Circulars, has rightly passed the impugned order.

12. We have given careful consideration to the submissions of the learned counsel appearing for the petitioner and the learned APP appearing for the respondent - State. With their able assistance, perused the grounds taken in the Petition, annexures

thereto, and the reply filed by the respondents. It appears that, the petitioner has undergone actual imprisonment of 11 years, 04 months and 23 days [till 28th February, 2017]. If the reply filed by respondents is perused, after including under-trial period of detention and other remissions, the petitioner has already undergone the period of 16 years, 06 months and 09 days imprisonment as on 28th February, 2017. It further appears that, respondent no. 2 - Dy. Inspector General of Prisons, Pune, granted 14 days furlough leave on certain terms and conditions on 17th August, 2012. The petitioner was released from Yerwada Central Prison, Pune, for a period of 14 days on 16th October, 2012, for the period from 17th October, 2012 to 30th October, 2012, and the petitioner was given intimation to surrender back in the prison on 31st October, 2012.

13. It further appears from the affidavit-in-reply filed by the respondents that, the petitioner applied for extension of 14 days furlough leave, since the petitioner's father fell sick, and accordingly, 14 days further extension was granted, and the petitioner was due to surrender in the Prison on 14th November, 2012. It is admitted position that, the petitioner surrendered on 15th November, 2012,

instead of 14th November, 2012, and without considering and accepting the plausible explanation of the petitioner, the respondents held petitioner guilty of committing a prison offence under Rule 10 [5] of the Prison [Bombay Furlough and Parole] Rules, 1959, and accordingly, the petitioner was proposed to be punished by issuing a "strict warning". According to the respondents, the said punishment was judicially appraised by the Sessions Court, Pune. In addition to the said action, deposited surety amount of Rs.10,000/- was confiscated, and deposited in the Government Treasury. It further appears that, the petitioner's request to the respondents to recall the said order of forfeiting the surety amount was not favourably considered. It appears that, the respondents carried impression that, the petitioner intentionally breached the conditions laid down in the order, and accordingly, as per the Prison Rules the surety amount was confiscated and came to be deposited in the Government Treasury.

14. Upon careful perusal of the explanation given by the petitioner, it appears that, the petitioner had left his house early on 14th November, 2012. However, on account of the agitation by the sugarcane

growers, he could not reach to the Prison. It further appears that, he could reach the Prison only at 3.00 p.m. and by that time, the prison gates had been closed early on account of "Moharam" holiday on that day i.e. on 14th November, 2012, and therefore, the authorities asked the petitioner to come on next day. Therefore, if the aforesaid explanation given by the petitioner is considered, it appears that, due to aforesaid unavoidable circumstances, which were beyond petitioner's control, he could reach to the Prison only by 3.00 p.m. on 14th November, 2012, but as already observed, the gates of the prison were closed on account of "Moharam" holiday on that day. The petitioner has also relied upon the statements of Shri Rathod and Shri Zopale that, he was not permitted to surrender on 14th November, 2012, and was asked to surrender on next day i.e. on 15th November, 2012.

15. In our opinion, in the peculiar facts and circumstances of this case, respondent no.2 ought to have accepted the explanation given by the petitioner, and therefore, we are inclined to consider the prayer of the petitioner.

16. Upon perusal of the operative part of the impugned order, it appears that, the extended period of furlough leave of 14 days

is cancelled by respondent no.2, relying upon the Circular issued by the Home Department, Government of Maharashtra, dated 2nd December, 2003. Upon perusal of the discussion in the impugned order, and also para 7 of the affidavit-in-reply, it appears that, the Deputy Inspector General [Prisons], Western Region, Pune i.e. respondent no.2, had sanctioned/granted extension of 14 days furlough leave, by his order bearing No. GFP/5812/2012, dated 21st December, 2012. Therefore, such extension of furlough leave is granted by respondent no.2 by the aforesaid order. It is unacceptable that, the very same authority i.e. respondent no.2, who passed the order and extended the furlough leave of 14 days earlier, subsequently relying upon the Circular, has disapproved/cancelled extension of 14 days furlough leave. Respondent no.2, while granting/sanctioning extension of furlough leave, ought to have kept in view the relevant Circulars / procedure. However, respondent no.2, by the afore-mentioned order, has sanctioned/granted extension of 14 days furlough leave, and therefore, he cannot disown earlier order passed by him. In the light of the discussion in the foregoing paragraphs, we are of the opinion that, in the peculiar facts and

circumstances of this case, the petition deserves to be allowed for the reason that, though the petitioner went to surrender on 14th November, 2012 at 3.00 p.m. i.e. due date to surrender, the gates of the Jail were closed on account of "Moharam" festival, and to that effect, the statements of the employees working in the Yerwada Prison namely; Shri Rathod and Shri Zopale are recorded wherein they have stated that, they asked the petitioner to come on next day i.e., on 15th November, 2012, for reporting in the Jail.

17. Therefore, in the light of the discussion herein above, in the peculiar facts and circumstances of this case, we are of the opinion that, the impugned order cannot sustain, hence the impugned order is quashed and set aside.

18. The rule is made absolute on above terms. The Criminal Writ Petition stands disposed of accordingly.

19. We appreciate able assistance rendered by the learned counsel appearing for the petitioner.