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**(1990) 11 GUJ CK 0018**  
**In the Gujarat High Court**

Khimji Siddik

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

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**Date of Decision :** 09-11-1990

**Acts Referred:**

Prisons Act, 1894 — Section 46, 46, 48A, 48A

**Citation :** (1991) 1 GLR 345

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

**Bench :** Division Bench

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**Judgement**

R.A. Mehta, J.—In all these petitions filed by different prisoners, a grievance is made regarding refusal of furlough due to them on the ground that their conduct is not satisfactory, in view of the jail punishment imposed on each of them for jail offence. In most of the cases, the jail offence is of overstay after the expiry of the period of parole/furlough, for which punishment by way of cut in remission has been imposed. In other cases, for other jail offences, the punishment of cut in remission is imposed.

According to the respondents, under Rule 4(6) of the Prisons (Bombay Furlough and Parole) Rules, 1959, furlough can be refused to the prisoners whose conduct is not satisfactory, and under Rule 4(10) of the said Rules, furlough can be refused to the prisoners who have defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough. The respondent-authorities have relied upon the judgment of this Court in Special Criminal Application No. 328 of 1986 decided on 23-2-1987.

2. On behalf of the petitioners, it is submitted that having regard to the nature and gravity of the prison offence, appropriate and commensurate punishment has been imposed on them by the prison authorities and even though the punishment of forfeiture of furlough could have been imposed, it has not been imposed by the punishing authority, and now when the furlough has become due, it is not open to the sanctioning authority to refuse furlough on the ground of the above punishment, and that would amount to awarding additional and

double punishment in respect of the same prison offence, and that such refusal of furlough would be illegal as held by the Division Bench of this Court in the case of Atulji Magaji v. State of Gujarat and Ors. 1984 GLH 139 , and by the Full Bench of this Court in the case of Bhikhabhai Devshi v. State of Gujarat and Ors. . It is further submitted that in any case the prison offence should be of such gravity that the authority comes to the conclusion that the conduct of the prisoner is not satisfactory enough to release him on furlough. It is not that every unsatisfactory conduct however trivial w Bhikhabhai Devshi Vs. State of Gujarat and Others, ould result into forfeiture or refusal of furlough. The particulars of the prison offences and the punishments in the present cases are as under:

| -----    |                                                                                          |                                                                             |         |                     |                                                                                          | Spl.                                |         |
|----------|------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|---------|---------------------|------------------------------------------------------------------------------------------|-------------------------------------|---------|
| Criminal | Offence                                                                                  | Punishment                                                                  | Appln.  | No.                 | 1                                                                                        | 2                                   | 3       |
| -----    |                                                                                          |                                                                             |         |                     |                                                                                          | 1155                                | of      |
| 1990     | Overstay by 21 days                                                                      | 105 days cut in the remission.                                              | 1419    | of 1990             | Carelessness in duty                                                                     | Reduction in the grade for 2 years. | 1476    |
| of 1990  | Overstay by 11 days                                                                      | 33 days cut in the remission.                                               | 1477    | of 1990             | Overstay by 105 days                                                                     | 105 days cut in the remission.      | 1490    |
| of 1990  | Overstay by 5 days                                                                       | 20 days cut in the remission.                                               | 1552    | of 1990             | Overstay by 30 days                                                                      | 60 days cut in the remission.       | 1634    |
| of 1990  | Roti Khatala 15 days cut in the remission and stoppage of canteen facility for 3 months. | 1650                                                                        | of 1990 | Overstay by 12 days | Pending.                                                                                 | 1750                                | of 1990 |
| of 1990  | Carelessness in duty                                                                     | Reduction in grade for ever, and stoppage of canteen facility for 3 months. | 1751    | of 1990             | Roti Khatala 15 days cut in the remission and stoppage of canteen facility for 3 months. |                                     |         |

3. Rule 2 of the Prisons (Bombay Furlough and Parole) Rules, 1959, provides for the "Sanctioning Authority", and it is mentioned that the Inspector General of Prisons shall be competent to grant furlough to a convicted prisoner. Rule 4(5), (6) and (10) reads as follows:

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

(5) Prisoners, who, in the opinion of the Superintendent of the Prison, show a tendency towards crime.

(6) Prisoners whose conduct is, in the opinion of the Superintendent of the Prison, not satisfactory enough.

(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.

Rule 8(5) provides that if furlough is not recommended, adequate reasons therefore, shall be given. Rule 9 provides that a prisoner may make a fresh application for furlough six months after the rejection of his previous application for furlough.

Note 3 to Rule 3, provides that if at any time, a prisoner who could have been granted furlough is either not granted or is refused the same, the period for which he could have been granted the furlough shall not be carried forward but shall lapse.

4. The above are the relevant Rules, and the question which the Court has to consider is whether the petitioners who have overstayed on the expiry of their furlough or parole period, and who have been punished by the competent authority for the same by imposing the punishment of cut in remission, and the punishment of the forfeiture of furlough is not imposed, can be refused furlough on the ground that he had committed prison offence of overstay on the expiry of their furlough or parole period, or on the ground that his conduct is not satisfactory enough.

5. In some of the above cases, the punishment has been awarded for other prison offences by way of cut in remission, but the punishment of forfeiture of furlough is not imposed. In such cases also, the furlough has been refused on the ground that the conduct of the concerned petitioner is not satisfactory.

6. u/s 46 of the Prisons Act, 1894 several punishments have been prescribed. One of them is loss of privileges admissible under the remission or furlough system. u/s 48A of the said Act, for breach of conditions of grant of furlough or parole, apart from any other punishment loss of privileges admissible under the remission or furlough system is also prescribed.

7. Rule 1287 of the Bombay Jail Manual provides that in case of late surrender, the necessary punishment or 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 to decide which particular punishment or punishment mentioned in Section 48A of the Prisons ACT, or in the said Rule 1287 may be imposed. Amongst the punishments mentioned in that Rule, are the following punishments:

(1) A maximum cut of days" remission for each day of overstay;

(2) ...

(3) ...

(4) In case of furlough, the furlough period not to be counted towards sentence." Thus, at the time of considering the nature and gravity of the prison offence, the punishing authority exercises the discretion of awarding or not awarding the various punishments permissible under the aforesaid Rules, and appropriate and commensurate punishment is awarded. It was open to the punishing authority, having regard to the gravity of the offence to impose the punishment of forfeiture of furlough in combination with or without, the punishment of cut in remission. In none of the present cases, the punishment of forfeiture of furlough has been imposed, and the punishment imposed is only of cut in remission, and the cut in remission, is also not the maximum permissible of five times the

period of overstay. In these circumstances, the sanctioning authority has to consider whether the nature and gravity of the prison offence is so serious enough as would disentitle the prisoner to the right and privilege of furlough.

8. The respondents have relied on the judgment of the Division Bench (Coram: M.B. Shah and P.M. Chauhan, JJ.) dated 23-2-1987, in Special Criminal Application No. 328 of 1986. In that case, at the time of distribution of food, some prisoners tried to jump the queue, and the petitioner-prisoner in that case had objected to the same, and some quarrel had ensued wherein the bowl containing vegetable was over-turned and on the charge of quarrel and overturning the vegetable vessel, the prisoner was punished by way of 20 days of cut in remission. The Division Bench held that the petitioner's conduct could not be held to be good conduct, which would entitled him to furlough leave, and therefore, the order refusing furlough, could not be said to be in any way erroneous.

9. In that case, the attention of the Division Bench was not drawn to the earlier Full Bench and the Division Bench judgments of this Court. In the case of Atulji Magaji (supra) the facts were that the petitioner in that case had committed prison offences of taking Khichadi instead of loaves, and purchasing lemons from the jail canteen, and for these two offences, remission of 5 days was cut. The Division Bench in that case held that having regard to the trivial nature of the jail offences as reflected in the order of punishment of cut in remission of 5 days, his conduct cannot be said to be not satisfactory enough that he should not be granted furlough leave. The Division Bench observed that every prison offence does not necessarily render the conduct to unsatisfactory as to result in the refusal of furlough. The Division Bench also observed that a plurality or combination of punishments is also contemplated by the Act and the Rules, but that has to be done consciously having regard to the nature and gravity of the prison offence. The Division Bench also referred to Rule 1316 of the Jail Manual, which- provides that "No prisoner shall be punished twice for the same offence", and if the furlough is refused only on account of jail offence it would be inflicting punishment twice, contrary to the specific provision of Rule 1316 of the Bombay Jail Manual.

10. This judgment of the Division Bench has been approved by the Full Bench in the case of Bhikhabhai Devshi (supra), and has taken the same view in para 24 of the judgment. The Full Bench approved the view taken by the Division Bench that trivial jail offences and minor lapses could not be said to be such as would enable the Superintendent of Prison to form an opinion that the conduct of the prisoner was not satisfactory enough to deprive him of his privilege of furlough, and had that been so, the furlough would have been forfeited by imposing that punishment, and thus, even though the prisoner had committed minor prison offences, he did not forfeit the privilege of furlough, and therefore, the request of the prisoner for furlough was required to be considered on merits. Ultimately, the Full Bench held that "the prison authorities cannot reject as ineligible the request

of due furlough of the prisoners who have surrendered late in past. The authorities have the power and duty to consider grant or refusal of such furlough due to the prisoners, having regard to the facts and circumstances of the case including the fact that the prisoner had surrendered late in past. That would be one of the relevant factors to be taken into account. Another relevant factor to be taken into account will be the view taken regarding the gravity of the offence while imposing punishment u/s 48A of the Act, read with Rule 1287 of the Jail Manual.

11. It seems the attention of the Division Bench which decided Special Criminal Application No. 328 of 1986 on 23-2-1987 was not drawn to these earlier binding judgments. Therefore, the observations made by that Division Bench in that case have to be confined to the facts of that case. However, it can be said that, that judgment does not lay down any principle of law that once a prison punishment is imposed, the prisoner can be said to be disentitled to the privilege of furlough. In each case, the sanctioning authority has to take into consideration whether the conduct of the prisoner is not satisfactory enough, meaning thereby, that the conduct of the prisoner is so unsatisfactory so as to disentitle the prisoner to the privilege of furlough, and while considering that, the sanctioning authority has to bear in mind the fact that for that particular prison offence, commensurate punishment has been imposed and suffered, and that the punishing authority has not considered that prison offence so serious as to invite the punishment of forfeiture of furlough. The sanctioning authority has to bear in mind that fact, while considering the seriousness and gravity of the unsatisfactory conduct of the prisoner.

12. In Special Criminal Applications Nos. 496 of 1981 and 527 of 1981, decided on 5-11-1982 (Nanubhai Bhanjibhai v. State of Gujarat) by M.P. Thakkar, C.J. (as he then was) and R.C. Mankad, J. the question was regarding Note 3 to Rule 3, and the question was whether furlough could be carried forward or would lapse when it is refused for no fault on the part of the prisoner, and in that case the Division Bench held that when the prisoner is refused furlough not on the ground of any fault on his part, he is entitled to carry forward furlough, and it would not lapse. In that case, the Division Bench held that the prisoners enumerated in Clauses 1 to 3 and 7 to 10 of Rule 4, are not eligible to be released on furlough, and these categories of prisoners do not have right to claim release on furlough. In that case, the Division Bench was only concerned with the question of carrying forward of furlough or lapse thereof when it is refused, and the Division Bench, in that case, was not concerned with the question of validity of refusal of furlough. This judgment of the Division Bench was also considered by the Full Bench in the aforesaid case. The Division Bench held that under Clause (6) of Rule 4, furlough could be refused if, in the opinion of the sanctioning authority, the conduct of the prisoner is not satisfactory, and when that furlough is validly refused, it cannot be carried forward. But the question whether furlough could be refused under Rule 4(6) was not at all under consideration before the Division Bench in that case.

Following the early Division Bench judgment in the case of Atulji and the Full Bench judgment in the case of Bhikhabhai, this Bench has also delivered a judgment on November 6, 1990 in Special Criminal Application No. 1213 of 1990. In that case, the prison offence was of misbehaviour and assault, by the prisoner, and he was inflicted the punishments of cut in remission of 15 days and withdrawal of canteen facilities. But subsequently when the due furlough was applied for, it was refused on the ground of prison offence. In that case, it was held that the punishing authority having considered the gravity of the prison offence had inflicted the punishment of cut in remission only and had not inflicted or imposed the punishment of forfeiture of furlough, and the authority sanctioning furlough cannot mechanically refuse furlough on the ground of the said prison punishment, and that the sanctioning authority has to be satisfied that the conduct of prisoner is so seriously unsatisfactory enough to deprive the prisoner of the privilege of furlough inspite of that punishment not having been imposed by the punishing authority, and inspite of me prisoner having suffered the punishment commensurate with the offence. The sanctioning authority cannot only look at the prison offence, and not to consider the gravity thereof, as considered by the punishing authority.

13. The learned Counsel for the respondents submitted that in the present cases, the unsatisfactory conduct is not only alleged, but it is proved to be unsatisfactory conduct and that unsatisfactory conduct is not wiped off merely because the punishment is undergone. It has been submitted that unsatisfactory conduct remains unsatisfactory, and therefore, the authority is entitled to take that unsatisfactory conduct into account. Even if that be so, the Court is of the view that, that fact by itself would not make the conduct so unsatisfactory as to unnecessarily result into depriving the prisoner of the privilege of furlough. It has to be a serious prison offence, and not a trivial or minor offence. The triviality or otherwise of the prison offence is reflected in the punishment imposed; and the sanctioning authority, while considering the request for furlough, has to consider all these aspects and without considering the same, mechanically refusing furlough on the ground of prison punishment is clearly illegal.

14. In the result, the action of the sanctioning authority in refusing the furlough applications of these petitioners is quashed and set aside and the respondents are directed to grant furlough leave to these petitioners, on usual terms and conditions.

15. In Special Criminal Application No. 1155 of 1990, the petitioner has also prayed for quashing aside the order of punishment and the consequential effect thereof. However, considering the affidavit-in-reply, this contention has no merit, and prayers (A) and (B) are, therefore, rejected. In Special Criminal Application No. 1419 of 1990, although there is a prayer to quash and set aside the order of punishment, the learned Counsel for the petitioner has not pressed the prayer (D).

16. In the result, all these petitions are allowed by setting aside the orders

refusing furlough to these petitioners, and by directing the respective respondents J to grant the furlough due to the petitioners on usual terms and conditions. Rule is made absolute.