

(2013) 02 BOM CK 0077

In the Bombay High Court

Case No : Criminal Writ Petition No. 2491 of 2012

Shafi Vazruddin Qureshi

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 15-02-2013

Acts Referred:

Constitution of India, 1950 — Article 161, 72
Criminal Procedure Code, 1973 (CrPC) — Section 432, 433A
Penal Code, 1860 (IPC) — Section 149, 302, 307
Prisons Act, 1894 — Section 11, 46, 59

Citation : (2013) 2 ABR 782 : (2013) ALLMR(Cri) 2076 : (2013) 2 BomCR(Cri) 575 : (2013) CriLJ 1660

Hon'ble Judges : A.S. Oka, J;A.P. Bhangale, J

Bench : Division Bench

Advocate : Mihir Desai instructed by Vijay Hiremath, for the Appellant; A.S. Pai, APP for State, for the Respondent

Judgement

A.P. Bhangale, J.—Rule. Heard by consent. Perused affidavits on record. The petitioner was prosecuted pursuant to the FIR No. 355 of 1990 reported at Wanwadi police station in a sessions trial No. 44 of 1991 tried by the Sessions Court Pune, and on 30-06-1994 convicted of offence punishable u/s 302 read with Sections 149 and 307 of the Indian Penal Code, and sentenced inter-alia to suffer rigorous imprisonment for life. The petitioner is undergoing sentence in Yerwada Central Prison, Pune.

2. In August - September 1996, the petitioner was released on furlough leave for a period of two weeks on 5-8-1996. His leave was extended by seven days. He surrendered late in prison by 15 days and was punished by reducing 45 days (3 x 15) with ratio 1:3 days from the remission earned by him. The reason for late surrender was that mother of the petitioner had a heart problem and in August 1996, she was hospitalized in Sassoon Hospital, Pune. In December 1996, the petitioner was released on parole and returned 460 days late on 30-06-1998 for which he was punished for five years. At that time, the petitioner was required to

perform marriages of his two sisters. Approval was not obtained from the Sessions Judge for the prison punishment. The petitioner was transferred to Kolhapur Central Prison, Kalamba, Kolhapur for some time. In 2003-2004, the petitioner was released on furlough leave on 27-11-2003. He had returned late by 14 days on 14-02-2004 for which 56 days were reduced (14×4) from the remission earned by him. At that time, father of the petitioner was seriously ill and the petitioner being elder son had to look after and take care of his father. In 2004-2006, when the petitioner was released on furlough leave, his remission was reduced by 3315 days as he had returned late by 663 days (5×663). This time his father had passed away and the petitioner had to take care of his mother during her iddat period. She was treated for her illness at the home. The petitioner himself got married and a son was born to him.

3. According to the petitioner, he had genuine family reasons to return late on all the four occasions and punishments imposed for returning late to prison upon him were harsh and excessive. The petitioner has already undergone 18 years of actual imprisonment. The petitioner was directed by the State to be prematurely released after completing 22 years of imprisonment. If remissions are counted then the petitioner has already completed 22 years. However, since the petitioner was subjected to prison punishments for late return to the jail as above he is not yet released as his remissions have been cut. The petitioner prayed for to quash and set aside the prison punishments imposed upon him by the prison authorities at Yerawada and Kolhapur and to set him at liberty forthwith.

4. Learned A.P.P. with reference to the affidavit by Shri. Ramesh Kamble, Superintendent of Yerawada prison, Pune submitted that the prisoner-petitioner in this case has undergone period of 18 years 05 months and 05 days till 31-07-2012 inclusive of remission. It is contended that the petitioner has a habit to overstay beyond the period of grant of furlough and/or parole. Learned A.P.P. submitted that the petitioner had to be arrested by the police and brought to the prison when he was granted parole for 30 days on 26-12-1996. He had overstayed for 460 days and his name was removed from the remission system for a period of five years. The petitioner while undergoing imprisonment in Kolhapur prison was granted 14 days furlough leave on 26-11-2003. It was extended by 14 days. The petitioner filed W.P. No. 114 of 2004 when this Court had extended the parole for 23 days more. However, the petitioner had overstayed despite direction by this Court to surrender to the sentence by 31-01-2004. He overstayed by 14 days resulting in deduction of remission by 56 days (14×4). On 20-07-2004, Divisional Commissioner, Pune granted parole to the petitioner for 30 days. The petitioner got it extended by 60 days and then overstayed for 663 days and had to be arrested by the police and brought back to prison. His remission was reduced by 3315 days (663×5). Learned APP submitted that the Sessions Court concerned had accorded judicial appraisal for the deduction of the period of remission. The petitioner was also granted parole on 3-8-2004 when petitioner's brother had threatened the complainant and C.R. No. 3130 of 2004 was reported at Wanwadi police station. Petitioner had visited

the police station with his brother and misbehaved with the police leading to diary entry No. 20 of 2004 dated 13-8-2004. The petitioner had also received the prison punishments for misbehaving with jail staff. On 12-11-2008, he had refused to wear uniform for convict and instead wore civil dress. The petitioner was proceeded under Rule 5(iv) in chapter 27 of the Maharashtra Prison Manual for his blameworthy conduct and his case has been categorized under 22 years. Since on four occasions, he had overstayed, the period of his remission was deducted as per guidelines.

5. The power to grant remission is within exclusive domain of the Sovereign in view of the Articles 72 and 161 of the Constitution of India. Executive as delegate from Sovereign can thus serve public purpose to grant remission in appropriate cases to prisoners undergoing sentence. But this power was never intended to be used or utilized as unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which, in effect mitigates the sentence of punishment awarded and which does not, in any way wipe out the conviction. It is a power to be exercised by the Sovereign against its own judicial mandate. Under Article 161 the Governor of a State have power to grant pardon, reprieves, respites, or remissions of punishments or to suspend remit or commute the sentence of any convict who is under the control of the executive power of the State. In *State of Haryana and Others Vs. Jagdish and Harpal*, , Hon"ble Supreme Court dealt with the issue of clemency power elaborately and held that such powers are unfettered and absolute. Where the State authority frame rules under Article 161 of the Constitution, the case of the convict is required to be considered under the said rules. Even if the life convict does not satisfy the requirements of the remission rules or of the short sentencing scheme, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency vested in them, under the provisions of Articles 72 and 161 of the Constitution. Therefore, for passing such orders of clemency power could be exercised by the President/Governor having regard to restriction prescribed by the legislature u/s 433A of the Cr. P. C. This provides that minimum sentence of 14 years required to be actually served in the prison by a convict sentenced to imprisonment for life before power to release the convict is considered by the Sovereign authority. The convict undergoing life imprisonment has no automatic right to be released soon after completion of minimum term of 14 years as prescribed by Section 433A of Cr.P. Code. In the ruling of *Md. Munna Vs. Union of India (UOI) and Others*, , Hon"ble Apex Court has held that a sentence of imprisonment for life was nothing else than an imprisonment which lasts till the last breath.

The non-obstante clause with which Section 433A begins makes it clear that such minimum imprisonment of 14 years is notwithstanding anything contained in Section 432 Cr. P. C. The appropriate Government is authorized u/s 432 Cr. P. C. to suspend or remit sentence of a convict, undergoing imprisonment for fulfilling the sentence imposed. The petitioner cannot therefore claim the premature release as a matter of right. The order of the Court in such an eventuality always

remains subject to the said clemency power which is a sovereign function.

6. The Apex Court in the ruling in SLP (Crl.) No. 6467/2012 (Crl. M.P. No. 17082/2012) in State of U.P. v. Sanjay Kumar decided on 21-08-2012 (reported in 2012 AIR SCW 5157) observed thus:--

--Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds for example non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon.

7. This Court in the ruling in Sk Jakir Sk Babu v. State of Maharashtra, W.P. No. 284 of 2006 decided on 05-09-2008 (reported is 2008 (6) ABR (NOC) 1125) (to which one of us A.P. Bhangale J. was a party) had considered the principles of natural justice and issued certain guidelines to curtail unnecessary flow of petitions to this Court.

8. In exercise of powers conferred by sub-clause (5) of Section 59 of the Prisons Act, 1894 the Government of Maharashtra under Notification of the Home Department, dated 8th March, 1962 framed rules namely the Maharashtra Prisons (Remission System) Rules, 1962 which came into force on the 1st day of April, 1962. Rule 23 of these Rules read thus:--

23. Subject to the provisions of Rule 22, a Superintendent may punish any prison-offence u/s 46 of the Act, in either of both the following methods, that is to say, by:-

(a) forfeiting any ordinary or special remission for a period not exceeding 60 days.

(b) removing any prisoner from the remission system for a period not exceeding one year:

Provided that where the Superintendent is of opinion that higher punishment by way of forfeiture of remission or removal from the remission system, (or both) is necessary in the case of any prisoner, he may, with the previous sanction of the Inspector General, award such higher punishment (including permanent removal from the remission system).

In exercise of the powers conferred by sub-section (1) of Section 11 of the Prisons Act, 1894 (IX of 1894) and of all other powers enabling in this behalf, the Inspector General of Prisons, has issued an Order vide Notification No. MJM 1561/39466 dated 2nd July, 1964. As per this Order, the Superintendent of the Central Prison is authorized under the provisions of Section 46 of the Prisons Act to impose punishment enumerated under the Order with prior approval of the

Inspector General of Prisons in the case of Central Prison and Deputy Inspector General of Prisons in the case of any other Prisons. Clause 1(1)(a) of the Order is relevant for our purposes which reads thus:--

1.(1) The Superintendent may award the following punishments in exercise of the powers conferred on him by Section 46 of the Prisons Act 1894 (IX of 1894), with the prior approval of the Inspector General of Prisons in the case of a Central Prison and of the Deputy Inspector General of Prisons (Regional) hereinafter referred to as "the Deputy Inspector General") in the case of any other prison, namely:--

(a) Forfeiture of remission earned in excess of 60 days.

Clause 2 of the Order stipulates that in each case of late surrender from furlough or breach of any of the conditions of parole, the punishment mentioned therein or specified in Section 48-A of the Act may be awarded by the Superintendent at his discretion with due regard to the circumstances of the case and after obtaining the prisoner's explanation and the prior approval of the Inspector General or the Deputy Inspector General if required under Clause 1.

These Rules contemplate and prescribe procedure for the purpose of higher punishment of forfeiture of remission for a period exceeding 60 days or removal of prisoner from remission system exceeding a year or both. Previous sanction has to be obtained from the Regional Deputy Inspector General of Prisons (competent sanctioning authority) before Superintendent of prison can award higher punishment, as may be proposed. Higher punishments can be imposed only after obtaining prior sanction from the Inspector General Prisons and judicial appraisal thereafter. Principles of natural justice are implied requirement-

1. No prisoner shall be condemned unheard i.e. audi alteram partem.
2. Competent Prison Authority has duty to act fairly and not in arbitrarily, or biased or unreasonable manner.

Procedure for awarding punishment in respect of any prison offence has to be just, fair and reasonable even though no specific provision is made in the Rules or in the Statute. Thus, a prisoner is entitled to have an opportunity to show cause against action/punishment proposed as the proposed action is affecting entitlement of the prisoner under the rules to get pre-mature release from confinement. Decision has to be taken in accordance with the Rules/Statute after the prisoner is given opportunity of putting forward his case. The principles of natural justice do apply even where statute or Rules are silent on the point of pre-decisional notice or hearing. Opportunity of hearing is considered fundamental right in any civilized legal system. Hence, it must be presumed that the law makers intended that failure to observe the principles of natural justice shall render null and void any decision contrary to the requirements as above.

9. We have observed tendency of prison authorities to use ready-made printed proformas with blank spaces filled in later even in cases where higher prison

punishment is proposed or ordered. Even in the present case, such printed proforma has been used which shows non-application of mind by the prison authorities. Such practice is depreciable. It must be borne in mind by the prison authority concerned that it shall issue show-cause notice and give an opportunity of hearing to the prisoner. It must be real and reasonable - not a pretence. It must be reasonable opportunity of genuine hearing and not a mere empty formality or mere ritualistic procedural exercise. It is true that prison authority need not adhere to regular forms of legal procedure like a trial, but it would be sufficient if prisoner is heard in quasi-judicial spirits and in accordance with principles of natural justice. Competent Prison Authorities acting fairly in the light of circumstances of the case is the least legitimate expectation of any prisoner. If the prison authority is of the opinion that higher prison punishment may be imposed for any prison offence committed, resulting in forfeiture of remission, it may adopt following guidelines which would apt compliance of the principles of natural justice in such cases. Guidelines are as under:

- (1) Sufficient notice preferably of at least seven days' duration be given to the prisoner for submitting reply to the notice of showing cause to proposed higher punishment.
- (2) Cause shown in the reply shall be considered. If no sufficient cause is shown, reasoned order be passed for not accepting the contentions/cause shown by prisoner.
- (3) If higher punishment is proposed against the prisoner, then the proposal be submitted to the higher prison authority competent to grant sanction for higher punishment for the prison offence committed in the case.
- (4) After receipt of sanction order from the competent sanctioning authority and judicial appraisal from the Sessions Judge concerned, an order imposing higher punishment may be passed and communicated to the prisoner.
- (5) The order of higher prison punishment may be implemented after following steps (1) to (4).

We are sure that the guidelines, if followed in their true spirit as above, will certainly curb lot of unnecessary flow of such petitions to this Court.

10. We reiterate here that the State Government is expected to exercise the power of remission u/s 432 of the Criminal Procedure Code in such a case and discretion must be left to the State Government, to perform its sovereign function. The petitioner has no vested right for reduction of the sentence for to release him on completion of total sentence of any period less than the prescribed period with remissions pursuant to prison guidelines having force of law. The State has sovereign function to exercise its discretionary powers in granting remissions according to law by considering the relevant prison Rules and guidelines framed there under. The prison punishment is to be imposed as applicable on the date when the prisoner returned late after overstaying the

parole or furlough leave period. In our opinion the Maharashtra Prison (remission system) Rules, 2011 brought in to force later as notified on 02-08-2011 would have no retrospective effect as amended rules shall operate prospectively. In the facts and circumstance of the present case, since it came to our notice that the usual printed proformas were used for to award prison punishments which give rise to doubt or inkling of suspicion that the impugned orders dated 23-08-2006 imposing prison punishment were passed without due application of mind, violating the principles of natural justice as stated by us. We therefore quash and set aside the same and permit the petitioner to make a fresh representation with prayer before the competent authority i.e. Superintendent of Prisons concerned requesting the prison authority to reconsider the total remission period allowable to the petitioner so as to compute the total period of imprisonment he is required to undergo, on expiry of which the pre-mature release may be granted in his favour. Hence, order:--

(a) Impugned orders (Copies annexed as Exhibit "A" and "B" to the petition) are hereby quashed and set aside. The petitioner is permitted to make a fresh representation within four weeks to the Superintendent of Prison concerned which shall be decided as early as possible, in any case within next four weeks from the date of receipt of the same.

(b) We do not consider it appropriate to disturb the order dated 19-07-2011 bearing No. RLP-1005/214/case No. 143/prison-3/Home Department, Mantralaya, Mumbai-32 issued by the Desk Officer Home Department, in the name and on behalf of the Governor of Maharashtra, as the Superintendent of the Prison concerned is already directed to forward review proposal in view of Section 432 of the Cr. Procedure Code, 1973 to the competent authority - Additional Director General of Police (Prisons), Maharashtra State to review the proposal for premature release of the prisoner. Superintendents of Prisons concerned will forward it accordingly alongwith the decision on the representation; if any submitted by the petitioner herein.

(c) The petition is partly allowed accordingly.