

(2014) 04 BOM CK 0183

In the Bombay High Court

Case No : Criminal Writ Petition No. 777 of 2013

Shalik Maruti Kowe

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 08-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Penal Code, 1860 (IPC) — Section 147, 148, 152, 224, 302
Prisons Act, 1894 — Section 45, 46, 46(4), 52, 59

Citation : (2014) ALLMR(Cri) 2116 : (2014) 3 BomCR(Cri) 230 : (2014) CriLJ 3922

Hon'ble Judges : C.V. Bhadang, J;B.R. Gavai, J

Bench : Division Bench

Advocate : N.N. Gawankar and Nitesh Samundre, Advocate for the Appellant;
B.H. Dangre, Public Prosecutor and M.K. Pathan, A.P.P, Advocate for the Respondent

Judgement

B.R. Gavai, J.—The petitioner though has initially approached this Court being aggrieved by the order dated 19.6.2012 passed by the respondent no. 3 and the order dated 22.6.2012 passed by the learned In-charge Principal District & Sessions Judge, Amravati, the petitioner had by way of amendment challenged the vires of Rule 22(i) of the Maharashtra Prisons (Remission System) Rules, 1962 being ultra vires of Article 14 of the Constitution of India. The undisputed facts giving rise to the present petition are as under:-

On 24.8.1996 the petitioner came to be arrested in connection with a murder case. The petitioner stood convicted for an offence punishable u/s 302 of the Indian Penal Code on 23.6.1997 and was put in Amravati Central Prison. Taking into consideration the good conduct of the petitioner, the petitioner came to be transferred to Morshi Open Prison on 14.5.2008. The petitioner had earned remission while he was at Central Prison, Amravati, so also at Open Prison, Morshi. However, it appears that on 17.5.2009 the petitioner escaped from prison to visit his mother at his native place within the jurisdiction of Police Station

Pandharkavada. On a report submitted by the Police Inspector, Open Prison, Morshi, a crime came to be registered against the petitioner for the offence punishable u/s 224 of the Indian Penal Code. The petitioner had along with his relatives surrendered to the Police Station Pandharkavada within three days. However, taking into consideration the fact that the petitioner was not present in the Open Prison, Morshi on 17.5.2009 the learned J.M.F.C., Morshi convicted the petitioner for the offence punishable u/s 224 of the Indian Penal Code and sentenced him to suffer imprisonment for three months.

2. It appears that in the meantime, the Superintendent, Morshi Open Prison had submitted a proposal to the Deputy Inspector General of Prisons recommending forfeiture of remission of 2413 days. The Deputy Inspector General of Prisons vide order dated 19.6.2012 in view of Rule 22(i) of the Maharashtra Prisons (Remission System) Rules, 1962 (hereinafter referred to as "the Remission Rules") granted approval vide order dated 19.6.2012 for forfeiture of 1693 days remission. The learned In-charge Principal District & Sessions Judge, Amravati vide order dated 22.6.2012 granted his approval to the proposal submitted by the Deputy Inspector General of Prisons. Being aggrieved thereby, the petitioner has approached this Court.

3. Mr. N.N. Gawankar, the learned Counsel for the petitioner, submits that in view of Section 52 of the Prisons Act, 1894, the petitioner cannot be sent to the trial before the learned Magistrate and also penalized by the Superintendent. He further submits that escaping from a prison is not included in Section 45 of the Prisons Act and, therefore, since a penalty is provided u/s 224 of the Indian Penal Code, the Prison Authorities have no jurisdiction to impose the penalty on the petitioner for escaping from the prison. The learned Counsel further submits that in view of the Maharashtra Prisons (Punishment) Rules, 1963 (hereinafter referred to as "the Punishment Rules") also, the only option which the Superintendent of Prisons has is to send a person convicted for an offence punishable u/s 224 of the Indian Penal Code for trial before the Magistrate and in view of the provisions of Rule 26 of the Punishment Rules, the petitioner cannot be penalized twice.

4. In the alternative, the learned Counsel submits that Rule 22(i) of the Remission Rules takes away the entire discretion from the authority. He submits that a straight-jacket provision is made without providing for a discretion to be exercised on the facts and circumstances of each case. The learned Counsel submits that non-providing of a discretion depending upon the exigencies in a particular case would also be violative of Article 14 of the Constitution of India.

5. Mrs. B.H. Dangre, the learned Public Prosecutor for the respondents, on the contrary, submits that clause (4) of Section 59 of the Prisons Act itself enables the State to declare the circumstances in which acts constituting both a prison offence and an offence under the Indian Penal Code may or may not be dealt with as a prison offence. The learned Public Prosecutor further submits that Rule 26 of the Punishment Rules itself provides 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 these Rules. The learned Public Prosecutor, therefore, submits that since the grant of remission is by way of a privilege on account of a well behaviour, a person who is found not entitled to such a privilege can very well be deprived of such a privilege. The learned Public Prosecutor further submits that there is no conflict between Rule 22(i) and Rule 22(iii) of the Remission Rules. She submits that under sub-Rule (iii) of Rule 22, the Superintendent is empowered to forfeit any remission. She, therefore, submits that the word "any" includes "all" and, therefore, Rule 22(i) which provides for entire remission to be forfeited cannot be said to be in conflict with sub-rule (iii) of Rule 22 of the Remission Rules. The learned Public Prosecutor, therefore, submits that the present petition is without substance.

6. For appreciating the rival submissions, we will have to refer to Section 46(4), Section 52 and Section 59(1), (3), (4) & (5) of the Prisons Act, 1894.

Section 46(4) reads as under:-

S. 46. Punishment of such offences.-- The Superintendent may examine any person touching any such offence, and determine thereupon, and punish such offence by-

.....

(4) such loss of privileges admissible under the remission or furlough or parole system for the time being in force as may be prescribed by rules made by the State Government;

.....

Section 52 of the Prisons Act reads as under:-

S. 52. Procedure on committal of heinous offence.-- If any prisoner is guilty of any offence against prison discipline which, by reason of his having frequently committed such offences or otherwise, in the opinion of the Superintendent, is not adequately punishable by the infliction of any punishment which he has power under this Act to award, the Superintendent may forward such prisoner to the Court of the District Magistrate or of any Magistrate of the first class or Presidency Magistrate having jurisdiction, together with a statement of the circumstances, and such Magistrate shall thereupon inquire into and try the charge so brought against the prisoner, and, upon conviction may sentence him to imprisonment which may extend to one year, such term to be in addition to any term for which such prisoner was undergoing imprisonment when he committed such offence, or may sentence him to any of the punishments enumerated in section 46:-

Provided that any such case may be transferred for inquiry and trial by the

District Magistrate to any Magistrate of the first class and by a Chief Presidency Magistrate to any other Presidency Magistrate: and Provided also that no person shall be punished twice for the same offence.

The relevant part of Section 59 of the Prisons Act reads as under:-

S. 59. Power to make rules.--The State Government may by notification in the Official Gazette, make rules consistent with this Act-

- (1) defining the act which shall constitute prison-offences;
- (2) -
- (3) fixing the punishments admissible under this Act which shall be awardable for commission of prison-offences or classes thereof;
- (4) declaring the circumstances in which acts constituting both a prison-offence and an offence under the Indian Penal Code (45 of 1860) may or may not be dealt with as a prison-offence;
- (5) for the award of marks and the shortening of sentences;
- (6).....

The perusal of the aforesaid provisions would thus reveal that if a prisoner is found guilty of any offence against the prison discipline and the Superintendent of Prisons is of the opinion that such an offence cannot be adequately punished by infliction of any punishment which he has power under the Act to award, he will forward such a prisoner to the Court of any Magistrate of the First Class having jurisdiction. The learned Magistrate is thereupon required to enquire into and try the charge so brought against the prisoner and upon conviction may sentence him to imprisonment which may extend to one year and such punishment is in addition to any term for which such prisoner was undergoing imprisonment when he had committed such offence. The learned Magistrate is also empowered to sentence him to any of the punishments enumerated in Section 46. The proviso thereto provides that no prisoner shall be punished twice for the same offence. Clause 4 of Section 46 would show that out of the several punishments provided, loss of privilege admissible under the remission or furlough system is one of the punishments prescribed under the said Act.

7. Section 59 is rule making power of the State Government. Clause (1) of Section 59 permits the State Government to make rules for defining the acts which shall constitute prison offences, Clause (3) thereof permits it to make rules for fixing the punishment admissible under the said Act which shall be awardable for commission of prison offences or classes thereof. Clause (4) permits it to make rules for declaring the circumstances in which acts constituting both a prison offence and an offence under the Indian Penal Code may or may not be dealt with as a prison offence. Clause (5) thereof permits it to make rules for award of marks, the suspension or remission and consequent shortening of sentences and the grant of release on parole or furlough and determining the

conditions on which and the authority by which the sentences may be suspended or remitted and the prisoners may be released on parole or furlough.

8. By exercising the powers as available to the State Government under Clauses 3, 4 & 28 of Section 59 read with Clauses 6 & 7 of Section 46 of the Prisons Act, the State Government has enacted the Maharashtra Prisons (Punishment) Rules, 1963. It will be relevant to refer to Rules 24, 25 & 26 of the said Rules, which read as under:-

24. Where a prisoner is sent in accordance with the provisions of section 52 for trial by a Magistrate and the Magistrate declines to act under the said section, the Superintendent may, subject to these rules, award any punishment specified in section 46 which he considers to be expedient and which the prisoner is fit to undergo.

25. Where an act of a prisoner constitutes an offence u/s 46 of the Prisons Act, 1894 and also an offence under the Indian Penal Code, the Superintendent may, in his discretion, use his powers u/s 46 of the Prisons Act, 1894 and award the punishment or forward the prisoner to a Court of the Magistrate of the First Class having jurisdiction, for trial:

Provided that a prisoner committing any of the following offences shall be prosecuted, namely:-

- (a) Rioting
- (b) Escape -
- (c) Offences affecting human body-
- (d) Any offence triable exclusively by a Court of Sessions.

26. No prisoner shall be punished twice for the same offence:

Provided 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 these rules.

9. Rule 24 provides that where a prisoner is sent in accordance with the provisions of Section 52 for trial by a Magistrate and the Magistrate declines to act under the said section, the Superintendent may, subject to these rules, award any punishment specified in section 46 which he considers to be expedient and which the prisoner is fit to undergo. Rule 25 thereof provides that when an act of prisoner constitutes an offence u/s 46 of the Prisons Act, 1894 and also an offence under the Indian Penal Code, the Superintendent may in his discretion use his powers u/s 46 of the Prisons Act, 1894 and award punishment or forward the prisoner to a Court of the Magistrate of the First Class having jurisdiction for trial. However, proviso thereto enumerates certain sections and mandates that in case of sections enumerated therein, the prisoner shall be prosecuted. Section

224 of the Indian Penal Code is included in the list of the offences which are mandatorily required to be prosecuted. Rule 26 provides that no prisoner shall be punished twice for the same offence. However, proviso thereto provides that the following eventualities shall not be treated as punishment for the purpose of the said Rules

- i. any measure taken for security and safe custody of a refractory or dangerous prisoner,
- ii. for preventing him from committing mischief, and
- iii. exclusion from a privilege which is otherwise admissible only to a well behaved prisoner.

10. The Maharashtra Prisons (Remission System) Rules, 1962 have been enacted by the State Government by exercising powers under Clause 5 of Section 59 of the Prisons Act. Rule 22 thereof reads thus:-

22.(i) Where a prisoner escapes from legal custody, the total remission earned by him up to the date of his escape shall stand forfeited,

(ii) Where a prisoner attempts to escape from legal custody or plans or abets escape, the Superintendent shall, with the previous approval of the Inspector General, pass such orders thereon as the circumstances of the case may require.

(iii) Where a prisoner, after his admission, into the prison, is convicted of an offence under sections 147, 148, 152, 224, 302, 304, 304A, 306, 307, 308, 323, 324, 325, 326, 327, 332, 333, 352, 353 or 377 of the Indian Penal Code, the Superintendent shall, with the previous sanction of the Inspector General, forfeit any remission earned by such prisoner.

It can thus be seen upon perusal of Rule 22 sub-clause (i) that when a prisoner escapes from legal custody, the total remission earned by him up to the date of his escape shall stand forfeited. Sub-clause (ii) provides that the Superintendent shall, with the previous approval of the Inspector General can pass such orders thereon as the circumstances of the case may require when a prisoner escapes from legal custody or plans or abets escape. Sub-clause (iii) provides that where a prisoner, after his admission, into the prison, is convicted of the offences enumerated therein, the Superintendent shall, with the previous sanction of the Inspector General, forfeit any remission earned by such prisoner.

11. Initially, though Mr. N.N. Gawankar, the learned Counsel for the petitioner, has raised various arguments, but he has restricted his challenge only to the validity of sub-rule (i) of Rule 22 of the Remission Rules.

12. We see quite force in the submissions made by the learned Counsel for the petitioner. Since he has not pressed the other challenges into service, we need not go into the submissions made by the learned Public Prosecutor regarding the source of rule making powers and the entitlement of the State Government to make the Rules.

13. The perusal of Section 52 of the Prisons Act, 1894, and Rule 24 of the Punishment Rules would itself provide that whenever prisoner is to be penalized, a discretion is vested in the authority. Not only that, but sub-rules (ii) & (iii) of Rule 22 of the Remission Rules itself also provide for a discretion with the authority to pass appropriate order as the circumstances of the case may require. It is only under sub-Rule (i) of Rule 22 that no discretion is provided and it is provided that the entire remission earned by him shall stand forfeited in the case of a prisoner escaping from legal custody. It is to be seen that escaping from legal custody is an offence u/s 224 of the Indian Penal Code also. It can further be seen that sub-rule (iii) includes much more serious offences than Section 224. The anomalous situation, therefore, would be that if a person is convicted for an offence punishable under Sections 302, 304, 304A or 306 which provides for a much higher sentence than Section 224, the Superintendent of the Prison will have a discretion to forfeit any remission earned by such a prisoner. To give an example in a given case, the Superintendent may only forfeit 100 days' remission if a prisoner has committed an offence u/s 302 of the Indian Penal Code. Per contra, if a person escapes from the custody and is also convicted for an offence u/s 224 of the Indian Penal Code, even if he earns 10000 days as remission, the same would stand forfeited in entirety.

14. Though it is urged by the learned Public Prosecutor that withdrawal of remission is not a punishment but is only taking away of an advantage, it cannot be disputed that withdrawal of an advantage has also adverse effect on the rights of a prisoner and certainly invites adverse consequences.

15. The Apex Court in the case of Mithu Vs. State of Punjab, had an occasion to consider the validity of Section 303 of the Indian Penal Code which made death sentence mandatory with regard to a particular class of persons. The Apex Court in paragraph 16 of the said judgment observed thus:-

16. Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. "The infinite variety of cases and facets to each would make general standards either meaningless "boiler plate" or a statement of the obvious.....". As observed by Palekar J., who spoke for a Constitution Bench in Jagmohan Singh v. State of U.P.: [SCC para 26, p. 35: SCC (Cri.) p. 184]

The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment..... The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

It can thus be seen that the Apex Court has criticized the mandatory sentence which fails to take into account the facts and circumstances of each particular case. The Apex Court in unequivocal terms has held that it is in those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. The Apex Court has approved the words borrowed from its earlier judgment in the case of Jagmohan Singh vs. State of U.P. and observed that the infinite variety of cases and facets to each would make general standards either meaningless "boiler plate" or a statement of the obvious. The Apex Court further observes that exercise of judicial discretion on well recognized principles is in the final analysis, the safest possible safeguard for the accused. The Apex Court, therefore, found Section 303 of the Indian Penal Code to be violative of Articles 14 & 21 of the Constitution of India.

16. In the present case, it can be seen that the petitioner right from 1996 to 2009 was behaving with a good conduct and had earned remission of 2413 days. However, it appears that in an emotional outburst after he was transferred to the Open Prison, he could not resist the temptation of meeting his mother and went to Pandharkavada. Not only that, but within 2 or 3 days he along with his relatives surrendered to the Police Station and was brought back to the prison. For this, his entire remission stands forfeited. However, to take a hypothesis if a prisoner convicted for an offence punishable u/s 302 was released on furlough or parole and commits an offence punishable u/s 302, the Superintendent of the Prisons with the prior approval of the Inspector General of Prisons will have a discretion under sub-rule (iii) of Rule 22 and can very well forfeit 100 days of remission or may even be empowered not to forfeit a day's remission. We find that, therefore, sub-rule (i) of Rule 22 of the Remission Rules which does not provide for discretion to be exercised on the basis of the facts and circumstances of the case is totally violative of Article 14 of the Constitution of India.

17. We are further inclined to take this view, inasmuch as even if sub-rule (i) of Rule 22 is held to be ultra vires, the authority can always by taking recourse to sub-rule (iii) of Rule 22 exercise the powers of forfeiting the remission and in a fit case the entire remission, as in the submission of the learned Public Prosecutor the word "any" includes "all". In that view of the matter, we find that sub-rule (i) of Rule 22 of the Maharashtra Prisons (Remission System) Rules, 1962 is ultra vires of Article 14 of the Constitution of India and is, therefore, held to be un-constitutional.

18. The impugned orders are quashed and set aside. The matter is remitted back to the Superintendent of Prison, Amravati, who shall decide the case of the petitioner in exercise of the powers vested in him under Clause (iii) of Rule 22 of the Maharashtra Prisons (Remission System) Rules, 1962 with the prior approval of the Inspector General of Prisons as to whether any remission earned by the petitioner deserves to be forfeited and if so, as to how many number of days is required to be forfeited. The same shall be done within a period of four weeks from today. The Writ Petition stands disposed of accordingly. Rule is made

absolute, in the aforesaid terms with no order as to costs.