

(2016) 04 BOM CK 0097

In the Bombay High Court

Case No : Criminal Writ Petition No. 4034 of 2014 along with Criminal Application No. 12 of 2015

Sharad Devaram Shelake

APPELLANT

Vs

State of Maharashtra (Home Ministry)

RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:

Indian Penal Code, 1860 — Section 302, 364, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402

Prisons Act, 1894 — Section 3, 3(5A), 3(5B), 28, 48A, 59, 59(5)

Prisons (Bombay Furlough And Parole) Rules, 1959 — Rule 4, 4(1), 4(4), 4(10), 4(13), 4(17), 4(18), 4(19), 6, 17

Constitution Of India, 1950 — Article 14, 20(2), 21, 226

Citation : (2017) 1 AIRBomRCri 33 : (2016) ALLMRCri 4128 : (2016) 3 BomCR(Cri) 180 : (2016) 4 MhLJ 228 : (2016) 3 MhLJCri 748 : (2016) 5 RCRCriminal 824

Hon'ble Judges : V.K. Tahilramani and Smt. Anuja Prabhudessai, JJ.

Bench : Division Bench

Advocate : Mr. Yashpal Thakur, Advocate, for the Appellant; Mr. A.S. Shitole APP, for the Respondent

Final Decision : Dismissed

Judgement

Smt. V.K. Tahilramani, J.—Rule. Respondents waive service. By consent rule made returnable forthwith.

2. A very short question is involved in this petition under Article 226 of the Constitution of India. It is directed against the Notification issued by the Home Department dated 23.02.2012. By this Notification, Rule 4 of the Furlough and Parole Rules was amended and after sub-rule (10), sub-rule 11 to 19 were added.

3. The petitioner was convicted by the learned Additional Sessions Judge, Pune under Sections 302 and 364 of IPC by Judgment and Order dated 31.8.2012 passed in Sessions Case No. 215 of 2011. The said case arises out of C.R. No. 217 of 2010 of Lonikand Police Station, Pune. In our opinion, the only relevant

fact is that the conviction and sentence has been interalia recorded for the offence punishable under Section 364 of IPC i.e kidnapping.

4. The petitioner has stated that he did not apply for furlough leave because in view of the Notification dated 23.2.2012 whereby sub-rule 13 was added, his application for furlough would be rejected by the Competent Authority. Rule 4 set out the cases when prisoners shall not be granted furlough. Though the entire Notification is challenged, we are concerned here only with sub-rule 13 of Rule 4 which reads as under:-

"4. The following categories of prisoners shall not be considered for release on furlough:- (13) Prisoners convicted for offences such as dacoity, terrorist crimes, kidnapping, smuggling including those convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and foreigner prisoners;

5. Mr. Yashpal Thakur, the learned counsel for the petitioner submitted that the petitioner is convicted and sentenced to suffer imprisonment for offence punishable under Section 364 of Indian Penal Code. Such a person is not entitled to furlough leave in terms of sub-rule 13 of Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959. Learned counsel for the petitioner submitted that the reasons namely, the nature of the offence, its gravity and it being under section 364 of Indian Penal Code cannot be said to be a valid ground for rejection of furlough leave. Thus, a challenge is raised to the provisions by which the authorities are empowered to refuse furlough leave in case of convicts/prisoners undergoing sentence for the offence of kidnapping. It is not disputed that the petitioner has been convicted for the offence under Section 364 of IPC.

6. Learned counsel for the petitioner submitted that when a person is convicted for kidnapping, then, he would not be released on furlough is the present rule and which would mean that for his entire tenure, as a prisoner/convict, the petitioner will never be released on furlough. The petitioner would, therefore, be permanently deprived of the right to be released on furlough.

7. It is argued that the selection of Section 364 for being included in the list of offences in respect of which furlough leave shall not be granted is arbitrary and that it is not based on any rational principle. If prisoners convicted for more serious offences such as murder are not precluded from claiming furlough leave, why should prisoners convicted of offences under Section 364 be denied the right to claim furlough leave? It is urged that the classification made by the rule making authority is not rooted in any rational principle and, therefore, Rule 4(13) must be struck down.

8. Lastly, it is submitted that the Rules do not mean that the application for furlough has to be rejected. Such rules cannot be construed as a mandate or a prohibition or embargo but will have to be construed as enabling the authority to refuse furlough in appropriate cases. Further, if this interpretation is not placed on the provision, then, it is ultra vires Article 14 of the Constitution of India.

9. We are unable to accede to the argument addressed to us by Mr. Thakur on behalf of the petitioner for reasons which will become presently evident.

10. The learned APP on the other hand has submitted that furlough is not a right of the prisoner and the distinction as made is not ultra vires Article 14 of the Constitution of India but consistent with the Legislative scheme of not permitting such convicts and prisoners whose mingling with the society will have an adverse effect and who are likely to indulge in similar acts, if released temporarily.

11. We have perused the notification issued by the Home Department dated 23rd February 2012 by which the Prisons (Bombay Furlough and Parole) Amended Rules, 2012 have been brought into effect. Rule 4 states thus:-

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

- (1) Habitual prisoners;
- (2) Prisoners convicted of offences under Sections 392 to 402 (both inclusive) of the Indian Penal Code;
- (3) Prisoners convicted of offences under the Bombay Prohibition Act, 1949;
- (4) Prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere, by the District Magistrate on the ground of public peace and tranquility;
- (5) Prisoners who, in the opinion of the Superintendent of Prison show a tendency towards crime;
- (6) Prisoners whose conduct is, in the opinion of Superintendent of the Prison, not satisfactory enough;
- (7) Prisoners confined in the Ratnagiri Special Prison, (other than prisoners transferred to that prison for Jail services);
- (8) Prisoners convicted of offences of violence against person or property committed for political motives, unless the prior consent of the State Government to such release is obtained;
- (9) A prisoner or class of prisoners in whose case the State Government has directed that the prisoner shall not be released or that the case should be referred to it for orders;
- (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.

12. The amendment as brought about by the Notification dated 23.2.2012 to the extent of Rule 4, referred to as the principle Rule reads thus:-

"2. In rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959 after sub-

rule (1), the following sub-rules shall be inserted, namely :-

(11) Prisoners whose presence is considered dangerous or otherwise prejudicial to public peace and order by the District Magistrate and Superintendent of Police;

(12) Prisoners who are considered dangerous or have been involved in serious prison violence like assault, outbreak, riot, mutiny or escape or who have been found to be instigating the serious violation of prison discipline;

(13) Prisoners convicted for offences such as dacoity, terrorist crimes, kidnapping, smuggling including those convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and foreigner prisoners;

(14) Prisoners convicted for failure to give surety for maintaining peace or good behaviour;

(15) Prisoners suffering from mental illness, if not certified by the medical officer to have recovered;

(16) Prisoners whose work and conduct have not been good during the preceding period of twelve months;

(17) Prisoners convicted of offences against any law relating to matters to which the executive power of the Union Government extends, unless approved by the Union Government;

(18) Prisoners whose release on leave is likely to have repercussions elsewhere in the country.

(19) Prisoners whose release on leave is likely to have repercussions during the period of code of conduct of local self Government, Legislature and Parliament elections."

13. Mr. Thakur submitted that the first ground assigned by the learned APP that furlough is not a right of the convict is wholly erroneous and not the correct position in law. He pointed out that the contention that furlough leave is not the right of the petitioner is contrary to the judgment of the Full Bench of Gujarat High Court in the case of Bhikhabhai Devshi v. State of Gujarat and Ors., A.I.R. 1987 Gujarat 136. The Full Bench has held that furlough is a matter of right and the same cannot be taken away. In that behalf, he relied upon the following observations in the Full Bench decision in the case of Bhikhabhai Devshi (supra):

"13. The parole and furlough rules are part of the penal and prison system with a view to humanise the prison system. These rules enable the prisoner to obtain his release and to return to the outside world for a short prescribed period. The objects of such a release of prisoner can be read from para 101 of the report submitted by the All India Jail Manual Committee as also the objects mentioned in Model Prison Manual. These objects are:

(i) to enable the inmate to maintain continuity with his family life and deal with family matters;

- (ii) to save the inmate from the evil effects of continuous prison life;
- (iii) to enable the inmate to maintain constructive hope and active interests in life."

"14. In the Statement of Objects and Reasons for Bombay (Prisons Amendment) Act No. 27 of 1953, the Jail Reforms Committee had recommended and the Govt. accepted the recommendation that;

"there should be the system of release of prisoners on furlough under which well behaved prisoners of certain categories should, as a matter of right have a spell of freedom occasionally after they undergo a specified period of imprisonment, so that they may maintain contact with their near relatives and friends and may not feel uprooted from society. Government accepted these recommendations and also decided that the furlough period should count towards the prisoner's sentence."

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The experience has shown that the system has worked satisfactorily. The Prisons Act, 1894 does not specifically provide for the grant of furlough and the remission of sentence consequent upon it. In order to place the system on a permanent footing and to enable the Govt. to delegate its powers to the Inspector General of Prisons, it is necessary that the Prisons Act, 1894 should be amended in its application to the State of Bombay."

15. Thus, the Legislature has put the furlough system in the Act and it is made a matter of right.

16. In furtherance of these objects, the parole and furlough rules are framed in exercise of powers under Sections 59(5) and 28 of the Prisons Act, 1894. Section 3 defines various terms in the Act and Cls. (5A) and (5B) of Section 3 define furlough system and parole system CL (5A) added by Bombay Act XXVII of 1953 reads as under :-

"(5A) :

"furlough system means the system of releasing prisoners in jail on furlough in accordance with the rules for the time being in force." Section 59(5) reads as follows :-

"S. 59 : Power to make rules : The State Govt. may make rules consistent with this Act

.....

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.....

Thus, the rules have to be consistent with the Act as Section 59 expressly

provides. One more relevant provision is Section 48A (also added by Act 27 of 1953) which reads as follows:-

S. 48 A :Punishment for breach of conditions of suspension or remission of sentence or of grant of furlough:- If any prisoner fails without sufficient cause to observe any of the conditions on which his sentence was suspended or remitted or furlough or release on parole was granted to him, he shall be deemed to have committed a prison offence and the Supdt. may, after obtaining his explanation, punish such offence by

(i) a formal warning as provided in CL (i) of Section 46;

(2) reduction in grade if such prisoner has been appointed an officer of prison;

(3) loss of privileges admissible under the remission or furlough or parole system; or

(4) loss of such other privileges as the State Govt. may by general or special order, direct."

17. Rule 1287 of the Bombay Jail Manual is also relevant for our present purpose. It reads as under : -

" In each case of late surrender or breach of any of the conditions of furlough or parole, the necessary punishment or punishments should be awarded by the Supdt. of Prison with due regard to the circumstances of each case. All the punishments mentioned below or in Section 48-A of the Prisons Act, 1894 need not necessarily be awarded in each case but it is left to the discretion of the Supdt. to decide which particular punishment or punishments should be awarded. If, in certain cases, the Supdt. is satisfied that the overstay was for good or sufficient reasons, he may excuse the prisoner. However, before awarding any punishment, the Supdt. should invariably obtain a prisoner's explanation in each case of overstay of period or breach of any conditions of furlough or parole.

.....

18. From the aforesaid provisions in the Prisons Act, the definition and the creation of furlough system, there is no doubt that the prisoners have a privilege admissible to them under the furlough system as mentioned in R.2(17) of the furlough rules. Even if furlough is not an absolute right of the prisoner, nonetheless it is a right and privilege admissible and regulated under the rules and it can be granted, refused or withdrawn as per rules.

(Emphasis supplied)

14. Thus, even in the decision of the Full Bench of the Gujarat High Court in the case of Bhikhabhai Devshi (supra), it is held, as is clear from paragraph 18 thereof, that furlough is not an absolute right of the prisoner and furlough can be granted, refused or withdrawn as per rules. Reference is also made in this

decision to Section 48A which deals with cases where there is breach of conditions of furlough, parole or remission. It is stated that if there is breach of conditions, it can lead to loss of privilege admissible under the remission, parole or furlough system. From this, it becomes clear that if there is a breach, the convict can lose the privilege of furlough.

15. In this regard useful reference may be made to a decision of the Supreme Court in the case of *State of Maharashtra v. Suresh Pandurang Darvakar*, 2 AIR 2006 SC 2471 wherein it is observed that, " But release on furlough cannot be said to be an absolute right of the prisoner as culled out from Rule 17". Rule 17 reads as under:-

" 17. Nothing in these rules shall be construed as conferring a legal right on a prisoner to claim release on furlough."

16. The learned counsel for the petitioner urged that once sub-rule 13 is applied, then, the petitioner will not be ever entitled to be released on furlough. All other reasons then are insignificant and irrelevant, once the benefit of furlough is taken away by virtue of the amendment. It was further contended that the incident occurred in 2010 and the Notification/Circular is dated 23.2.2012 which brought about the amendment to Rule 4. Therefore, Mr. Thakur submitted that the amendment cannot be given retrospective effect and cannot be applied to the petitioner.

17. Mr. Thakur submitted that in a decision dated 18.2.2014, the division Bench of this Court, Aurangabad Bench in the case of *Balu s/o. Savleram Ubale v. The State of Maharashtra*, Criminal Writ Petition No. 432 of 2013 has held that the rules would apply prospectively and not retrospectively and as the convict in the said case was convicted in the year 2002, the Circular of 23.2.2012 would not apply to the convict. As far as the issue of prospective or retrospective effect of the circular is concerned, the Government by Circular No. sankirn 0913/1074/CR 593/13/PRS-31 dated 13.6.2014 has clarified that the Government Notification dated 23.2.2012 would apply with prospective effect. Thus, now there cannot be any dispute about the circular being retrospective or prospective as it has been clarified that the said notification would apply with prospective effect. Mr. Thakur submitted that in view of *Balu Ubale (supra)* which holds that the notification will apply prospectively and as the offence took place prior to the circular, the circular which is stated to apply prospectively would not be attracted in the case of the petitioner. We find this submission to be incorrect because in *Balu Ubale (supra)*, the relevant date was held to be the date of conviction and if the date of conviction was prior to the notification, it was held that the notification would not apply. In the present case, the petitioner was convicted after the notification, hence, the notification would in fact apply to him. However for reasons stated in paragraph 19 of this decision, we are of the opinion that the decision in the case of *Balu Ubale (supra)* would not be good law.

18. Reliance was also placed by Mr. Thakur on the decision dated 5th March,

2014 of the Division Bench of this Court, Aurangabad Bench in the case of Sardar Shahwali Khan v. State of Maharashtra & Ors., Cri. Writ Petition No. 48 of 2014. Mr. Thakur pointed out that in the said case, the judgment convicting the prisoner was dated 6.4.2007. The Division Bench held that the Rules amended by Circular dated 23.2.2012 are prospective in nature and the order rejecting the application for furlough was set aside and the matter was relegated to the concerned authority for fresh consideration.

19. The Division Bench of this Court in the case of Subhash Hiralal Bhosale v. State of Maharashtra & Anr, 2014 ALL M.R. (Cri) 4330 has held that the relevant date is the date of application for furlough and not the date of conviction. It, therefore, follows that the relevant date is the date of application and not date of offence or date of conviction. Thus, it is not the date on which the offence was registered or the prisoner was convicted and sentenced which is relevant but the date on which he applied for furlough leave. If the application is after 23.2.2012, the Notification/Circular dated 23.2.2012 would apply. The decision in the case of Subhash Bhosale (supra) is dated 4.9.2013 and the decision in the case of Balu Ubale (supra) is dated 18.2.2014 and the decision in the case of Sardar Khan (supra) is dated 5.3.2014. Both these decisions were rendered in ignorance of the earlier decision of the Division Bench of this Court in the case of Subhash Bhosale (supra) by which the issue was concluded that the relevant date to be considered in relation to the Circular dated 23.2.2012 is the date of application. The decision in the case of Subhash Bhosale (supra) was not pointed out when the case of Balu Ubale (supra) and Sardar Khan (supra) were decided. Thus, it will have to be held that these two decisions are per incuriam. In this view of the matter, reliance on these decisions would not advance the case of the petitioner.

20. Then, coming to the main submission of the learned APP that if furlough leave is to be refused to prisoners convicted for offences such as dacoity, terrorist activities, kidnapping, smuggling, including those convicted under NDPS Act (61 of 1985) and foreigner prisoners, then, that has a definite nexus with the object sought to be achieved. In introducing penal reforms, the State that runs the administration on behalf of the society and for the benefit of the society at large cannot be unmindful of safeguarding the legitimate rights of the citizens in regard to their security in the matters of life and liberty. It is for this reason that in introducing such reforms the authorities cannot be oblivious of the obligation to the society to render it immune from those who are prone to criminal tendencies and have proved their susceptibility to indulge in criminal activities by being found guilty (by a Court) of having perpetrated a criminal act. One of the discernible purposes of imposing the penalty of imprisonment is to render the society immune from the criminal for a specified period. It is, therefore, understandable that while meting out humane treatment to the convicts, care is taken to ensure that kindness to the convicts does not result in cruelty to the society. Naturally enough the authorities would be anxious to ensure that the convict who is released on furlough does not seize the opportunity to commit another crime when he is at large for the time-being under the furlough leave

granted to him by way of a measure of penal reform. This appears to be the object underlying Rule 4 which enjoins that prisoners of the specified categories shall not be enlarged on furlough. It would not be safe from the point of view of the society to throw such a person in the midst of it thereby exposing the society to further crimes by him. The same idea appears to run through most of the clauses of Rule 4. It would be dangerous to the society to release such a person on furlough merely out of consideration of penal reform and humane treatment. As observed earlier, consideration of sympathy for him cannot be permitted to overshadow the consideration regarding security of the society.

21. It was argued by Mr. Thakur that if a more serious crime like murder was not included in the list, there was no rational basis for including offences relating to kidnapping in sub-rule 13 of Rule 4. Here again, the argument ignores the fact that murder may be a crime against society but by and large an offence of murder is committed by a person under some real or imagined provocation or in a moment of passion and the perpetrator of the crime usually has a motive or animus against a particular individual or individuals and not against the society at large. There is, therefore, less danger of his committing a similar crime when he is on leave on furlough whereas offences of dacoity, terrorism, kidnapping & under NDPS Act are offences which are directed against the entire society at large and the entire society is exposed to the danger emanating from them. In case of murder only that person against whom the perpetrator has a motive or animus alone is exposed to danger from him and not others. So far as kidnapping, dacoity, acts of terrorism and under the NDPS Act are concerned, any victim is a good victim and the entire society is exposed to the risk. It is, therefore, clear that these offences fall in a different category. Whether or not the offence is more serious is not the relevant consideration for withholding furlough. The relevant consideration is whether his release will expose the society to the very danger to shield from which the criminal is imprisoned. Therefore, the fact that murder may be by and large considered to be a more serious crime is not a circumstance which in any way impairs the reasoning underlying the selection of the offences falling under the class specified in sub-rule 13.

22. The learned counsel for the petitioner does not dispute that the legislature in its wisdom can make a classification of prisoners and their conviction for serious offences. If all sub-rules are read together and harmoniously, then, it is evident that the Legislature intended that such of the prisoners whose presence is considered dangerous or otherwise prejudicial to the public peace and order or who have been considered dangerous because of their involvement in serious prison violence or offences which have an impact on the entire society should not be released on furlough, then that classification cannot be held to be arbitrary, unreasonable, unfair and discriminatory to say the least. The prisoners, whose conviction is for such offences, which affect larger public interest and public good so also public peace cannot claim to mingle with the society as a matter of right. Further the classification made does not suffer from any irrationality, more so,

when it is not vitiated by arbitrariness, unreasonableness and malafides. One has to also keep the object sought to be achieved in mind that is to protect the larger public interest, public good and public peace.

23. In addition to sub-rule 13 of Rule 4, all prisoners who are convicted can be denied furlough if they fail to give surety for maintenance of peace or good behaviour. All prisoners irrespective of the offences for which they are convicted can be denied furlough if they are mentally ill or whose presence is considered dangerous or their conduct and work has not been good during the preceding period of 12 months of their application. There are also prisoners, whose cases are covered by sub-rule 17, 18 and 19 of Rule 4, which deny furlough leave. In these cases, there is no distinction made in relation to the offences for which they are convicted. Thus what is paramount is the impact and repercussions on the society at large, if the prisoners are enlarged on furlough leave. The impact or release on furlough on the society and the country as a whole, therefore, is a very relevant and germane consideration. It is well settled that the nature of the offences committed, for consideration of furlough leave application, is germane and relevant factor. This has been held by the Division Bench of this Court in Subhash Bhosale (supra).

24. The maintenance of peace or good behaviour and good conduct is necessary because there are crimes which will affect the society and would be prejudicial to the interest of public peace. Sub-rule 13 outlines such crimes and they are heinous in nature. One cannot, therefore, ignore that if the conviction is for offences like terrorism, kidnapping, smuggling or under the NDPS Act, then, release of such prisoners on furlough should be considered to be dangerous or otherwise detrimental to public peace and order. They may harm the victim/complainant or the witnesses who have deposed against them. The tendency to take revenge cannot be ruled out. Therefore, mingling of such persons with the society will not be in the interest of society and that is a valid reason for this categorization.

25. If the rules provide for furlough leave and equally contain the provisions enabling imposition of conditions for being released on furlough leave, then, the prisoner cannot claim it to be a matter of right. A prisoner cannot urge that despite the provisions in the rules and contrary thereto, his case for furlough must be considered and granted. His case can be considered provided it falls within four corners of the rules. The petitioner before us has understood this position and, therefore, has raised a challenge to the validity of sub-rule 13 of rule 4. However, we find that his challenge is not well founded.

26. Mr. Thakur submitted that a convict who falls under Rule 4 can be released on parole but not on furlough, this is highly discriminatory. However, from the Rules relating to furlough, it is clear that furlough is to be granted for no particular reason, hence, it can be denied in the interest of the Society, whereas parole can be granted only on account of sufficient cause such as case of severe illness or death of any member of the prisoner's family or for other sufficient

cause. Therefore, parole is not a matter of right and only when there is sufficient and serious cause the Society and the jail administration may sometimes, have to take some risk to release the prisoner on parole, but that would be no ground for releasing the prisoner on routine furlough irrespective of his past conduct and performance. In fact parole may be denied to a prisoner even when he makes out sufficient cause for release on parole if the competent authority is satisfied on valid grounds that the release of a prisoner on parole would be against the interest of the society or the prison administration. For example, a prisoner who has once escaped or attempted to escape or who is likely to escape, may be denied parole because the competent authority has discretion ("may") to grant or not to grant parole even when cause is shown. Therefore, comparison of release on parole and furlough is absolutely uncalled for.

27. In the case of *Ramchandra Raghu Naik v. State of Maharashtra*, 2005(3) Mh. L.J. 933, the Furlough Rules have been referred to and the Division Bench held that the Furlough Rules provide for terms and conditions thereby, curtailing the entitlement of furlough leave to the prisoners. Such Rules are not penal in character. The Division Bench opined that any entitlement prescribed under the statute can be availed within the parameters prescribed under the statute. It was further held that if the statute imposes a condition to claim any such benefit under the statute, same are to be availed on compliance of conditions and not otherwise. The provisions regarding the entitlement of benefit has to be read along with conditions attached to the same. Being so the entitlement has to be read along with conditions provided for the same. The entitlement of leave would be to the extent permissible and would not be available in cases where it is sought to be curtailed by specific provisions in that regard. The Division Bench held that there are Furlough Rules which speak of the categories of prisoners who shall not be considered for release on furlough. In turning down the challenge raised before it that denial of furlough would amount to a punishment or double jeopardy, the Division Bench observed thus:-

14. Evidently, the rules make elaborate provisions regarding entitlement as well as disentitlement of furlough leave to the prisoner. Merely because under certain circumstances the rule provides that a prisoner would not be entitled to furlough leave, that does not amount to a penal provision so as to contend that the implementation of such provision would amount to double jeopardy in the case of a prisoner who is punished under Section 48A of the Prisons Act. The provisions relating to entitlement or disentitlement of furlough leave do not relate to penal action on the part of the authorities. Besides, punishment for jail offence by the Jail Superintendent would not even bar the prosecution and punishment in a Court for the same offence because the powers of the jail superintendent are in the nature of administrative authority for maintenance of discipline and to inflict summary punishment for breach of discipline and those proceedings are not judicial proceedings. In a case where a military personnel was tried in Court martial proceedings and being found guilty was sentenced to rigorous imprisonment for one year and subsequently was dismissed from service in an

action taken under the service Rules, the decision was upheld by the Apex Court in *Union of India v. Sunil Kumar Sarkar*, reported in AIR 2001 SC 1092 holding that it does not amount to double jeopardy under Article 20(2) of the Constitution of India and two proceedings operate in two different fields though the crime or the misconduct might arise out of the same act. Hence the contention sought to be raised that on account of the punishment having been imposed under Section 48A of the Prisons Act, the respondents would not be entitled to deny the furlough leave by taking resort to the provisions of law comprised under Rule 4(10) of the Furlough Rules is devoid of substance and has to be rejected.

28. In the case of *State of Maharashtra v. Suresh Pandurang Darvakar (supra)*, the Supreme Court held thus:-

"5. But release on furlough cannot be said to be an absolute right of the prisoner as culled out from Rule 17. It is subject to the conditions mentioned in Rule 4(4) and 6.

..... Since the furlough is granted for no particular reason, it can be denied in the interest of society.

6.

7. A bare reading of Rule 4(4) indicates that release can be refused when the same is not recommended by the Commissioner of Police in Greater Bombay and elsewhere, by the District Magistrate on the ground of public peace and tranquility.

29. In sub-rule 13, furlough is denied on the basis of gravity of offence. In the case of *Sunil Batra v. Delhi Administration and Ors.* AIR 1978 SC 1675, the Apex Court upheld the validity of a classification based on the gravity of the offence.

30. Useful reference may be made to a decision of the Supreme Court in the case of *State of Haryana v. Jaising*, AIR 2003 SC 1696. In that case, what the Supreme Court was considering was a case of remission to prisoners/convicts. However, a notification giving the benefit of remission made certain prisoners and convicts ineligible for the same. The classification was that the convicts who have been convicted for rape, dowry death, abduction and murder of children below 14 years, offences of robbery, prisoners sentenced under NDPS Act, TADA and Foreigners Act and those detained under detention laws and found guilty of violation of Jail Manual shall not be given such remission. That provision came to be challenged before the Punjab and Haryana High Court. The High Court held that it is not open to the State Government while granting general remission to carve out special exception to cases which according to it, could be terms as heinous offences and deny benefit of remission to such class of convicts. Therefore, the petition of Jail Singh was allowed.

The State of Punjab and Haryana appealed to the Supreme Court and the Supreme Court held as under:-

"8. The answer to the said question, in our opinion, should be in the negative. This Court in a catena of decisions has recognised that the gravity of an offence and the quantum of sentence prescribed in the Code could be a reasonable basis for a classification. This Court in *State of Haryana & Ors. v. Mohinder Singh etc.* 2000 (3) SCC 392 held : Prisoners have no absolute right for remission of their sentence unless except what is prescribed by law and the circular issued thereunder. That special remission shall not apply to a prisoner convicted of a particular offence can certainly be a relevant consideration for the State Government not to exercise power of remission in that case."

31. Having come to the conclusion that the gravity of the offence can be the basis for a valid classification, we will now consider whether the offences excluded from the impugned notification can be said to be such offences which have been wrongly excluded from the benefit of furlough. We notice that the convicts who have been excluded from the benefit of said notification, are those convicts who have been sentenced for offences of kidnapping, dacoity, terrorist activities etc. The said offences can be categorized as grave offences, therefore, they can be aptly classified as grave offences, which classification will be a valid classification for the purpose of deciding whether the persons who have committed such offences should be granted furlough or not. On this basis, we are of the opinion that the State Government having decided not to grant furlough to these offenders is justified in doing so.

32. Similarly, the offences under the NDPS Act, apart from carrying heavy penal sentences are offences which could be termed as offences having serious adverse effect on the society, cognizance of which is required to be taken by the State while granting furlough. Therefore, they can also be classified as offences which should be kept out of the purview of furlough and in our opinion, can be classified for exclusion from the benefit of furlough. Therefore, we are of the opinion that the offences excluded from the benefit of furlough under the impugned notification have been properly classified which classification, in our opinion, is a valid classification for the purpose of making them ineligible for the grant of furlough.

33. In view of the decision of the Supreme Court in *Jaising* (supra), we do not see how we can take a different view in the cases of furlough leave. If remission in sentence can be denied as held by the Supreme Court on the ground of gravity of offences and that can form the basis of a valid classification, then, all the more in the case of furlough leave we cannot take a different view. At this stage, Notification dated 1.12.2015 was brought to our notice. By this Notification, Rule 4 was further amended to include offence of rape. In our opinion, the same reasoning as in the case of sub-rule 13 to Rule 4 would apply to cases of rape.

34. Mr. Thakur, thereafter, submitted that Clause 26.4 of the Parole/Furlough Guidelines 2010 which were approved by Lt. Governor, Government of NCT of Delhi which are applicable in the case of convicts undergoing sentence in prison was challenged before the Delhi High Court. Clause 26.4 reads as under:-

"26. In order to be eligible to obtain furlough, the prisoner must fulfil the following criteria:-

26.1

26.2.

26.3

26.4. The prisoner should not have been convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion."

Mr. Thakur pointed out that Clause 26.4 is similar to sub-rule 13 of Rule 4 of Bombay Parole and Furlough Rules. Mr. Thakur pointed out that the Delhi High Court held that Clause 26.4 of the guidelines of 2010 does not stand judicial scrutiny which makes prisoner ineligible for furlough merely on the basis of the nature of the crime committed by them. It would amount to snatching their right to at least consider their cases for grant of furlough. Mr. Thakur stated that observing thus, guideline 26.4 was struck down as unconstitutional. As far as this contention is concerned, the vires of sub-rule 13 was challenged before this Court in the case of Subhash Bhosale (supra). The Division Bench after considering the issue in detail, negated the contention that sub-rule 13 of Rule 4 violates the mandate of Articles 14 and 21 of the Constitution of India. The decision of the Delhi High Court at the most can only have persuasive value and it is not binding on this court. Moreover, when we have a decision of this Court on the issue in the case of Subhash Bhsale (supra), we are bound to follow the decision of this Court.

35. In view of the above, there is no substance in the argument that the mandate of Articles 14 and 21 of the Constitution of India is violated and sub-rule 13 of Rule 4 falls foul of that mandate. It is not possible to uphold the contention that sub-rule 13 of Rule 4 is discriminatory in character and is violative of Article 14 of the Constitution of India. We are of the opinion that the classification has a rational basis and has a distinct nexus with the underlying object of the legislation and that it does not introduce any element of hostile discrimination. In the result, we come to the conclusion that sub-rule 13 of Rule 4 is valid and intra vires and not vulnerable to the charge of being violative of Article 14 of the Constitution of India.

36. For all the above reasons, we do not find any substance in the challenge to the validity of sub-rule 13 of Rule 4. As a result, the Writ Petition fails. Rule is discharged.

37. In view of disposal of the Writ Petition, nothing survives in the Criminal Application, the same is disposed of accordingly.