

(2001) 01 GUJ CK 0001

In the Gujarat High Court

Case No : Letters Patent Appeal No. 807 of 2001 and Criminal Application No. 6318 of 2001

State of Gujarat

APPELLANT

Vs

Aniruddhsinh Mahipatsinh Jadeja

RESPONDENT

Date of Decision : 01-01-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 268, 268(1)

Penal Code, 1860 (IPC) — Section 104, 302

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 25(1), 3(2)

Citation : (2001) 01 GUJ CK 0001

Hon'ble Judges : D.M. Dharmadhikari, C.J.;R.R. Tripathi, J

Bench : Division Bench

Advocate : S.N. Shelat, General and A.D. Oza, Govt. Pleader, for the Appellant;
K.J. Shethna, for the Respondent

Judgement

D.M. Dharmadhikari, C.J.—This LPA has been preferred by the State and Inspector General of Police (Prison) to challenge the order of the learned Single Judge dated 14.8.2001 whereby against the decision of the authority of the State, parole has been granted to the petitioner who is a life convict for a period of five days so that he may offer condolences to the members of his family, after the accidental death of his younger brother on 18.5.2001.

2. Learned Single Judge, after considering the objections raised to the grant of parole of the petitioner, imposed stringent conditions requiring security and escort to be provided to the petitioner at his cost and on deposit of Rs.1lakh as a condition precedent of his release. The stringent conditions on which parole has been granted are required to be reproduced to appreciate the objections raised by the authority of the State to the grant of parole to the petitioner:

(a) That the State Government will provide strict , complete and competent escort and the strength of the escort will be determined by the State Government considering the apprehension which has been pointed out by the

State Government. However, it is directed to the State Government to provide appropriate disciplinary escort to the petitioner from the jail authority while transferring the petitioner from Sabarmati Central Jail to Rajkot District Jail.

(b) The petitioner is directed to deposit the sum of Rs.1,00,000/- (Rupees one lakh in cash) by himself or any of his relative before the concerned Sabarmati Central Jail authority on or before the release of the petitioner on parole. It is further directed to the petitioner to deposit passport before the concerned jail authority, if possessed by him, prior to release of the petitioner on parole.

(c) The brother in law of the petitioner Shri Balvirsingh Dilipsingh Gohel is directed to deposit the sum of Rs. 1,00,000/- (Rupees one lakh in cash) before the concerned Sabarmati Central Jail authority on or before the release of the petitioner on parole and he is also required to file an undertaking, as a condition to this order, before this court with assurance to this court that during the five days parole, the petitioner will not indulge into any such activity which adversely affect the public order and public peace and the petitioner will not commit any offence during the parole period of five days and the petitioner will definitely surrender to the concerned jail authority along with escort on completion of five days and in case of any condition of the undertaking so also this order, the brother in law of the petitioner Dalbirsingh Dilipsingh Gohel will be liable to face contempt proceedings for committing breach in any manner by the petitioner. Such undertaking to the aforesaid effect is required to be filed before this court on or before 17th August 2001 and a copy thereof is directed to be served to the State of Gujarat through the office of the learned Public Prosecutor.

(d) On compliance of the aforesaid conditions, the State Government is directed to transfer the petitioner from Sabarmati Central Jail to Rajkot District Jail under full escort, at the cost of petitioner, as may be deemed fit by the State of Gujarat considering all the aspects of the apprehension expressed by State.

(e) During the 5 days period of parole as granted by this court in the present order, to is directed to the State and the concerned jail authority to take the petitioner from Rajkot District Jail at 7.00 a.m. in the morning to the village of the petitioner at Ribda with full escort as may be determined and posted by the State and each day during the evening, the petitioner shall be brought back to the Rajkot District Jail on or before 5.30 p.m. with full escort who may be accompanying the petitioner in the morning hours. It is made clear that for all five days parole, the petitioner will be taken from Rajkot District Jail to his village Ribda in the morning and brought back in the evening as directed hereinabove.

(f) Parole period will commence from the day on which the petitioner is taken from Rajkot District Jail to his village Ribda and shall accordingly end on completion of five days. That on completion of the parole as specified hereinabove, the State Government is directed to bring back the petitioner to the Sabarmati Central Jail without fail.

(g) It is also made clear that the cost of the escort will have to be borne by the petitioner and same shall be adjusted against the deposit as directed by this court hereinabove. The amount that may be deposited by the brother in law of the petitioner Shri Dalvirsingh Dilipsingh Gohel and the petitioner, as directed by this court, after adjusting the cost of the escort from the deposit of the petitioner, shall be returned to the respective depositor on satisfactory compliance of the order of this court and the undertaking as directed to be filed by this court by Shri Dalbirsingh Dilipsingh Gohel.

(h) However, in case of any default or breach of any of the conditions set out in this order and undertaken by the brother in law of the petitioner Dalbirsingh Dilipsingh Gohel, the amount of deposits made by the petitioner and his brother in law shall be liable to be forfeited by the State Government.

It is further made clear that after completion of all these formalities of filing undertaking by the brother in law of the petitioner Dalbirsingh Dilipsingh Gohel and depositing the amount of deposits in cash as directed by this court, within three days, the State Government will release the petitioner on parole for a period of five days with full escorts may be determined by the State by strictly following the conditions as set out hereinabove."

3. The Commissioner of Police ,Rajkot had recommended grant of parole , but the District Superintendent of Police, Rajkot had objected to the grant of parole by sending fax message in which it was stated that it would be hazardous to grant parole to the petitioner keeping in view the past criminal history and danger to his own life and all others. The application for grant of parole made to the State Government in accordance with Rule 18 of the Prison (Bombay furlough and Parole) Rules, 1959 (`the Rules" for short) was not granted within a reasonable time after the accidental death of the younger brother of the petitioner. The petitioner, therefore, approached this court by way of a writ petition under Article 226 of the Constitution of India, whereupon, after hearing the learned counsel for the petitioner and learned counsel appearing for the State , parole was granted by the learned Single Judge on terms and conditions quoted above.

4. Learned Advocate General appearing for the State in questioning correctness of the order of the learned Single Judge , catalogued the grounds on which grant of parole to the petitioner is considered by the State as not desirable. It is submitted that the petitioner was convicted for the offences punishable u/s 302 read with section 104 of the Indian Penal Code and u/s 3(2) of TADA Act read with section 25(1)(iii) of the Arms Act. The petitioner was convicted and sentenced by the Supreme court of India and for two years, he was said to have absconded and surrendered after two years before the Sessions Court. He has been avoiding his arrest after conviction as his father had been urging that there was danger to his own life from the police authorities themselves who are likely to kill him in an encounter. The petitioner was convicted for the murder of MLA of Gondal. He was convicted by the Supreme court on 10.7.1997 and he

surrendered before the Sessions court, Rajkot on 28.4.2000. In SCA, an affidavit opposing grant of parole has been filed by the Deputy Secretary, Home Department, in which it has been stated that report was received from the Commissioner of Police by fax message dated 20.10.2000 that he had received complaints from various people that the petitioner had been threatening them on mobile phone. As a result of these complaints, on 25.10.2000, on the report of the Superintendent of Central Prison, Ahmedabad, the State Government passed an order u/s 268(1) of the Code of Criminal Procedure, 1973 to the following effect:

"Whereas Aniruddhsingh Jadeja convicted prisoner No.S/7548 (hereinafter referred to as the prisoner) has been undergoing sentence u/s 302 of IPC , section 3(2) and 5 of TADA and section 25(1) of Arms Act . And whereas the prisoner is at present lodged in Ahmedabad Central Jail.

And whereas Commissioner of Police , Rajkot and Superintendent ,Ahmedabad Central Prison vide their letters quoted above has proposed to place the prisoner under 268 (1) of CRPC and Government has considered them carefully,

Now, therefore, in exercise of powers conferred by sub- section (1) of section 268 of the Code of Criminal Procedure, 1973 and having regard to:

(a) the nature of the offence for which or the grounds on which the person or class of persons has been ordered to be confined or detained in prison; (b) the public interest, generally.

The Government of Gujarat hereby directs that Aniruddhasinh Jadeja the convicted prisoner shall not be removed from the Ahmedabad Central Jail."

5. Section 268 of Criminal Procedure Code authorises the State Government to pass an order directing that any person or class of persons shall not be removed from prison in which he or they may be confined or detained and such power has to be exercised in circumstances, amongst others, that there is likelihood of disturbance of public order if the person or class of persons is allowed to be removed from prison. Section 268 reads as under :

"268. Power of State Government to exclude certain persons from operation of section 267(1) The State Government may, at any time, having regard to the matters specified in sub- section (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they maybe confined or detained, and thereupon, so long as the order remains in force, no order made u/s 267, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under sub section (1), the State Government shall have regard to the following matters, namely:-

(a) the nature of the offence for which or the grounds on which the person or class of persons has been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison;

(c) the public interest, generally."

Consequent upon the order passed u/s 268(1), the petitioner is lodged in Ahmedabad Central Prison and cannot be removed to any other jail. On behalf of the State , it is explained that there was some delay in communicating the decision on his application for grant of parole because the Government was actively considering the reports of police authorities and there were various representations made by various organizations, political persons and others which were required to be considered in the interest of justice, before taking a final decision. It is submitted that keeping in view the aforesaid antecedents of the prisoner, the statutory order made by the State Government u/s 268 of the Code of Criminal Procedure as also various complaints and likelihood of breach of peace on his release, the State Government decided not to grant him parole.

6. Learned Advocate General contends that parole is not a right of a prisoner. It is a discretionary power of the State Government under Rule 18 of the Rules and the power has been exercised keeping in view the relevant considerations. Such decision of the executive authority was not liable to be interfered with and substituted by the order of the learned Single Judge. It is submitted that the very fact that such stringent conditions have been imposed by the learned Single Judge supports the stand of the State Government that parole should not have been granted as there was threat and danger both to the life of the prisoner and to others.

7. Learned senior counsel Mr. K. J. Sheehan with learned counsel Mr. Tushar Mehta for the prisoner have strenuously urged that the learned Single Judge has duly taken into consideration human rights of prisoners and quoting and following the decisions of the Supreme court has rightly come to the conclusion that it was inhumane on the part of the authorities not to allow the prisoner to meet members of his family after the death of his real younger brother . On behalf of the prisoner, it is stated that as per the custom followed by Rajput community to which the petitioner belongs, it is necessary to meet in traditional way the widow of the deceased brother. It is submitted that atleast for this customary condolence, the learned Single Judge rightly granted parole and has imposed such heavy conditions as to direct the prisoner to meet the cost of the escort and security and to deposit a sum of Rs. one lakh as a security for his return to the prison after completion of the period of release. It is submitted that the order of the learned Single Judge should not be interfered with merely because there is a delay in passing the order as the death had occurred on 18.5.2001 and the order is passed on 14.8.2001. The learned counsel for the prisoner submitted that in fact, the application for parole was immediately made after the said incident of the death of younger brother of the prisoner, but, the delay was caused by the State in considering the said application and consequently, there was a delay in court proceedings.

8. After hearing the learned counsel for the parties and perusing the record and judgment of the learned Single Judge, we are not persuaded to uphold the order challenged in this LPA. We need not deal elaborately, as has been done by the learned Single Judge, with various decisions of the Supreme court on prison reforms. We respectfully bow down to the verdict of the Supreme court. Grant of parole, however, is essentially an executive function which is a part of reformatory process. Power to grant parole is discretionary but the discretion has to be regulated by the provisions of the Rules of 1959. Rule 18 (2) empowers the competent authority i.e. Superintendent of Prison to release a convicted prisoner on parole not exceeding 15 days in case of death of his close relation like father, mother, brother, sister, spouse or child. Under Rule 19, the competent authority may grant parole upto 30 days in case of serious illness or death of nearest relative of the prisoner, but the power has to be exercised after obtaining police reports, except in case of death of nearest relative. Relevant Rule 19 reads as under :

"19. When a prisoner may be released on parole: A prisoner may be released on parole for such period not exceeding thirty days at a time, as the competent authority referred to in rule 18, in its discretion may order, in cases of serious illness, or death or nearest relative such as mother, father, sister, brother, children, spouse of the prisoner, or in case of natural calamity such as house collapse, floods, fire. No such parole or extension of parole shall be granted without obtaining a police report in all cases except in the case of death of his nearest relatives mentioned above: Provided that a prisoner shall not be released on parole for one year after expiry of his last parole except in case of death of his nearest relatives mentioned above."

Rule 22 contains the procedure and manner in which applications for parole are to be dealt with. Sub-rule (2) of Rule 22 requires the District Superintendent of Police concerned or Commissioner of Police to inquire and ascertain genuineness of grounds on which parole is sought and whether he recommends grant of parole and whether there is likelihood of breach of peace if the prisoner is released on parole. Rule 22(2) reads as under :

"22. Applications for parole to be dealt with:

(2) The District Superintendent of Police concerned or the Commissioner of Police, Bombay, as the case may be, shall immediately make enquiries to ascertain whether the ground or grounds on which parole is applied for is or are genuine and submit immediately his report to the Competent Authority mentioning inter alia whether it recommends the grant of parole and also whether there is a likelihood of breach of peace if the prisoner" is released on parole."

From the provisions of Prison Rule 19 read with sub-rule (2) of Rule 22, it is clear that power to release a prisoner on parole is discretionary to be exercised on relevant grounds. One of the relevant grounds is likelihood of breach of peace if

the prisoner is released on parole as provided in sub-rule (2) of Rule 22. Learned counsel for the prisoner referred to the provisions regarding grant of 'furlough' which the prisoner earns for good conduct in prison and is different from 'parole'. Sub-rules (9) and (10) of Rule 4 in the matter of grant of furlough read as under :

"4. When prisoners shall not be granted furlough:

(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 on furlough."

For refusing furlough, the fact that prisoner had escaped from lawful custody or defaulted in surrendering at appropriate time is a good ground. The learned counsel for the prisoner argued that grounds available for rejection of furlough under Rule 4 may not apply to refusing parole under Rule 19. In our opinion, the ground on which furlough can be refused can also be good ground for the competent authority in exercising discretion not to grant parole. Provisions of Rules 19 and 22 (2) are widely worded. The most important considerations which weighed with the authority in refusing parole were that the petitioner was convicted of murder of MLA. He was himself apprehensive of danger to his life from the police authorities. Such apprehension was expressed by his father. After conviction by the Supreme court, he surrendered after two years. There were complaints that he was using mobile phone to give threats to the public. We need not go into the correctness or falsehood of these complaints at this stage. There was an express order of the State Government u/s 268 of the Cr. P.C. that in view of the likelihood of disturbance of public order, the prisoner shall not be removed from Ahmedabad Central Prison. There were representations. There was likelihood of breach of peace on his release because atmosphere was surcharged as is reported by the police authorities of Rajkot. As a result of grant of parole, the prisoner would have to be taken out of Ahmedabad Central Prison and will have to be taken to his village in Rajkot district which was the district in which the offence was committed. The State Government had thought it fit not to revoke the order passed u/s 268 of the Cr. P. C. These were all, according to us, very relevant considerations in exercising power of refusing parole. We are not attaching any importance to the fact that much time has intervened after the accidental death of the younger brother of the prisoner on 18.5.2001 and the order of release on parole granted by the learned Single Judge by the impugned order dated 14.8.2001.

9. Prisoners are no doubt human beings and humane approach is required in dealing with them. Punishment imposed on them should have reformatory influence and they are not to be turned out to be hardened criminals after

completion of the sentence. Power to grant parole is executive in nature. Discretion has to be exercised in accordance with Rules and on settled guidelines. It has not to be exercised arbitrarily. If it is exercised arbitrarily without taking into consideration the relevant facts and aspects, there can be scope for interference by court. But since power has to be exercised in relation to a prisoner by the prison authority and when this power has been exercised on considerations which are found to be relevant, judicial interference is not called for. It was an error on the part of the learned Single Judge to have substituted his own discretion for the discretion exercised by the State and the prison authorities. In the matter of grant or refusal of parole, greater latitude is required to be given to the authorities as they alone know the actual situation of the prisoner and surrounding social atmosphere. The very fact that the learned Single Judge thought it fit to impose such stringent conditions for security and escort of the prisoner for release on parole, indicates that the State Government was right in refusing parole.

10. Learned Advocate General was fair enough in suggesting that if it is a question of sentiment in meeting the members of the family in bereavement, prison authorities would allow the widow of the deceased brother of the prisoner and his other nearest relatives to meet the prisoner in the prison for a period longer than generally allowed to prisoners under the Prison Rules.

11. As a result of the discussion aforesaid, we allow this LPA , set aside the order of the learned Single Judge dated 14.8.2001 and uphold rejection of the application for grant of parole by the State Government and the prison authorities. We, however, direct that if the prisoner desires, he shall be allowed to meet the widow of his deceased younger brother with other nearest relatives in the prison for a period necessary for observance of customary rituals. This interview and meeting with the members of the deceased younger brother will, however, be allowed for a reasonable period in accordance with the Prison Rules and with due regard to maintenance of discipline of Prison. No orders on Misc. Criminal Application.