

(2016) 11 BOM CK 0033

In the Bombay High Court

Case No : Criminal Writ Petition No. 2473 of 2015

Wilson Benjamin Castellino

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 28-11-2016

Acts Referred:

Constitution of India, 1950 — Article 20(2)
Prison Act, 1952 — Section 48A

Citation : (2017) 1 AIRBomRCri 454 : (2017) ALLMRCri 427 : (2017) 1 BomCR(Cri) 467 : (2017) CriLJ 1479 : (2016) 6 MhLJCrI 452

Hon'ble Judges : Smt. V.K. Tahilramani and Mrs. Mridula Bhatkar, JJ.

Bench : Division Bench

Advocate : Mrs. Farhana Shah Advocate (appointed), for the Petitioner; Mr. H. J. Dedia APP, for the State

Final Decision : Disposed Off

Judgement

Smt. V.K. Tahilramani, J. (Oral) - Heard both sides.

2. Rule. By consent, Rule is made returnable forthwith.

3. The case of the petitioner is that in the year 2010, he was released on furlough on 19.11.2010. He had to surrender on 4.12.2010, however, on 1.11.2012, when he was going to surrender to the prison, he met with an accident and therefore he was disoriented and could not report back to the prison. Thus, there was overstay of 674 days. On account of this, his remission has been cut. Further it is the case of the petitioner that earlier he was appointed to the post of convict overseer, however, after he came back to the prison, he was not reappointed to the post of convict overseer. Thus, it the case of the petitioner that he was punished twice for the same offence i.e for overstay while he was on furlough.

4. The petitioner had to surrender on 4.12.2010, however, the case of the petitioner is that he was going to surrender to the prison on 1.11.2012 when he

met with an accident. This is after about two years from the date, when he had to actually surrender back to the prison. There is no explanation for these two years why the petitioner did not report back to the prison on his own. In fact, he was arrested by the police in two other cases i.e C.R. No. 14/2012 of Vita Police Station and C.R. No. 3104/2012 of Karad Police Station. After being arrested in C.R. No. 14/2012, he was brought back to the prison. Had the police not arrested the petitioner, the petitioner would have continued to remain outside and not reported back to the prison.

5. The learned Advocate for the petitioner submitted that the petitioner is being punished twice which cannot be allowed. She claimed that it is a case of double jeopardy under Article 20(2) of the Constitution of India. She submitted that on account of overstay, his remission was cut and in addition, he was removed from the post of overseer. Hence, according to her, it is clearly a case of double punishment i.e double jeopardy. She also relied upon Section 300 of Code of Criminal Procedure.

6. The argument advanced on behalf of the petitioner is that it is a case of double punishment in the sense that for the overstay, punishment was imposed of cutting of remission. In addition, he was removed from the post of overseer. Thus, the petitioner has been doubly punished which is in violation of Article 20(2) of the Constitution of India and which cannot be allowed under Section 300 of Code of Criminal Procedure.

7. Double jeopardy is a concept which would amount to violation of Article 20(2) of the Constitution of India and it is also barred under Section 300 of the Code of Criminal Procedure. On going through the provisions of Article 20(2), as well as Section 300, we find that the petitioner cannot derive any benefit therefrom. We are of the opinion that it is not a case of double jeopardy. The only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. Article 20(2) reads as under:-

" 20. Protection in respect of conviction for offences :-

(1)

(2) No person shall be prosecuted and punished for the same offence more than once;

(3) "

The Apex Court in the case of *Maqbool Hussain v. State of Bombay*, 1953 (Cri. L.J. 1432 : 2010 ALL SCR (O.C.C.) 294 held that the words "before a Court of law or judicial tribunal" are not to be found in Article 20(2), yet in order to invoke the protection of Article 20(2), there must have been a prosecution and punishment in respect of the same offence before a Court of Law or Tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer. The Article contemplates

proceedings of criminal nature before a Court of law in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. It was also held that Article 20(2) incorporates within its scope the plea of "autrefois convict" as known to British Jurisprudence or the plea of "double jeopardy" as known to the American Constitution but circumscribes it by providing that there should not only be a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.

8. The petitioner in this case cannot get any benefit, because he has not been prosecuted earlier. Article 20(2) would become operative in a case where the second prosecution and punishment is for the same offence for which the person concerned has already been prosecuted and punished. Moreover, the principle is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. The rule against double jeopardy is stated in the maxim *Nemo debet bis vexari pro una et eadem causa*. It is only when the offence has been the subject of judicial adjudication and it ended in acquittal or conviction, the criminal justice system would not allow repetition of the adjudication in a separate trial on the very same facts. In the present case, the petitioner has not been prosecuted before any Court of law or Tribunal. There were no proceedings of criminal nature "before a Court of law" in accordance with the procedure prescribed in the statute which creates offences and regulates procedure for punishment, therefore, it is clearly not a case of double jeopardy.

9. The only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. No other ingredient could be added. Both, Article 20(2) and Section 300, Criminal Procedure Code are not attracted in the instant case. The petitioner has not been convicted or acquitted earlier for an offence based on the same facts. Thus, in view of the above, the doctrine of "double jeopardy" contained in Article 20(2) or even the bar of Section 300, Criminal Procedure Code could not be applied to the case of the petitioner.

10. Section 300 of Code of Criminal Procedure would not be attracted because it covers cases of persons convicted or acquitted earlier and states the situations where under, the person can be tried again. In the present case, the petitioner has not been tried by a competent Court for any of his misdeeds, hence, he cannot claim any benefit. This is in view of the fact that Section 300 states that such person ought to have been convicted or acquitted by a competent Court. While dealing with Section 300 of Criminal Procedure Code, it is necessary to take note of the exceptions provided under the said sub-section also the explanation thereunder. Sub-section (4) of Section 300 of the Code provides that a person acquitted or convicted of any offence constituted by any acts, may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the

offence with which he is subsequently charged. The explanation thereto provides that the dismissal of a complaint or the discharge of the accused is not an acquittal for the purpose of the said Section.

11. It is, therefore, clear that to attract the provisions of Section 300 (1) of the Code, it must be established that :

1.(a) A person has once been actually tried by a competent Court for the same offence charged in the second trial; or

(b) Though not actually tried for the same offence charged in the second trial, the person could have been on the same facts charged with it under Sections 221(1) or convicted of it under Section 221(2).

2. The person has been convicted or acquitted in the earlier trial. Dismissal or discharge is not acquittal.

3. Conviction or acquittal is in force i.e it has not been set aside by a superior Court.

The said Section 300 of the Code corresponds to Section 403 of the Code of Criminal Procedure, 1903.

12. Thus, in our view, so far as the constitutional provision is concerned, the prohibition is against the prisoner being prosecuted and punished for the same offence more than once. The action taken against the petitioner of cutting of remission is only a disciplinary action taken against the prisoner for which there was no prosecution launched against him nor there was any order of conviction and sentence awarded as contemplated under Article 20(2) of the Constitution. It would be relevant to refer to two other judgments of the Apex Court in this connection.

The first case is of *Thomas Dana v. State of Punjab*, AIR 1959 SC 375 decided by the Constitution Bench of the Supreme Court. In that case, the Supreme Court was considering the principle of double jeopardy laid down in Article 20(2) of the Constitution. The question before the Supreme Court was whether prosecution under the Penal Code and the action taken under the provisions of Section 167 of the Sea Customs Act were hit by Article 20(2) of the Constitution. It was held that the proceeding before the Sea Customs authorities under Section 167 of the Sea Customs Act was not a prosecution within the meaning of Article 20(2) of the Constitution observing that "prosecution" means a proceeding either by way of indictment or information in the criminal courts in order to put an offender upon his trial. Thus, in the present case, the imposition of penalty under the rules framed under the Prison Act would not amount to prosecution as contemplated under Article 20(2) of the Constitution.

13. Another judgment of the Supreme Court is in the case of *Union of India and Ors. v. Sunil Kumar Sarkar* (2001)3 SCC 414. That was a case where the delinquent was found guilty and sentenced by the General Court Martial to R.I.

for 6 months under Army Act. The disciplinary authorities had punished him by dismissing him from service under the rules for his misconduct. It was held that Court Martial proceedings and disciplinary proceedings deal with different aspects i.e. one under the Army Act and another under the Service law i.e. 3 (2001) 3 SCC 414 Central Civil Services (CCA) Rules under which disciplinary action was taken and therefore, the concurrent proceedings under the two i.e. Army Act and CCS (CCA) Rules would not amount to double jeopardy within the meaning of Article 20(2) of the Constitution.

14. In our view, applying the above principle in the present case, two actions taken against the petitioner, one of deducting the remission earned by him and the second of not reappointing him to the post of convict overseer do not amount to double jeopardy within the meaning of Article 20(2) of the Constitution. This is in view of the clear dicta of the Supreme Court given by the Supreme Court as far back as the year 1953 in the case of Maqbool Hussain (supra) and thereafter in 1958 by the Constitution Bench of the Supreme Court in the case of Thomas Dana (Supra) and thereafter, in the judgment of the Supreme Court in Sunil Kumar's case (Supra) in the year 2001. So also, for the reasons stated earlier, the case of the petitioner is not covered by Section 300 of Criminal Procedure Code

15. This Court in four decisions to which one of us was a party (V.K. Tahilramani, J.) took the same view in similar circumstances. These decisions are :- Anil Lala Saundade v. State of Maharashtra 2003 ALL MR (Cri) 433, Niyaj Ahamad Abdul Jabbar v. State of Maharashtra 2011 ALL MR (Cri)2509. Akash @ Vijay Kumar Khandekar v. State of Maharashtra & Anr.,2011 ALL MR (Cri) 3831 and Buwaji Sahadeo Hazare v. State of Maharashtra,Criminal Writ Petition No. 2477 Of 2015 decided on 24.6.2016: [2016 ALL MR (Cri) 4539] (Coram : V.K. Tahilramani & M.R. Bhatkar, JJ)

16. In the case of Anil Saundade (supra), the petitioner had escaped from lawful custody. On account of this, he was prosecuted under Section 224 of IPC and sentenced to one year of imprisonment and in addition his remission was deducted. In the said case also, the argument of double jeopardy was raised, however, the Court negatived the said contention. In the case of Niyaj Ahamad (supra), the grievance of the petitioner was that on account of not doing work properly in prison and disobeying the orders of the Jail Authorities, he was transferred to special prison and in addition thereto, a period of 15 days was deducted from his remission which according to the petitioner therein amounted to double jeopardy. This Court relying on the decision in the case of Maqbool Hussain (supra) held that it was not a case of double jeopardy. In the case of Akash Khandekar (supra), the argument advanced on behalf of the petitioner was that it is a case of double jeopardy in the sense that apart from punishment of cutting of remission being imposed for overstay, the petitioner's application for parole was rejected. In the case of Akash (supra), relying on the decision of the Supreme Court in the case of Maqbool Hussain (supra), the contention was

negated. In the case of Buwaji Hazare, on account of overstay when the prisoner was granted furlough, his remission was cut and his subsequent applications for parole and furlough were rejected, hence, it was contended that it was a case of double jeopardy, which contention was negated.

17. Thereafter, after referring to Section 48-A of the Prisons Act, 1894, it was sought to be contended on behalf of the petitioner that the petitioner having been already punished under the said provision of the Prisons Act by cutting his remission on account of the period for which he had overstayed, the petitioner could not be again penalized by removing him from the post of overseer, as it amounts to double jeopardy.

Section 48-A of The Prisons Act, 1894 reads as under:-

" 48A. 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 Superintendent, may, after obtaining his explanation, punish such offence by -

1. a formal warning as provided in clause (1) 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 Government may by a general or special order direct.]"

The provisions relating to cutting of remission does not relate to penal action on the part of the authorities. So is the case of not appointing to the post of overseer. The powers of 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. The contention that on account of the punishment having been imposed under Section 48-A of the Prisons Act, the respondents would not be entitled to deny the petitioner of the post of overseer is without merit.

18. It would also be relevant to point out that proviso to Rule 26 of Chapter XXVII of the Maharashtra Prison Manual clearly lays down 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 purpose of Prison Rules. Thus, even if remission was cut on account of overstay, it cannot be deemed to be a punishment. So also not reappointing him to the post of overseer cannot amount to punishment. Thus, in view of this fact and all the above facts, we are of the considered opinion that this is not a case of double jeopardy. There is no violation of Article 20(2) of the

Constitution or Section 300 of Criminal Procedure Code

19. In view of above, Rule is discharged.

20. Office to communicate this order to the petitioner who is in Kolhapur Central Prison, Kalamba.