

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 951 OF 2015

Mohd. Azam Aslam Butt	]	
48 years, Occupation : Nil	]	
residing at 1/G-2, Holiberry Bldg,	]	
Motiram Garden, Near Kher Junction	]	
Ambarnath, Dist. Thane	]	
At present in Nashik Jail,	]	
Dist Nashik.	]	
(Confined at Nasik Road Central	]	
Prison, Nasik Road)	]	..Petitioner.
<i><u>Versus</u></i>		
1. State of Maharashtra.	]	
	]	
2. Pradeep Bhanudas Chaudhari,	]	
Jail Constable, Nasik Road Central	]	
Prison, Nasik Road.	]	
	]	
3.The Addl. Director General of Police]		
& Inspector General of Prisons	]	
Maharashtra State, Central Bldg,	]	
Pune – 411 001.	]	..Respondents.

Mr. N. N. Gavankar i/b Mr. Manas N. Gavankar for the Petitioner.
Mr. S. K. Shinde, PP with Mrs. S. V. Sonawane, APP for the State.

Coram : RANJIT MORE &
V. L. ACHLIYA, JJ.

Date of Reserving Judgment : **February 16, 2016.**
Date of Pronouncement : **April 5, 2016.**

Judgment (Per Ranjit More, J.) :

1. In this writ petition filed under Article 226 of the

Constitution of India read with section 482 of the Code of Criminal Procedure, 1973, the Petitioner is seeking to quash the FIR bearing CR No.14 of 2015 registered with Shivaji Nagar Police Station, Ambarnath on 10th January 2015. The said FIR is registered against the Petitioner at the instance of Respondent No.2 for an offence punishable under section 224 of the Indian Penal Code, 1860. The Petitioner has also taken exception to the communication dated 29th June 2013 issued by Respondent No.1 and the notification dated 19th July 2013 issued by Respondent No.3, and to Rule-27 of the Maharashtra Prisons (Mumbai Furlough and Parole) Rules, 1959 which came to be amended by sub-clause (b) of paragraph 22 of the Notification dated 1st December 2015 issued by Home Department.

2. The brief facts giving rise to the filing of the present petition can be summarised thus :

. The Petitioner is a life-convict in Sessions Case No. 43 of 2006. He was lodged in Nashik Road Central Prison to undergo the said sentence. By invoking the provisions of Rule 19 of the Maharashtra Prisons (Mumbai Furlough and Parole) Rules

1959, he obtained 30 days' parole leave on 3rd September 2014. He came to be released from the prison on 4th September 2014 after he complied with the parole order and furnished the bail bonds. He got extended this parole leave twice, on each occasion for 30 days' period. In compliance with the order granting and extending parole leave, the Petitioner was to report back to the prison authority on 4th December 2014 but he did not report back. The prison authorities, therefore, declared him to be an absconder. On that ground, they also registered the subject CR against him for the offence punishable under section 224 of the Indian Penal Code, 1860.

. The basis for the registration of said CR is, which the Respondent-Authorities also agree, the Communication dated 29th June 2013 issued by Respondent No.1 and the Circular dated 19th July 2013 issued by Respondent No.3. As stated above, apart from seeking quashment of the CR, in this petition the Petitioner has also assailed this Communication and Circular.

4. Certain important facts having bearing on the issue at hand also need mention. In the year 2013, Respondent No.3 had sought guidance from Respondent No.1 regarding the action

to be taken against the prisoners who do not surrender in time after the expiry of furlough or parole leave period. Respondent No.1 by its communication dated 29th June 2013 informed Respondent No.3 that the Prison Authorities themselves are expected to take action against the prisoners who do not surrender after the expiry of parole or furlough leave period, by taking recourse to the provisions of section 224 of IPC and no separate orders from the Government in this regard are required. In pursuance of this communication, Respondent No.3 issued Circular dated 19th July 2013 whereby the guidelines regarding the registration of FIR against the prisoners who do not surrender after the expiry of period of parole or furlough are given. Under these guidelines it is specifically directed to register an FIR against such prisoner and to arrest him.

5. It is also worthwhile to note certain development that has taken place during the interregnum of this petition. By the Notification dated 1st December 2015, Respondent No.1 amended the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959 [for short, ***“the Rules of 1959”***]. Vide paragraph 22(b) of the said Notification, Rule-27 of the Rules of 1959 came

to be amended whereby the words “**may** arrest the prisoner, if at large, and remand him to undergo the unexpired portion of his sentence” appearing in sub-rule (2) of Rule-27 came to be substituted by the words “**shall** arrest the prisoner, if at large, and remand him to undergo the unexpired portion of his sentence”. By amending the petition, the Petitioner has also taken an exception to this amended provision of Sub-rule (2) of Rule 27 of the Rules of 1959.

6. The challenge to the Circular dated 19th July 2013 and amended provision of sub-rule (2) of Rule 27 of the Rules of 1959 is on the ground that they are illegal and contrary to law.

7. Mr. Gawankar, learned Counsel appearing for the Petitioner contended that section 224 of IPC has no application in case the prisoner, who is on parole or furlough leave, overstays. He contended that the Respondent Authorities have committed an error in implying that section 224 of the IPC provides for an action against the prisoner who has overstayed on parole or furlough. He submitted that by sub-clause (b) of Paragraph 22 of the notification dated 1st December 2015, Respondent No.1 has exceeded its jurisdiction.

Mr. Gawankar submitted that section 224 of IPC is applicable only when person intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence. He submitted that overstaying of the prisoner or not surrendering of the prisoner on expiration of the furlough and parole leave will not amount to the commission of an offence within the ambit and scope of section 224 of IPC. He submitted that in order to bring the action of the prisoner within the ambit and scope of offence as contemplated by section 224 of the IPC, there must be an overt act on the part of the prisoner and in the absence of any such act, the prisoner cannot be prosecuted for the offence punishable under section 224 of the IPC.

. In support of his submissions, Mr. Gawankar placed heavy reliance on two authorities : Ashok vs. State of Mah. [1988 Mh.L.J. 903] and Philip John vs. State of HP [1985 Cri.L.J. 397].

8. Mr. Shinde, the learned PP vehemently opposed the

petition. He submitted that it has been a problem of long time that in number of cases, the prisoners after obtaining parole or furlough leave, have not surrendered. The issue in this regard was earlier raised before this Court in Criminal Writ Petition No. 1098 of 2013. This Court by the order dated 27th September 2013 took note of the fact that several prisoners have absconded after obtaining parole or furlough leave and, observed that stringent measures like provision under section 224 of IPC need to be invoked against such prisoners who fail to report to custody after obtaining parole or furlough leave. He submitted that in pursuant to the observations made by this Court as contained in the order dated 27th September 2013, a Committee consisting of high officials of the Government was formed to give suggestions to implement the system wherein the prisoners granted parole or furlough leave should be brought back to the prison to undergo the remainder of sentence period. This Committee gave certain suggestions, pursuant to which the Rules of 1959 came to be amended extensively. One of the amended provision is about the registration of an FIR for the offence punishable under section 224 of IPC against the prisoner who does not surrender

after the expiry of the period of furlough or parole leave.

. Mr. Shinde submitted that in the instant case, the Petitioner was supposed to surrender before the prison authorities of Nashik Road Central Prison on 4th December 2014, however, he did not, and accordingly report to that effect was submitted to the Superintendent of Police and the senior officers of Thane Police; the Petitioner's surety was called upon and informed about the fact that the Petitioner has not surrendered, however, the said surety also did not respond to the notice. The Petitioner was thereafter declared as absconder and accordingly an FIR for the offence punishable under section 224 of IPC came to be registered.

. Mr. Shinde, placed reliance on the Apex Court decision in Sunil Fulchand Shah vs. Union of India [(2000) 3 SCC 409] and decision of this Court in Dinesh Mitaramji Gabhane vs. State of Maharashtra [2005 ALL MR (Cri) 484] and submitted that though the prisoner granted parole or furlough is released from the **actual custody** of prison authorities, he remains in legal custody of the State and non surrendering to the Prison Authorities after the expiry of the parole or furlough period

amounts to “escape or attempt to escape” within the meaning of section 224 of IPC. He lastly submitted that there is no merit in the petition and the same deserves to be dismissed.

9. Having considered the rival submissions and having gone through the petition and affidavit-in-reply and decisions cited at bar, in our view following issues deserve consideration in the present petition :

- [1] *Whether releasing of prisoner on furlough or parole amounts to releasing him from lawful custody ?*
- [2] *Whether on releasing prisoner on furlough or parole, prison authorities cease to have any control over him ?*
- [3] *Whether not reporting back by the prisoner to the prison authorities after the expiry of furlough or parole leave, amounts to “escaping the custody of prison authorities” ?*

10. A look at section 224 of IPC at this stage would be apposite, which reads thus :

“224. Resistance or obstruction by a person to his lawful apprehension.--

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation.-The punishment in this section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted. "

11. The Apex Court in *Sunil (supra)* distinguished parole from bail and held that both have different connotations in law though the substantive legal effect may be release of prisoner from the custody. The Apex Court held that since release on parole is a temporary arrangement by which the detenu is released from custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence, that parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise. The Apex Court further held that the detenu is not a free man even while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps

ticking during this period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody.

12. The Division Bench of this Court in *Dinesh (supra)* relied upon the above decision of the Apex Court in *Sunil (supra)* and held that the period of parole is a part of sentence and is therefore required to be counted towards the sentence. The Division Bench further held that the parole is a temporary release from the custody which does not suspend or interrupt the sentence like in bail and although the prisoner while on parole is temporarily released from actual custody, he is still in the legal or constructive custody and he thus continues to serve the sentence though in a different manner.

13. Thus, the proposition of law propounded by the Apex Court and the Division Bench of this Court, is that though the prisoner is released from prison on parole for temporary period, he still continues in legal or constructive custody of the

prison authorities. The period of parole is part of the sentence and is therefore required to be counted towards the sentence.

14. Having taken the view that the Petitioner during his parole leave is in legal or constructive custody of the prison authorities, let us consider whether his non-surrender to the prison authorities after the expiry of the parole period or extended parole period will amount to escape or attempt to escape from legal custody as contemplated under section 224 of the IPC.

15. The dictionary meaning of the word “escape” is :
(1) the act or instance of breaking free from confinement, restraint, or an obligation.
(2) An unlawful departure from legal custody without the use of force.

[Reference : Black's Law Dictionary, 8th Edition]

. If in the context of second part of section 224 of IPC, the meaning of the word “escape” as given in clause (2) above is considered, then, the unlawful departure from the legal custody without the use of force does amount to “escape” in the context of provisions of section 224 of IPC.

16. As stated above, though the Petitioner was not in actual prison on account of grant of parole leave, is deemed to be in the legal custody of the prison authorities and his act of non surrendering after the expiry of period of parole leave can be safely said to be an act amounting to escape, the reason being the "departure" connotes a deviation or divergence from a standard rule or regulation. Under the Prison Rules, Clause 10(5) of Chapter XXXVII (Furlough and Parole to the Prisoners) it is stipulated that the prisoner will surrender himself to the Superintendent of Prison from which he was released on the expiry of the period of parole or furlough. In our considered view, non surrendering to the prison authorities after the expiry of parole or furlough leave period will amount to divergence from the standard rules and regulations. Thus, it can be safely said that the Petitioner has unlawfully departed from the legal custody by non surrendering to the Prison authorities after the expiry of his parole period and the same amounts to escape from the legal custody. The Petitioner's conduct of non surrendering on time after the expiry of parole leave period amounts to escape. Clause (11) of the said Chapter incorporates that before releasing a

prisoner on furlough, declaration as under shall be given by him on the release order itself :

"I hereby accept and agree to abide by the above conditions of the release order and I acknowledge that should I fail to fulfill these conditions or any portion of them, the Sanctioning Authority may revoke the order of release and forfeit the amount of security furnished by me, and I may be arrested by any police officer without warrant and remanded to undergo the unexpired portion of my sentence, and I further acknowledge that should I fail to fulfill these conditions or any portion of them, I am liable to be punished on conviction, with imprisonment for a term which may extend to two years or with fine which may extend to Rs.1,000/- or with both, under section 51-B of the Prisons Act, 1894."

17. The rule and regulations granting parole to the prisoner put the parolee under an obligation to surrender to the prison authorities upon the expiry of parole period. If prisoner does not surrender accordingly on the expiry of parole period, it undoubtedly amounts to deviation or divergence from the standard rule or regulation. Such a deviation or divergence from the rules and regulations of parole will bring the act of the prisoner within the ambit and scope of definition of "escape" as postulated by section 224 of IPC.

18. Here, it would be worthwhile to mention that

number of prisoners have absconded after obtaining the parole and furlough leave. The cases of misuse of the liberty of parole and furlough are large. The details given by the prison Authority in their affidavit-in-reply are indeed shocking and alarming. The Division Bench of this Court in Writ Petition No. 1098 of 2013 had also taken note of this fact and suggested the Government to take appropriate measures in order to ensure that prisoners released on parole or furlough, who have not reported back after the expiry of parole or furlough period, are brought back to prison to undergo the remaining sentence. In the light of those observations, a committee was constituted and in accordance with the recommendations made by the said committee, rules are amended by issuing notification dated 1st December 2015.

19. Before parting with the matter, we must make reference to the decisions cited by Mr. Gawankar, learned Counsel appearing for the Petitioner. In *Philip (supra)*, the Petitioner was handcuffed by two constables while he was being medically examined by doctor. The Petitioner therefore prayed for an action against them for contempt of Court for having committed contempt of Court by acting in utter disregard of the

directions issued by the Supreme Court to the effect that the prisoner in transit shall not be handcuffed. The Division Bench of HP High Court held that High Court has no jurisdiction to commit for contempt any person who acts in willful disregard/breach of the directions issued by the Supreme Court in regard to the hand cuffing of undertrial prisoners/convicts while in transit. The Court further held that the high Court however cannot throw out the petition on that ground, for the law declared by the Supreme Court is binding on all Courts within the territory of India and it is not only within the power, authority, and jurisdiction of the High Court to secure the enforcement of such law by issuance of an appropriate writ, but also it is the constitutional obligation and duty to do so. The Division Bench after perusal of the provisions of section 55 of the Prisons Act, 1894 and section 224 of the IPC observed that a prisoner when being taken to or from any prison in which he might have been lawfully confined, for the purposes, *inter alia*, of medical treatment, or when he is working outside or is otherwise beyond the limits of any prison, such as when he is being actually medically examined or is taking medical treatment in any hospital, in or under the lawful custody or control of a

prison officer belonging to such prison, will be regarded as if in prison, by virtue of the legal fiction enacted in section 55 of the Prison Act and that he can be dealt with under section 224 of the Penal Code in case he escapes or attempts to escape from such custody. These observations show that the prisoner is deemed to be in custody when he is taken out of the prison for the medical treatment or when he is working outside or beyond the limits of the prison. The question whether parolee is in legal custody or constructive custody of prison authorities did not fall for consideration before the Division Bench of the HP High Court in Philis's case. Besides, in view of the the latest proposition of law as laid down by the Apex Court in *Sunil Fulchand Shah's case (supra)*, the decision of the HP High Court in *Philip's case* will not take the Petitioner's case any further.

20. The Division Bench of this Court in *Ashok Shetye (supra)* held that non-surrender of the prisoner after the completion of parole or furlough period can at the most be construed as a breach of condition or parole and/or furlough for which separate liability has been imposed by a notification whereby it is provided that there would be a maximum cut of 5

days' remission for each day of overstay. The Division Bench further held that breach of any of the conditions of parole or furlough would not by itself amount to "absconding" and at the most it may make the prisoner liable for losing the remission of 5 days for each day of overstay. The Court interpreted the words "absconding" and held that in "absconding" there should always be an element of concealing or hiding. The question of application of the provisions of section 224 of IPC was not under consideration before the Division Bench nor the same is considered. This authority, therefore, has no application in the present case.

21. Since we have come to the conclusion that parolee is in legal custody of the State or its agents and his non-surrender to the prison authorities after the expiry of the parole period amounts to escaping from the legal custody within the meaning of section 224, the petition fails and the same is accordingly dismissed.

[V. L. ACHLIYA, J.]

[RANJIT MORE, J.]