

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CRIMINAL WRIT PETITION NO. 904 OF 2017

Ashishrao Venkatrao Phad
(Convict No. C/10398)
Age: Major, Occu: Nil,
R/o. Nashik Road Central Prison, Nashik. ... Petitioner

VERSUS

1. State of Maharashtra,
Through Home Department,
Through its Chief Secretary,
2. Divisional Commissioner,
at Nashik.
3. Deputy Inspector General of Prisons,
Central Region, Aurangabad.
4. Deputy Inspector General of Prisons,
Head Office, Maharashtra Region,
Nashik.
5. Superintendent,
Nashik Road Central Prison,
Nashik. ... Respondents

.....
Ms Monali Patil, Advocate (appointed) for the petitioner
Mrs V. N. Patil-Jadhav, APP for respondent/State
.....

**CORAM : S. S. SHINDE &
A. M. DHAVAL, JJ.**

RESERVED ON : 08.09.2017.
PRONOUNCED ON : 14.09.2017.

JUDGMENT (Per A. M. Dhavale, J.): -

1. A request letter received from the petitioner, who is in Jail,
has been treated as Writ Petition and by appointing Ms Monali Patil,

learned counsel, to espouse the cause of the petitioner, this petition is entertained.

2. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties and taken up for final disposal at admission stage.

3. By the present petition, the petitioner has made two material prayers which are as follows :

B. To quash and set aside the show cause notice dated 22.9.2016 issued by respondent No. 5-Superintendent, Nashik Road Central Prison, Nashik for curtailment of remission by 75 days for late arrival by 25 days.

C. To quash & set aside F.I.R. bearing No. 0189/2016 registered with Majalgaon Police Station, Beed dated 16.9.2016 for the offence punishable under section 224 of Indian Penal Code for not returning after furlough period in time.

4. There is no factual dispute that the applicant is undergoing imprisonment of seven years for offence punishable u/s 307 r/w 34 of the Indian Penal Code and is lodged in Nashik Road Central Prison, Nashik. The applicant had made an application seeking parole for 30 days on account of illness of his mother and same was allowed

on 08.06.2016 subject to regular terms regarding furnishing security and others. He was actually released from Jail on 23.06.2016.

5. On 04.07.2016, he had made another application for extension of parole for 30 days as his mother was still ill. There was supporting report from Police Department and he was granted 30 days extended parole from 24.07.2016 to 22.08.2016.

6. The applicant had again moved an application on 06.08.2016 for further extension of 30 days on the same ground of illness of his mother. Meanwhile, there was amendment to the rules of furlough and parole by Notification dt. 26.08.2016. The Divisional Commissioner, Nashik by order dt. 03.09.2016 (Exh. 'C') rejected the application on the ground that as per Notification dt. 26.08.2016, the applicant was not entitled for further extension of parole. This order was communicated by Superintendent of Jail by letter dt. 09.09.2016 and was served on the applicant on 12.09.2016.

7. On 17.09.2016, the applicant voluntarily attended the Jail.

8. Meanwhile, on 16.09.2016, FIR was lodged against the applicant with Majalgaon Police Station for the offence punishable u/s 224 of the Indian Penal Code and a show-cause notice dt.22.09.2016 was served upon him by Superintendent of Nashik

Road Central Prison, Nashik thereby calling upon him to explain as to why his remission should not be reduced by 75 days (i.e. 1:3 ratio) by way of punishment.

9. Learned counsel for the petitioner - Ms Monali Patil argues that the applicant had no intention to jump the parole. His mother was seriously ill and order of rejection of his application for extension of parole was not communicated to him in time. On receipt of the said communication, within five days the petitioner has voluntarily returned to the Jail, which shows his *bona fides*. His application shows that he returned on 17.09.2016 when there was his Birthday. Ms Patil submitted that, the Notification dt. 26.08.2016 will not be applicable as the application for extension of parole itself was moved on 06.08.2016. She also submitted that, the conduct of the petitioner does not attract any of the ingredients of Section 224 of the IPC. The petitioner had neither any intention to offer any resistance or illegal obstruction to his lawful apprehension of himself for any offence for which he was charged or of which he has been convicted or to escape or to attempt to escape from any custody and, therefore, there could not have been prosecution u/s 224 of the IPC. She has also submitted that, for imposition of curtailment of remission of above 60 days, the sanction of Director Inspector of General (DIG) is essential. In this regard, she relied upon Sanjay Vs State of Maharashtra 2009(1) Mh.L.J. 839.

10. Per contra, learned APP Mrs V. N. Patil-Jadhav submitted that when a convict does not return after his parole period is over, it amounts to escape from the custody and the prosecution u/s 224 of the IPC was legitimate and justified. She also argued that as per GR dt. 26.08.2016, the maximum parole period is reduced to 45 days. When application of the applicant for extension of parole was rejected, he has not immediately returned and he returned only after lodging of FIR against him. Hence, she submitted that the application should be rejected.

11. It was deemed necessary to call the circular whereby the Government has issued guidelines to the Superintendent of Jail with respect to lodging of cases u/s 224 of the IPC when the convict does not return after expiry of period of furlough or parole and accordingly the said circular has been produced.

12. After carefully considering the arguments advanced, the points for our consideration are :

- (i) Whether the show-cause notice for curtailment of remission by 75 days at the rate of 1:3 deserves to be quashed?
- (ii) Whether the FIR bearing C.R. No. 0189/2016 registered against the petitioner for offence u/s 224

of IPC deserves to be quashed?

- (iii) We answer point No. 1 in the negative and point no.2 in the affirmative for the following reasons.

REASONS

[I] As per Prisons (Bombay Furlough and Parole) Rules, 1959 (hereinafter referred to as 'the Rules') when the period of furlough granted comes to an end, the convict is bound to return to the Jail of his own and if he does not do so, punishments are prescribed by way of curtailment of remission as per the guidelines provided. There is no dispute that the petitioner's parole period was over on 22.08.2016 and he returned to the Jail on 17.09.2016 i.e. 25 days late. As per the said rules, the Superintendent of Jail is bound to issue him show-cause notice as to why there should not be curtailment of his remission. As per the guidelines laid down by the Home Department, Mantralaya, Mumbai dt. 02.08.2011, normally the curtailment of remission is 1:3 when the period of delay is 25 days. The relevant guidelines read as under:

अभिवचन रजेवरुन उशिराने परत येणा-या कैद्यांसाठी

अनु क्रमांक	प्रवर्ग	शिक्षा माफीतील कपातीचे प्रमाण
3	मंजूर अभिवचन रजेचा कालावधी संपल्यानंतर पहिल्या वेळी 15 दिवसापेक्षा जास्त व 1 महिन्यापर्यंत उशिराने, (अ) स्वतःहुन तुरुंगात स्वाधीन झाल्यास, (ब) पोलिस प्राधिका-यांनी तुरुंगात आणल्यास,	1 : 3 दिवस 1 : 4 दिवस

Accordingly, show-cause notice has been issued. There is no substance in the contention that the said notice is bad for want of sanction of DIG. The sanction of DIG comes into picture only after the Superintendent of Central Prison takes decision of curtailment. Thereafter the said proposal is forwarded to DIG for approval and also to the concerned Sessions Judge for judicial appraisal and thereafter there is finality to the punishment of curtailment of remission. Issuance of show-cause notice is only first step in order to give opportunity to the petitioner to explain why there should not be curtailment of remission by maximum period of 75 days as per the Rules. The petitioner would get opportunity to make his representation before the Superintendent of Central Jail and his representation will have to be considered by the DIG (Prison) for granting approval and by Sessions Judge for granting judicial appraisal. In the light of these facts, the challenge to the show-cause notice is premature. There is nothing wrong in issuance of show-cause notice, which is issued as per the rules. It does not give rise to any cause of action. Hence, prayer 'B' cannot be allowed.

- [II] It is argued that, when the convict has returned to the Jail *suo motu*, there cannot be double punishment viz. one by curtailment of remission and other by way of prosecution u/s 224 of the IPC.

13. We find that, the provisions of Furlough and Parole Rules were not there in the past. Those were introduced later for granting solace to the convicts so that they can occasionally go to their house, stay with family and again return to the Jail for undergoing the remaining sentence. The law even treats the period of furlough or parole as part of sentence undergone by him. In short, even when a convict is released from Jail and is enjoying his family life at his residence, he is still in the custody of Superintendent of Jail. While releasing him, conditions are imposed upon him that he has to give undertaking and he has to furnish bail bonds, personal bond and surety bond. It is his bounden duty to return to the Jail after the furlough or parole period is over. In order to secure his return, the provision has been made to impose punishment for the convicts returning late. These are departmental punishments for breach of undertakings. These are applicable to both cases deliberate delay & unintentional delay.

14. It is common knowledge that large number of convicts released on furlough and parole have taken disadvantage of their release and they have not returned to the Jail to undergo the further sentence. Some of them are absconding and not traceable. When the law assumes that they continue to be in the custody of Jailor and if they do not return to the jail after the furlough or parole period is

over, it will be an offence u/s 224 of the IPC. As per Section 33 of the IPC, offence can be committed by act as well as by omission. Wherever the word 'act' has been used in the IPC, it includes the word 'omission'. A deliberate omission to return to the Jail by a convict certainly amounts to escaping from the lawful custody of the Jailor and, therefore, the prosecution u/s 224 of the IPC in appropriate cases of delay in returning to the Jail is justified and legal. When a prisoner remains outside the Jail beyond the period of furlough or parole, he removes himself from the lawful custody of the Superintendent of Jail and thereby commits offence u/s 224 of IPC. It amounts to jumping the bail & committing breach of understanding as well.

15. For every offence, *mens rea* is an essential ingredient and in case of delay in returning to Jail, it is difficult to draw a line when the *mens rea* can be assumed. Therefore, the State of Maharashtra has issued guidelines by letter dt. 29.06.2013. The Government has taken a wise decision in considering the maximum period permissible to be enjoyed by a convict either as a furlough or parole for considering the *mens rea* of the convict and the action to be taken against him for committing offence u/s 224 of the IPC. The guiding instructions disclose that the convict is entitled for furlough of 14 days with additional furlough extension of 14 days. In case of parole, the maximum period at one time can be 30 days, which can be

extended twice so as to grant maximum period of parole for 90 days. If the application is moved by the convict for extension of furlough or parole and same is rejected and still he does not return to the Jail, FIR should be lodged against him u/s 224 of the IPC. The Circular dt. 01.01.2015 shows that, in case of furlough, if the convict does not return on 29th day and in case of parole he does not return on 91st day, crime should be registered against him u/s 224 of the IPC. This circular refers to assumption of extension of furlough or parole even though such furlough or parole might not have been granted. This circular gives due weightage to the expectancy of the convict to get extension of furlough or parole but at the same time due caution is taken that such expectation cannot be beyond the permissible period.

16. In the present case, second extension of parole was rejected on the ground that it was not permissible as per GR dt. 26.08.2016. However, the Division Bench at Principal Seat in **Subhash Hiralal Bhosale vs. State of Maharashtra and others [2015(1) Mh.L.J. (Cri.) 664]** has held that the provisions of Notification dt.26.08.2016 would be applicable from 26.08.2016 onwards and those should not be applicable to the applications moved before 26.08.2016. It is held that, the relevant date for consideration is the date of application. In the present case, the application was moved on 06.08.2016 and the extended parole was to be granted from 23.08.2016. In either case, there was no notification dt. 26.08.2016 and same could not be made

applicable and therefore the Divisional Commissioner's rejection of the second application for extension of parole was on wrong ground.

17. However, we find that, the applicant had already enjoyed 60 days of leave. There is no documentary evidence in the form of medical certificate of his mother to justify extension for second time. The extension of parole is not a right. It can be granted in appropriate cases whenever justified with documentary material. We therefore find that the petitioner was not entitled for second extension on merits.

18. However, the petitioner was released on 23.06.2016. As per Government guidelines dt. 01.01.2015, the prosecution u/s 224 of IPC could have been filed against him only after period of 90 days was over from 23.06.2016. The petitioner has returned late by 25 days after enjoying parole of 60 days and thus he has returned to Jail on 85th days and as per the Government Policy itself, the petitioner could not have been prosecuted u/s 224 of IPC. It is relevant here to state that the petitioner has returned to the Jail of his own. He was served with order rejecting extension of parole for second time on 12.09.2016 and he returned on 17.09.2016. Considering the Government Policy, we hold that no FIR could have been lodged against the petitioner when he had returned within 90 days.

19. It appears that, all the concerned assumed that the Notification dt. 26.08.2016 would be applicable to the petitioner and therefore his failure to return after communication of rejection of his application for second extension was enough to file FIR against him. We, therefore, hold that this is a fit case for quashing of FIR u/s 224 of IPC lodged against the petitioner.

20. Though we have held that the Government Circular dt. 01.01.2015 has duly considered the period of maximum permissible limit of furlough and parole as a guideline, we make it clear that for every offence there is necessity of *mens rea*. If the facts of any particular case indicates that the convict has not returned within maximum permissible limit of furlough or parole, in each case the offence u/s 224 of IPC would not be made out. If it was beyond the control of the convict to return to the Jail on account of his own serious ill-health requiring hospitalization or some untoward incident in his house like death of his near relative or accident involving close relative requiring immediate attention, the Jail Superintendent should use the judicial discretion in cases of marginal delays even beyond the maximum permission limit and after verifying the grounds for delay should take appropriate decision as to whether the FIR should be lodged or not. If the ground for delay is not convincing, it will be for the accused to prove it in Court.

21. It is obvious that, in such cases, the delay beyond the permissible limit should be marginal and should be explainable on clear unimpeachable material. This observation is for clarifying our earlier views.

22. We partly allow the application. The prayer clause 'C' for quashing of the FIR lodged against the petitioner for offence u/s 224 of the IPC is allowed. The prayer 'B' for quashing of Show-cause notice dated 22.9.2016 issued by respondent No. 5-Superintendent, Nashik Road Central Prison, Nashik, is rejected.

23. Rule made absolute in the above terms with no order as to costs.

24. This order may be communicated immediately to the petitioner through the Superintendent of Jail.

25. We appreciate the able assistance given by Ms Monali Patil, learned counsel appointed to represent the petitioner. She shall be paid fees as per rules.

[A. M. DHAVALE]
JUDGE

[S. S. SHINDE]
JUDGE