

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

CRIMINAL WRIT PETITION NO. 987 OF 2017

Padamsing Daulatsing Jarhade,
Convict No.6169,
Age 68 years,
Central Prison, Aurangabad

.. Petitioner

Versus

1. The Deputy Inspector of
Prisons, Central Region,
Aurangabad
2. The Jail Superintendent,
Aurangabad Central Prison,
Aurangabad
3. The Police Inspector,
Police Station, Khultabad
District Aurangabad

.. Respondents

Mr P.D. Jarare, Advocate (appointed) for petitioner
Mr A.R. Borulkar, Advocate for respondents

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

DATE : 15th September 2017

ORAL JUDGMENT (Per A.M. Dhavale, J.)

1. Rule. Rule returnable forthwith. With the consent of parties, matter is taken up for final disposal at admission stage.
2. The petitioner under Article 226 of the Constitution seeks writ of mandamus for following reliefs :
 - (i) To direct the respondents - D.I.G. Central Prison, Aurangabad and Jail authorities to consider the furlough request of the present petitioner, as expeditiously as possible.

(II) By amended prayer clause B-1 to quash and set aside the F.I.R. registered at C.R.No.76 of 2016 against the petitioner at Khultabad Police Station under Section 224 of Indian Penal Code.

3. The letter received from the petitioner from jail has been converted into writ petition by appointing learned Advocate Mr P.D. Jarare for the petitioner at State expenses.

4. As per the petition, the petitioner is convicted with imprisonment for life and is lodged in Central Prison, Aurangabad. He has so far undergone sentence of 13 years and 5 months. On 21.3.2016, he applied for furlough leave, which was kept in abeyance. He was released on parole on 30.4.2016. The said parole was further extended by the Divisional Commissioner, Aurangabad for a period of sixty days. The petitioner was expected to return back to the jail on 30.7.2016, but according to him, he was not keeping good health and, therefore, he returned to jail on 6.8.2016 i.e. after seven days, of his own. The authorities served him with show-cause notice dated 8.8.2016 as to why his remission should not be curtailed by 35 days in the proportion 1 to 5. He was also intimated that due to delay in his arrival crime was registered at C.R. No.76/2016 under Section 224 of Indian Penal Code at Khultabad police station. The petitioner claimed that he was suffering from jaundice and needed attention and family care. He had no deliberate intention nor he has from the jail authorities. Besides, the act of curtailment of remission as well as prosecution under Section 224 of Cr.P.C. amounts to double jeopardy.

5. Respondent no.2 has filed affidavit dated 16.8.2017. It discloses that the application of the petitioner dated 21.3.2016 for furlough leave of 14 days was duly forwarded to D.I.G. Central Prison, Aurangabad. Though the enquiry report 16.4.2016 submitted by Sub Divisional Police Officer, Gangapur was adverse, still, D.I.G., Central Prison, Aurangabad by letter dated 29.4.2016, called upon the petitioner to furnish the name of one additional surety. It was received on 3.5.2016. Meanwhile, on 30.4.2016, the petitioner was released on parole for thirty days each. The said leave was further extended by 30 + 30 days and the petitioner was expected to return upto 30.7.2016. As he did not return, F.I.R. was lodged against him on 5.8.2016 under Section 224 of Indian Penal Code. Thereafter, the petitioner returned on 6.8.2016. The application for furlough leave of the petitioner was rejected by the D.I.G. Central Prisons, Aurangabad on 5.5.2017. The curtailment of remission by 35 days is according to the procedure laid down. The petitioner had earlier come late on four occasions by 250 days, 23 days, 79 days and 20 days. In the last case of parole, even after enjoying 90 days of parole, he came late by seven days. His remission was cut off by 35 days as per Rules dated 2.8.2011.

6. Heard learned Advocate Mr Jarare for the petitioner and learned A.P.P. Mr A.R. Borulkar for the State. Learned Advocate Mr Jarare submitted that since the prayer for taking quick decision on the application of the petitioner for furlough has been duly complied, the said prayer no more survives, but he pressed this petition for quashing of F.I.R. under Section 224 of Indian Penal Code. He submitted that the petitioner has been subjected to double jeopardy,

namely curtailment of remission by 35 days (+) prosecution under Section 224 of Indian Penal Code. He also submitted that the ingredients of Section 224 of Indian Penal Code are not disclosed. There was no resistance or obstruction to the arrest nor escape or any intentional act on the part of petitioner. He has voluntarily surrendered. Hence, the F.I.R. should be quashed.

7. Learned A.P.P. supported the impugned order.

8. Learned Advocate for the petitioner has placed reliance on the judgment in Criminal Writ Petition no.77 of 2013 of Nagpur Bench in Shalik M. Kowe Vs. State of Maharashtra and others, dated 8.4.2014 and Smt. Jaya Chheda Vs. State of Maharashtra in Criminal Writ Petition No.1917 of 2016 decided by Division Bench at principal seat, High Court, Bombay on 14.10.2016.

9. After carefully considering the arguments advanced and the record produced and considering the judgments cited before us, we proceed to decide the issue of quashing of F.I.R. under Section 224 of the Indian Penal Code.

10. In Shalik Kowe's case (cited supra), the petitioner undergoing sentence of life imprisonment under Section 302 of Indian Penal Code had escaped from the open jail at Morshi to meet his ailing mother. The jail authorities initiated prosecution under Section 224 of Indian Penal Code and at the same time, there was proposal for forfeiture of entire remission of 2413 days. The D.I.G. Central Prison, Aurangabad granted approval for forfeiture of remission of 1693 days, which was approved by the Principal District Judge, Amravati. Rule 22 (1) of Remission Rules giving no discretion, but providing a straight jacket

formula for curtailment of remission on account of escape from jail custody was challenged on the ground of violative of Article 14 of Constitution. Besides, the simultaneous actions under two provisions were also challenged. After considering the provisions of Section 46 (4), 52, 59 (1) (2) (3) (4) (5) of Prisons Act and Rules 24, 25, 26 of Maharashtra Prisons Punishment Rules 1963, it was held that Rule 22 (1) of the Maharashtra Prisons (Remission System) Rules was ultra virus of Article 14, however, under Rule 22 (3) of the Maharashtra Prisons (Remission System) Rules, the authority had right to forfeit the remission either in part or in entirety. Rule 22 of the Maharashtra Prisons (Remission System) Rules was relied upon, which reads as under :

“22. [Forfeiture] of remissions -

(1) Where a prisoner escape from a legal custody the total remission earned by him upto the date of his escape shall stand [Forfeited].

(2) Where a prisoner attempts to escape from legal custody or plans or abets escape, the Superintendent shall, with the previous approval of the (the Regional Deputy Inspector General), pass such orders thereon as the circumstances of the case may require.

(3) Where a prisoner, after his admission into the prison, is convicted of an offence under section 147, 148, 152, 224, 302, 304, 304A, 306, 307, 308, 323, 324, 325, 326, 327, 332, 333, 352, 353 or 377 of the Indian Penal Code, the Superintendent shall with the previous sanction of the [Regional Deputy Inspector General] [forfeit] any remission earned by such prisoner.”

Rule 26 of the Maharashtra Prisons (Remission System) Rules provides proviso was also relied upon, which reads as under :

“26. Power of State Government and Inspector General to revoke remissions-

The State Government or the Inspector General may, at any time, called for the record of the case regarding remissions granted to a prisoner and if it or he is satisfied that any prisoner was granted remission without sufficient reasons, by order, revoke, in whole or in part, any ordinary special remission granted to such prisoner or remove him from the remission system for the period specified in the order.”

11. In this case, the prisoner was convicted by learned Judicial Magistrate, First Class, Morshi under Section 224 of Indian Penal Code and was sentenced to suffer imprisonment for three months. It was held that Rule 22 (1) of the Maharashtra Remission Prison System Rules, which provides for forfeiting the entire remission was ultra virus, but the right to forfeit appropriate remission under Rule 22 (3) of the Maharashtra Remission Prison System Rules was recognised.

12. The judgment in Jaya Chheda's case relates to the suspension of sentence for temporary period of sixteen weeks on the ground of taking medical treatment by the petitioner. In this case, referring to the ingredients of Section 224 of Indian Penal Code and the meaning of word “escape” appearing therefrom, it is observed :

“26. The Division Bench of this court in case of **Mohd. Azam Aslam Butt** (supra) has adverted to the dictionary meaning of the word “escape” which reads thus : -

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.

27. This Court held that if in the context of second part of Section 224 of IPC, the meaning of the word “escape” as given in clause (2) of the dictionary meaning of “escape” 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. This court after adverting to the Prison Rules, Clause 10(5) of Chapter XXXVII (Furlough and Parole to the Prisoners) held that the 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 and it could be safely said that the petitioner had 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.”

13. In the facts of the said case, it was observed that the applicant had not escaped from the hospital, where she was admitted pursuant to the order passed by the Honourable High Court for treatment and where she was allowed to continue to stay in the hospital. In that case, the petitioner was released on furlough on 26.4.2016. On 10.5.2016, she suffered serious chest pain and was referred to Civil General Hospital, Thane. As she fell down, she was taken for treatment for angiography and spine fracture of neck. Her application for temporary bail was rejected but the Honourable High Court

directed that she should be treated in J.J. Hospital, Mumbai. In this situation, on 28.5.2016, F.I.R. came to be lodged against the applicant for not returning within twenty days. In this context, it was observed that lodging of F.I.R. under Section 224 of Indian Penal Code against her by the jail authorities was gross abuse of process of law and the same was quashed.

14. In Ashishrao Venkatrao Phad Vs. State of Maharashtra and Ors., Criminal Writ Petition No.904 of 2017, decided by us on 14.9.2017, we have taken view that a deliberate omission to return to the jail by a convict, after completion of period of furlough or parole amounts to escape from the lawful custody of the jailor. In paragraph 14 of the judgment, we observed as under:

“...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. We have relied upon the Circular dated 1.1.2015 of the State of Maharashtra wherein the guidelines for filing F.I.R. under Section 224 of Indian Penal Code against convicts not returning to furlough or parole have been laid down. In the said circular, the maximum permissible period of furlough $14 + 14 = 28$ days and maximum permissible period of parole of $30 + 30 + 30 = 90$ days was considered as a guideline even though the extension of furlough/parole might not have been granted to the convict. It is held that if the convict does not return even after the permissible limit of furlough or parole, F.I.R. under Section 224 of Indian Penal Code can be filed. In paragraph 20 of the judgment, we have also given due consideration to the inability of the convicts to return to the jail even after the permissible period is over on account of grounds beyond their control and have held that Jail Superintendent should use the judicial discretion in case of marginal delay even beyond the maximum permissible limit and after verifying the grounds for delay should take appropriate decision as to whether F.I.R. should be filed or not.

16. In the present case, the petitioner enjoyed parole of maximum permissible period of ninety days. He was released on 30.4.2016 and his bail period came to an end on 30.7.2016. Though the petitioner voluntarily returned on 6.8.2016, i.e. after seven days, it cannot be ignored that one day earlier, F.I.R. was lodged against him at the concerned Police Station.

17. The petitioner has produced some documents to show that his physical condition was such that it was beyond his control to return to the jail on 31.7.2016. His hemogram report dated 28.7.2016 shows

Hemoglobin level 5.60 gms. We find that since the petitioner has not returned even after the maximum permissible period of ninety days, the lodging of F.I.R. by jail authorities was fully justified. If the petitioner was unable to join even after ninety days on account of his ill health, it will be open for him to lead such evidence in the Court by way of defence as absence of mens rea. We find that in this petition, it will not be permissible for us to give any finding on the merits and demerits of the case initiated on the basis of F.I.R. under Section 224 of Indian Penal Code lodged against the petitioner. We, therefore, hold that this is not a fit case for quashing the F.I.R. under Section 224 of the Indian Penal Code lodged against the petitioner.

18. With the above observations, Criminal Writ Petition is dismissed. The Rule is discharged.

19. However, we make it clear that the observations made herein are prima facie in nature and made only for the purpose of deciding this petition.

20. We appreciate the valuable assistance provided by learned Advocate Mr P.D. Jarare appointed by this Court. He shall be entitled for fees as per rules.

(A.M. DHAVAL, J.)

(S.S. SHINDE, J.)