

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.1237 OF 2017

Hariom Vijay Pandey,
Age-36 years, Occu:Prisoner,
Convict No.C-8617,
R/o-At Post-Kharhani, Tahsil-Mahnagar,
Dist-Azamgarh, Uttar Pradesh,
At present: In Nashik Road Central Prison,
Nashik

...PETITIONER

VERSUS

- 1) The Superintendent,
Nashik Road Central Prison,
Nashik,
- 2) The Divisional Commissioner,
Nashik Division, Nashik,
- 3) The Sr. Jailor,
Parole & Furlough Dept. In-charge,
Nashik Road Central Prison,
Nashik.

...RESPONDENTS

...

Ms. Harshita M. Manglani Advocate appointed
for Petitioner.
Mrs.V.N. Patil-Jadhav, A.P.P. for Respondent
Nos. 1 to 3.

...

**CORAM: S.S. SHINDE AND
MANGESH S. PATIL, JJ.**

DATE OF RESERVING JUDGMENT : 12TH OCTOBER, 2017.

DATE OF PRONOUNCING JUDGMENT: 13TH OCTOBER, 2017.

JUDGMENT [PER S.S. SHINDE, J.] :

1. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. The Petition is filed with following prayers:

"b. Order and sanction leave extension for two days,

c. Quash and declare the complaint (F.I.R.) lodged by respondent no.1 and 3 against the petitioner u/s 224 of the I.P.C. at Nashik Road police station vide C.R. No.00/17 dated 10/06/2017 as

null and void and devoid of any merit or substance in the interest of justice.

d. Issue a writ in the nature of Mandamus or any other appropriate writ order or direction under Article 226 and 227 of the Constitution of India directing to release the Petitioner immediately on furlough leave as he has already completed the surety bond formalities of the same."

3. The background facts giving rise to file this Petition, in nut-shell are as under:-

A) The Petitioner is a citizen of India by birth a permanent resident of Kharihani, Tehsil-Mehnagar, Dist-Azamgarh, State-Uttar Pradesh and that he is survived by his wife and children.

B) The Petitioner was convicted by learned

Sessions Judge, Sessions Court at Dindoshi, Mumbai for offence punishable under Section 302 of the Indian Penal Code (for short "I.P. Code) and was sentenced to suffer life imprisonment vide Judgment and order dated 16th December, 2010. The Petitioner was not on bail during pendency of trial and since his arrest on 16th March, 2009, he is in jail and is presently serving imprisonment at Nashik Road Central Prison.

C) The Petitioner had been previously released on furlough leave on one occasion and had surrendered back on the due date.

D) The Petitioner had also been released on parole leave on 9th May, 2017 and was supposed to surrender to prison on 9th June, 2017 on completion of his leave period, but due to unavoidable circumstances, as the Petitioner fell severely ill and was unable to undertake a journey of two days, hence on regaining fitness, he

surrendered back to prison and in the process was late by two days.

E) The Petitioner had also contacted the office of the Divisional Commissioner (Respondent No.2) through a telephonic conversation and had pleaded for relief and had asked whether he could be granted parole leave extension for two days or so since he was ill and unable to surrender but the authorities clearly declined and stated that as the Petitioner has approached the High Court for leave, he should approach the High Court again for the extension too.

F) The Petitioner had also contacted and intimated Prison Authorities (Respondent Nos.1 and 3) regarding his inability to surrender back in time from parole leave through a telephonic message, and had clearly informed that he would be surrendering back on 11th June, 2017 as it takes two days to complete the journey back to the

prison from his State i.e. Uttar Pradesh, but even then the prison authorities unnecessarily lodged a totally baseless complaint against him at Nashik Road police station, vide C.R. No.00/17 dated 10th June, 2017 under Section 224 of the I.P. Code.

G) The Petitioner had also applied for furlough leave and had been sanctioned the same vide order dated 8th May, 2017 by the Sanctioning Authority and that while returning from parole leave, the Petitioner had completed the required surety formalities for the same and had brought along the Bond papers for his subsequently release on furlough leave.

H) The Petitioner was denied release on furlough leave by Respondent Nos.1 and 3 and was rather told that he would first have to procure bail in the case registered by them under Section 224 of the I.P. Code and then only he would be released on furlough.

I) The Petitioner was denied release on furlough by the prison authorities by them citing amended Rule 4 Sub rule (11) of the Bombay (Furlough and Parole) Rules, 1959 vide Notification dated 26th August, 2016 wherein it is mentioned and inserted that prisoners whose appeal against conviction is pending or who have any case pending against them in any Court of law shall not be eligible for release on furlough unless the concerned Courts have granted bail in the said cases.

J) The Petitioners thereafter the prison authorities through his application dated 4th August, 2017 explaining that he did not have and second case pending against him in any Court of law and as the prison authorities too did not possess any warrant (production or remand) issued by any Court in connection with any second case pending against him in any Court of law, the

action of Respondent Nos.1 and 3 of preventing the Petitioner's release on furlough was clearly illegal, illogical and dictatorial and that the Petitioner had requested to release him on furlough.

K) Even after explaining the legal point of view and the correct meaning of the rules, Respondent Nos.1 and 3 refused to acknowledge the same and once again informed the Petitioner that they would not release him on furlough till he procures bail in the complaint lodged by them under Section 224 of the I.P. Code.

4. On the above grounds the Petitioner has filed this Petition and prayed for the reliefs as afore mentioned.

5. Learned counsel appearing for the Petitioner submits that the Petitioner was released on Parole on 9th May, 2017 and he was

supposed to surrender back to the prison on 9th June, 2017. It is submitted that the Petitioner suddenly fell ill, he could not surrender back to the jail within time and he surrendered late by two days. It is submitted that the Petitioner has also contacted the office of the Divisional Commissioner and jail authorities through a telephonic conversation and prayed for extension of parole for two days, but his request was not favourably considered. In support of her contentions, learned counsel invites our attention to the medical report of the Petitioner from Adarsh Pathology Centre, Kharihani, Azamgarh, Uttar Pradesh and the prescription given by the Medical Officer Dr. M.K. Vishwakarma of "Ashirwad Chikitsalaya", Kharihani, Azamgarh.

6. Learned counsel appearing for the Petitioner submitted that, the Petitioner was supposed to surrender back to the jail on 9th June, 2017 and as he did not report back on due

date, the jail authorities lodged Crime No.00/17 against the Petitioner for the offence under Section 224 of the I.P. Code. It is submitted that there was no mens rea on the part of the Petitioner to commit offence under Section 224 of the I.P. Code. Learned counsel pressed into service the exposition of law by the Division Bench of this Court (CORAM S.S. SHINDE AND A.M. DHAVALA, JJ) in the case of Ashishrao Venkatrao Phad vs. State of Maharashtra and others (Criminal Writ Petition No.904 of 2017), dated 14th September, 2017, and submits that in the said Judgment this Court has taken a view that 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. It is submitted that in the said Judgment this court has occasion to consider the Circular dated 1st January, 2015 issued by the Home Department, Government of Maharashtra, of which reference is made in Para 15 of the Judgment and

after adverting to the said circular, this Court has observed 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. It is observed that the said Circular refers to assumption of extension of furlough or parole even though such furlough or parole might not have been granted. The Circular gives due weightage to the expectancy of the convict to get extension of furlough or parole.

7. Learned counsel submitted that the Petitioner prayed for extension of parole leave and under expectation and due to illness was required to overstay for two days and then instead of 9th June, 2017, he reported back to jail on 11th June, 2017. It is submitted that the Petitioner has reported back to the jail on 32nd day after his release. After completion of maximum period of parole for 90 days if the convict fails

to report back to the jail, on 91st day crime could be registered against him under Section 224 of the I.P. Code. Therefore, it is submitted that the crime registered against the Petitioner is liable to be quashed.

8. Learned counsel appearing for the Petitioner submitted that the Respondent authorities rejected the application of the Petitioner to release him on furlough relying upon Rule 4(11) of the Prisons (Bombay Furlough and Parole) Rules, 1959, amended as per the Notification dated 26th August, 2016. Learned counsel further submits that merely because appeal against conviction and sentence is pending, is no ground to deny the furlough in view of the orders passed by the Division Bench of the Bombay High Court, Bench at Nagpur, in Criminal Writ Petition No.196 of 2017 and Criminal Writ Petition No.97 of 2017 [Arun s/o Gulab Gawli and another vs. D.I.G. (Prisons) (East) Nagpur and another], and Criminal

Writ Petition No.462 of 2017 [Abdul Rajjak Sheikh Abdul Nabi Shah vs. Divisional Commissioner, Nagpur and others]. Learned counsel submits that the Petition deserves to be allowed.

9. On the other hand, learned A.P.P. appearing for the State, invites our attention to the affidavit-in-reply filed by one Rajkumar keshavrao Sali, serving as Superintendent, Nashik Road Central Prison, and the annexures thereto and submits that the Petition may be rejected.

10. We have given anxious consideration to the submissions made by the learned counsel appearing for the Petitioner, learned A.P.P. appearing for the State, and with their able assistance perused the averments in the Petition, grounds taken therein, annexures thereto, reply filed by the Respondents and the exposition of law in the cases cited by the learned counsel appearing for the respective parties.

11. So far as the contention of the learned counsel appearing for the Petitioner that no FIR should have been registered against the Petitioner taking recourse to the provisions of Section 224 of the I.P. Code is concerned, it may be apt to reproduce herein below Para 15 from the Judgment of the Division Bench of this Court, in the Case of in the case of Ashishrao Venkatrao Phad vs. State of Maharashtra and others (Criminal Writ Petition No.904 of 2017), cited supra:

"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."

12. If the facts of the case of the Petitioner are carefully perused, the Petitioner was released on parole on 9th May, 2017 and he was required to surrender back to the prison on 9th June, 2017. But he failed to surrender in time and surrendered late by two days, i.e. on 11th June, 2017. It appears that immediately on 10th June, 2017, Crime No.00/17 was registered against the Petitioner for the offence under Section 224 of the I.P. Code. In the first place, keeping in view the medical papers placed on record by the Petitioner and the fact that he surrendered late by only two days, it cannot be said that there was mens rea on the part of the Petitioner or there was deliberate omission to return to the jail. As observed by this Court in Para 15 of the Judgment

in the case of Ashishrao Venkatrao Phad vs. State of Maharashtra and others (Criminal Writ Petition No.904 of 2017), cited supra, already reproduced herein above, if the convict is released on parole, and the application is moved by the convict for extension of parole and the same is rejected and still he does not return to the Jail, on 91st day FIR should be lodged against him under Section 224 of the I.P. Code. In the present case admittedly the Petitioner applied for extension of parole and reported back to the jail on 32nd day. As already observed the Petitioner has placed on record medical papers regarding his ailment and and also there was delay of only two days, the explanation given by the Petitioner deserves acceptance.

13. In the peculiar facts and circumstances of this case and keeping in view the material on record, we are of the opinion that there was no deliberate omission on the part of the Petitioner

to return to jail and therefore the Petition deserves to be allowed in terms of prayer clause "b" and "c".

14. Upon perusal of the affidavit-in-reply filed by the Respondents, it is stated in the reply that since the appeal filed by the Petitioner challenging his conviction is pending before the High Court, in view of the provisions of Rule 4(11) of the Prisons (Bombay Furlough and Parole) Rules, 1959, amended as per the Notification dated 26th August, 2016, furlough/parole cannot be granted to him. Another reason given by the Respondents is that Cr. No.00/17 for the offence under Section 224 of the I.P. Code is registered against the Petitioner at Nashik Road Police Station. Since we are allowing the Petition in terms of prayer clause "b" and "c", the second ground of registration of FIR would not survive.

15. So far as the reason stated by the Respondents that appeal filed by the Petitioner against his conviction is pending before the High Court is concerned, as rightly submitted by the learned counsel appearing for the Petitioner, merely because appeal against conviction and sentence is pending, is no ground to deny the furlough in view of the orders passed by the Division Bench of the Bombay High Court, Bench at Nagpur, in Criminal Writ Petition No.196 of 2017 and Criminal Writ Petition No.97 of 2017 [Arun s/o Gulab Gawli and another vs. D.I.G.(Prisons) (East) Nagpur and another], and Criminal Writ Petition No.462 of 2017 [Abdul Rajjak Sheikh Abdul Nabi Shah vs. Divisional Commissioner, Nagpur and others].

16. In the light of discussion herein above, the Writ Petition is allowed in terms of prayer clause "b" and "c". So far prayer clause "d" is concerned, we grant liberty to the Petitioner to

file application afresh requesting to release him on furlough. If such application is filed by the Petitioner, the Respondent authorities to decide the same as expeditiously as possible, however within TWO WEEKS from the date of filing such application, ignoring that aforementioned Crime No.00/17 was registered against him and secondly his appeal is pending before the High Court.

17. Rule is made absolute in above terms. The Writ Petition stands disposed of, accordingly.

18. We appreciate the sincere efforts taken by learned counsel Ms. Harshita Manglani in promptly preparing the memo of the Petition, filing the same within time and extending able assistance during the course of hearing of the Petition so as to reach to the correct conclusion. Since Ms. Harshita Manglani, learned counsel is appointed to prosecute the cause of the petitioner, her fees be paid as per the schedule

of fees maintained by the High Court Legal
Services Sub-Committee, Aurangabad.

[MANGESH S. PATIL, J.]

[S.S. SHINDE, J.]

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