

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

Criminal Writ Petition No. 0094 of 2018

District : Osmanabad

Dattatraya s/o. Tulshiram Phirange,
Age Major,
Occupation Nil,
Convict No.C/9797,
R/o. Nashik Road Central Prison,
Nashik.

.. Petitioner.

versus

1. The State of Maharashtra,
Through its Chief Secretary,
Home Department,
Mantralaya, Mumbai - 400 032.

2. Additional Director General
of Police & Inspector General
of Prisons,
Maharashtra State, Pune-1.

3. Deputy Inspector General
of Prison,
Central Region,
Aurangabad.

4. Superintendent,
Nashik Road Central Prison,
Nashik.

.. Respondents.

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*Mr. P.P. Karegaonkar, Advocate (appointed), for
the petitioner.*

*Mr. K.S. Patil, Addl. Public Prosecutor, for
respondent nos.01 to 04.*

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**CORAM : PRASANNA B. VARALE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 14TH MARCH 2018

ORAL JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

Heard learned Counsel (appointed) for the petitioner and the learned Addl. Public Prosecutor for the respondents.

02. By the present petition, the petitioner - convict no. C-9797 is challenging the order dated 15.06.2017, passed by respondent no.03 i.e. Deputy Inspector General of Prisons, Aurangabad, thereby rejecting the application made by the petitioner seeking furlough leave. The petitioner has also challenged the order dated 03.11.2017, passed by respondent no.02 i.e. Addl. D.G.P. & Inspector General of Prisons, Pune, thereby rejecting the appeal preferred by the petitioner.

03. The prayer of the petitioner seeking furlough leave was rejected on the ground that the appeal preferred by the petitioner against his conviction and sentence is pending before this Court. Another ground for rejection of furlough leave is, one of the co-accused by name, Gulab Birajdar (Bhosale) is absconding since 29.01.2016 when released on leave. Another co-accused, by name Shrikrishna Mandale is on leave since 20.06.2017.

One of the grounds for rejection is, in view of the judgment of this Court delivered at principal seat, in Criminal Writ Petition No. 4017 of 2016, in the matter of *Smt. Rubina Suleman Memon Vs. The State of Maharashtra & others*, dated 22nd December 2016, the petitioner is not entitled for furlough leave. The last ground for rejection is, there is no recommendation of Jail Superintendent.

04. Learned Counsel for the petitioner submits, that the grounds for rejection of furlough leave to the petitioner, are vague and unsustainable. He submits, that filing of appeal against conviction and sentence is a statutory right of the convict. He further submits, that a co-accused is absconding when released on leave, is also a reason which is untenable. So far as judgment of this Court, in the case of *Smt. Rubina Suleman Memon (supra)*, the learned Counsel submits that the ratio of the said judgment is not applicable to the facts of the present case as the convict in the said case was undergoing sentence for the conviction under the Terrorist and Destructive Activities Act, 1987. He has, therefore, urged that the petition be allowed and the petitioner may be released on furlough leave.

05. Learned Counsel for the petitioner further submitted that in so far as the first ground in respect of pendency of appeal, is concerned, the Division Bench of this Court at Nagpur Bench was

pleased to consider this very aspect. Our attention is invited to the copy of an unreported order dated April 26, 2017, in Criminal Writ Petition (CWP) No. 196 of 2017 and Criminal Writ Petition (CWP) No. 97 of 2017, in the matter of *Arun s/o. Gulab Gawli & another Vs. State of Maharashtra*, through its Secretary, Home Department & others. It would be useful to refer observations of the Division Bench in paras 2 and 3 of the order, which read as under :

"2. The learned PP submits that the appropriate Authorities have advised State Government which is taking some steps and those steps may result in amendment to the Rules. She seeks time till after vacation to make a definite statement in this respect.

3. The learned Senior Advocate has no objection provided the request of the petitioner for grant of furlough in Criminal Writ Petition No. 97 of 2017 is considered. He also adds that from the response of the respondents, it appears that they have accepted the inconsistency or arbitrariness in the provision which denies furlough to the prisoners whose appeal challenging conviction is pending and bail application is rejected by the High Court. " (Emphasis supplied)

The Division Bench, in view of the statement made before the Court and on considering other grounds, namely, a vague police report and the track of leave of the petitioner, found that there was no reason to deny furlough leave. The Division Bench accordingly

directed release of the petitioner in Criminal Writ Petition No. 97 of 2017 on furlough leave, within two weeks from the date of the order, after obtaining appropriate bonds, undertakings from the convict and his relatives / sureties.

06. Learned Addl. Public Prosecutor appearing for the respondents has opposed the petition and supported the impugned orders. He has urged that the petition may be dismissed.

07. So far as the ground, that the appeal preferred by the petitioner against his conviction and sentence is pending before this Court, is concerned, same is not tenable. As rightly submitted by the learned Counsel for the petitioner, filing of appeal is a statutory right of the convict and pendency of appeal has no nexus with grant or rejection of furlough leave. So also, if a co-accused is absconding when released on leave, the petitioner cannot be deprived of his liberty to avail furlough leave. The ground, that in view of the judgment of this Court in the matter of *Smt. Rubina Suleman Memon (supra)* the petitioner cannot be granted furlough leave, is also untenable. The petitioner in that case was a convict under the Terrorist and Destructive Activities Act, 1987, and rigors of the notification dated 23.02.2012, more particularly, Sub-Rule 13 of Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959, were fully applicable to the

petitioner therein. Such is not the case of the present petitioner. The petitioner is not suffering punishment for any act under the provisions of TADA. So far as last ground, that there is no recommendation of Jail Superintendent, is concerned, the leave sanctioning authority can *suo motu* call remark in respect of recommendation or otherwise from the Jail Superintendent.

08. There is no dispute, that the very circular which is referred to in the order prevents the prisoner to avail the benefit and statement was made before the Division Bench at Nagpur Bench, that the State Government is in process to re-think the rule and if necessary, cause an amendment to rule. We may also take note of the decision by Division Bench of this Court at this Bench, in Criminal Writ Petition No. 1010 of 2017, in the matter of *Shivaji Vs. The State of Maharashtra & others*, decided on 13.10.2017. So also, a useful reference can be made to the decision of Division Bench of this Court at this Bench, in Criminal Writ Petition No. 1237 of 2017, in the matter of *Hariom Vijay Pandey Vs. The Superintendent & others*, decided on the same day. In both these petitions, the Division Bench of this Court had taken note of the above referred judgment of the Division Bench at Nagpur Bench, in the matter of *Arun s/o. Gulab Gawli & another (supra)* and the benefit was then given to the petitioners therein.

09. Further, we may refer to a Full Bench judgment of this Court at principal seat in the matter of *S. Sant Singh @ Pilli Singh Ajit Singh Kalyani Vs. Secretary, Home Department, Govt. of Maharashtra & others* [2006 (2) Mh.L.J. 422 = 2006(1) Bom.C.R.(Cri.) 743]. Though this is the case which was pronounced prior to Government Circular dated 26.08.2016, yet it appears that at that time also, there was similar provision, wherein it has been observed in paras 26 and 27 of the judgment, thus :

"26. The provisions of law clearly disclose that once a person is convicted and sentence is imposed by the Court, and such person is sent to jail as a prisoner the execution of the sentence imposed upon him is to be done by the appropriate Government in accordance with the rules framed in that regard. Once a person is in prison he would be governed by the Prisons Act, and the Rules framed thereunder. The Prison Rules clearly provide for grant of parole. It is for the Competent Authority or the Government to decide as to whether any Parole for any particular period is to be granted to the convicts undergoing imprisonment period and on the conditions as may be fixed. It is, therefore, clear that merely because a convict prefers an appeal before the Appellate Court, that would not divest the Government of its powers under the Prison Act to deal with the management of the convict by following the rules framed under the said Act.

27. From this, it is clear that the powers of the State to grant Parole are not fettered even if the appeal of the convict is pending before the Court. Thus, the Competent Authority or the Government would have the legal competence to

entertain an application for parole by following the procedure set out under the Prison Rules to meet the contingencies stated therein. The exercise of such power would not be in any way be in conflict with the powers exercised under section 389 and/or Section 432 of the Code of Criminal Procedure. It is also evident that the amendments carried out in this scheme of Rules 19 and 25 in the year 1989 have provided for adequate safeguards so as to ensure that the benefit of parole leave is not misused or abused so as to defeat or nullify the Courts order passed under Section 389 of the Code of Criminal Procedure as was noticed in *Jayant Veerappa Shetty Vs. State of Maharashtra* [1986(1) Bom.C.R.311 = 1986 Cri.L.J. 1298]. "

Thus, we find that this reason cannot be a hurdle in the way of the petitioner.

10. In the facts and circumstances of the case, learned Counsel for the petitioner has made out a case for grant of relief as prayed in the petition.

11. In the result, the criminal writ petition is allowed.

The impugned order dated 15.06.2017, passed by respondent no.03 i.e. Deputy Inspector General of Prisons, Aurangabad, so also, order dated 03.11.2017, passed by respondent no.02 i.e. Addl. D.G.P. & Inspector General of Prisons, Pune, are quashed and set aside. The petitioner - convict is directed to be released on furlough leave, as expeditiously as possible, after complying necessary formalities.

12. Learned Advocate Mr. P.P. Karegaonkar was appointed to represent the case of the petitioner. His fees is quantified at Rs. 3,000/- [Rupees three thousand].

(Smt. Vibha Kankanwadi)
JUDGE

(Prasanna B. Varale)
JUDGE

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