

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

Criminal Writ Petition No. 00511 of 2018

District : Nashik

Barkya s/o. Navashya Gaikwad,
Convict No. C/8129,
Nashik Road Central Prison,
Nashik.

.. Petitioner.

versus

1. The State of Maharashtra,
Through its Secretary,
Home Department,
Government of Maharashtra,
Mantralaya, Mumbai.

2. Additional D.G.P. and
Inspector General (I.G.)
(Prison & Correctional
Service), Pune - 1.

3. Deputy Inspector General
(Dy.I.G.)(Prison),
Aurangabad.

4. The Superintendent of
Prison,
Nashik.

.. Respondents.

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*Mr. Sunita D. Shelke, Advocate (appointed),
for the petitioner.*

*Mr. R.B. Bagul, Addl. Public Prosecutor, for
respondent nos.01 to 04.*

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

DATE : 03RD MAY 2018

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

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

02. By the present petition, the petitioner - convict no. C/8129 is challenging the order dated 31.07.2017 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 04.12.2017 passed by respondent no.02 i.e. Additional 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 grounds viz. (a) Police report is adverse to the petitioner inasmuch as there is danger to the prosecution witnesses and their families, if the petitioner is released on leave, (b) Appeal filed by the petitioner against his conviction and sentence is pending before this Court, (c) 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, and
(d) There is no recommendation of Jail Superintendent.

04. Learned Advocate (appointed) for the petitioner submits, that though the impugned orders indicate that the police report is adverse to the petitioner, no instances in respect of previous conduct of the petitioner while released on leave, are mentioned. She further submits, that filing of appeal against conviction and sentence is a statutory right of a convict. Further submission is, judgment of this Court in the matter of *Smt. Rubina Suleman Memon (supra)* is not applicable to the case of the petitioner because the petitioner is not a convict undergoing sentence for conviction under the provisions of the Terrorist and Destructive Activities Act, 1987. She has, therefore, urged that the petition be allowed and the petitioner may be released on furlough leave.

05. Learned Advocate 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 be dismissed.

07. As rightly submitted by the learned Advocate for the petitioner, though the police report is stated to be adverse to the petitioner, no specific instances are mentioned when the petitioner was earlier released on leave so as to derive a conclusion that there is threat to the witnesses at the instance of the petitioner, if released on furlough leave. Similarly, filing of appeal against conviction and sentence is a statutory right of a convict. It has no nexus with grant or rejection of furlough leave. So also, learned Advocate for the petitioner was right in submitting that the judgment of this Court in the matter of *Smt. Rubina Suleman Memon (supra)* is not applicable to the facts of the present case. The convict in the said case was undergoing sentence for conviction under the provisions of 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. The ground that there is no recommendation of the Jail Superintendent is also unsustainable. The leave sanctioning authority can suo motu call remarks 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 Advocate 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 31.07.2017 passed by respondent no.03 i.e. Deputy Inspector General of Prisons, Aurangabad, so also order dated 04.12.2017 passed by respondent no.02 i.e. Additional D.G.P. & Inspector General of Prisons, Pune, are quashed and set aside. The petitioner is directed to be released on furlough leave, as expeditiously as possible, on complying all necessary formalities.

12. Learned Advocate Ms. Sunita D. Shelke was appointed to represent the case of the petitioner. Her fees is quantified at Rs. 3,000/- [Rupees three thousand].

(Smt. Vibha Kankanwadi)
JUDGE

(Prasanna B. Varale)
JUDGE

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