

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL W.P.NO. 2599 OF 2018**

Yogesh Balaso Ingale
C/4401, Kolhapur Central Prison,
Kalamba, Kolhapur .. Petitioner

Vs.

The State of Maharashtra & Ors. .. Respondents

....
Mr. D.G. Khamkar Advocate for Petitioner
Mr. Arfan Sait APP for State
....

**CORAM : SMT.V.K.TAHILRAMANI ACTING C.J.
AND M.S.SONAK, J.**

DATED : AUGUST 03, 2018

ORAL JUDGMENT [PER SMT. V.K.TAHILRAMANI, ACJ.]:

1 Heard both sides.

2 The petitioner preferred an application for furlough on 20.10.2016. The said application was rejected by order dated 3.1.2017. Being aggrieved thereby, the petitioner preferred an appeal. The appeal was dismissed by order dated 5.10.2017, hence, this petition.

3 The main ground for rejecting the application of

the petitioner for furlough is Rule 4(13) of the Bombay Furlough and Parole Rules, 1959. By Notification dated 23.2.2012, Rule 4(13) of the said Rules, was amended to add "kidnapping for ransom". Rule 4(13) of the said Rules sets out cases where the prisoner is not eligible to be granted furlough. This means that prisoners who are convicted for the offence for kidnapping for ransom are not eligible to be released on furlough.

4 According to the petitioner, the incident occurred in the year 2001 and his date of conviction is 3.12.2007, hence, Notification dated 23.2.2012 cannot be made applicable to his case. According to him, the said Notification being much after the date of the incident or his date of conviction could not be made retrospectively applicable to him. In support thereof, he placed reliance on a decision of the Aurangabad Bench of this Court ***dated 18.2.2014*** in the case of ***Balu S/o Savleram Ubale Vs. The State of Maharashtra*** in ***Cri. W.P. No. 432 of 2013*** and in the case of ***Sardar Shahwali Khan Vs. State of Maharashtra*** in ***Criminal W.P. No. 48 of 2014 dated 5.3.2014***. This Court had occasion to consider the

decision in the case of Balu Ubale (supra) and Sardar Khan (supra) in the case of **Santosh Namdeo Bhukan Vs. State of Maharashtra**¹. It was noticed by the Court that earlier decision of this Court in the case of **Subhash Hiralal Bhosale Vs. State of Maharashtra and Anr**², wherein it was held that the relevant date is the date of the application for furlough and not the date of conviction was not brought to the notice of the Court when **Balu Ubale** and **Sardar Khan** were heard and decided. Thus, the decisions in **Ubale and Sardar Khan(supra)** were passed in ignorance of the decision in **Subhash Bhosale** and hence, the said decisions being *per incuriam* would not help to advance the case of the petitioner.

It, therefore, follows that the relevant date is the date of application and not the date of offence or date of conviction. Thus, it is not the date on which the offence was registered or the prisoner was convicted and sentenced which is relevant but the date on which he applied for furlough or parole leave. If the application is

¹ 2017 (1) ABR (Cri.) 404 :2016 (3) BCR (Cri.) 165

² 2014 All MR (Cri.) 4330 : (2013 (6) AIR Bom R 261),

after 23.2.2012, the Notification / Circular dated 23.2.2012 would apply. The decision in the case of Subhash Bhosale (supra) is dated 4.9.2013 and the decision in the case of Balu Ubale (supra) is dated 18.2.2014 and the decision in the case of Sardar Khan (supra) is dated 5.3.2014. Both these decisions were rendered in ignorance of the earlier decision of the Division Bench of this Court in the case of Subhash Bhosale (supra) by which the issue was concluded that the relevant date to be considered in relation to the Circular date 23.2.2012 is the date of application. As stated earlier, the decision in the case of Subhash Bhosale (supra) was not pointed out when the case of Balu Ubale (supra) and Sardar Khan (supra) were decided. Thus, it will have to be held that these two decisions are per incuriam. In this view of the matter, reliance on these decisions would not help the petitioner. The same view was taken by this Court in ***Sharad Devram Shelkate Vs. State of Maharashtra***³.

5 Thereafter the learned counsel for the petitioner submitted that to be released on furlough is the right of

3 2017(1) ABR (Cri.) 33 : 2016(4) Mh.L.J. 228.

the petitioner hence, he has to be released on furlough. As far as this contention is concerned, useful reference may be made to a decision of the Supreme Court in the case of ***State of Maharashtra Vs. Suresh Pandurang Darvakar⁴***, wherein it is observed that “..... But release on furlough cannot be said to be an absolute right of the prisoner as culled out from Rule 17”. Rule 17 reads as under:

“17. Nothing in these rules shall be construed as conferring a legal right on a prisoner to claim release on furlough.”

Thus, there is no merit in the contention of the petitioner on this aspect.

6 As stated earlier, the application of the petitioner for furlough came to be rejected in view of Notification dated 23.2.2012. We may state here that the vires of said Rule 4(13) to which kidnapping was added by Notification dated 23.2.2012 was challenged before this Court in the case of Sharad Shelake (supra) and it was turned down. In

4 AIR 2006 SC 2471 : (2006 All MR (Cri.) 1839 (SC))

the case of Sharad Shelake (supra), it was observed as under :

“35. In view of the above, there is no substance in the argument that the mandate of Articles 14 and 21 of the Constitution of India is violated and sub-rule (13) of Rule 4 falls foul of that mandate. It is not possible to uphold the contention that sub-rule (13) of Rule 4 is discriminatory in character and is violative of Article 14 of the Constitution of India. We are of the opinion that the classification has a rational basis and has a distinct nexus with the underlying object of the legislation and that it does not introduce any element of hostile discrimination. In the result, we come to the conclusion that sub-rule (13) of Rule 4 is valid and intra vires and not vulnerable to the charge of being violative of Article 14 of the Constitution of India.

36. For all the above reasons, we do not find any substance in the challenge to the validity of sub-rule (13) of Rule 4. As a result, the Writ Petition fails. Rule is discharged.”

7 In this view of the matter, no case is made out for interference as far as the orders of rejection of application of the petitioner for furlough are concerned.

8 Thereafter, the petitioner has raised another contention of double jeopardy. According to him, when he was earlier released on parole leave, he did not report back in time and there was delay of more than 100 days in reporting back to the prison, on account of this, his remission was cut and on account of the fact that he had overstayed his parole leave, his application for furlough also came to be rejected. He submitted that this amounts to double jeopardy. We may state that the application of the petitioner has also been rejected on the ground that the petitioner did not surrender in time and he was arrested by the police and brought back to the prison.

9 The learned Advocate for the petitioner also submitted that the petitioner is being punished twice which cannot be allowed. He claimed that it is a case of double jeopardy under Article 20(2) of the Constitution of India. He submitted that on account of overstay, his application for furlough came to be rejected and in addition thereto, punishment has been imposed on the petitioner of cutting remission, hence, according to him, it is clearly a case of double punishment i.e double jeopardy.

10 The argument advanced on behalf of the petitioner is that it is a case of double punishment in the sense that for the overstay, punishment was imposed of not being released on furlough and in addition, remission was cut. Thus, the contention is that the petitioner has been doubly punished which is in violation of Article 20(2) of the Constitution of India and which cannot be allowed under Section 300 of Code of Criminal Procedure.

11 Double jeopardy is a concept which would amount to violation of Article 20(2) of the Constitution of India and it is also barred by Section 300 of Cr.P.C.. On going through the provisions of Article 20(2) as well as Section 300 Cr.P.C., we find that the accused cannot derive any benefit therefrom. We are of the opinion that it is not a case of double jeopardy. The only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. Article 20(2) reads as under:-

" 20. Protection in respect of conviction for offences :-

- (1)
- (2) No person shall be prosecuted and punished for the same offence more than once;
- (3) "

The Apex Court in the case of **Maqbool Hussain Vs State of Bombay**⁵ held that the words "before a Court of law or judicial tribunal" are not to be found in Article 20(2), yet in order to invoke the protection of Article 20(2), there must have been a prosecution and punishment in respect of the same offence before a Court of Law or Tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorized by law to administer. The Article contemplates proceedings of criminal nature before a Court of law in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. It was also held that Article 20(2) incorporates within its scope the plea of "autrefois convict" as known to British Jurisprudence or the plea of "double jeopardy" as

5 1953 (Cri. L.J. 1432 : 2010 ALL SCR (O.C.C.) 294

known to the American Constitution but circumscribes it by providing that there should not only be a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.

12 The petitioner in this case cannot get any benefit, because he has not been prosecuted earlier for his act of overstay. Article 20(2) would become operative in a case where the second prosecution and punishment is for the same offence for which the person concerned has already been prosecuted and punished. Moreover, the principle is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. The rule against double jeopardy is stated in the maxim *Nemo debet bis vexari pro una et eadem causa*. It is only when the offence has been the subject of judicial adjudication and it ended in acquittal or conviction, the criminal justice system would not allow repetition of the adjudication in a separate trial on the very same facts. In the present case, the petitioner has not been prosecuted before any

Court of law or Tribunal. There were no proceedings of criminal nature “before a Court of law” in accordance with the procedure prescribed in the statute which creates offences and regulates procedure for punishment, therefore, it is clearly not a case of double jeopardy.

13 The only condition precedent for application of the principle of double jeopardy is that the person concerned has been prosecuted and punished for the same offence. No other ingredient could be added. Article 20(2) is not attracted in the instant case. The petitioner has not been convicted or acquitted earlier for an offence based on the same facts. Thus, in view of the above, the doctrine of "double jeopardy" contained in Article 20(2) could not be applied to the case of the petitioner.

14 Thus, in our view, so far as the constitutional provision is concerned, the prohibition is against the prisoner being prosecuted and punished for the same offence more than once. The action taken against him of cutting of remission is only a disciplinary action taken against the prisoner for which there was no prosecution

launched against him nor there was any order of conviction and sentence awarded as contemplated under Article 20(2) of the Constitution. It would be relevant to refer to two other judgments of the Apex Court in this connection.

The first case is of **Thomas Dana v. State of Punjab**⁶ decided by the Constitution Bench of the Supreme Court. In that case, the Supreme Court was considering the principle of double jeopardy laid down in Article 20(2) of the Constitution. The question before the Supreme Court was whether prosecution under the Penal Code and the action taken under the provisions of Section 167 of the Sea Customs Act were hit by Article 20(2) of the Constitution. It was held that the proceeding before the Sea Customs authorities under Section 167 of the Sea Customs Act was not a prosecution within the meaning of Article 20(2) of the Constitution observing that "prosecution" means a proceeding either by way of indictment or information in the criminal courts in order to put an offender upon his trial. Thus, in the present case, the imposition of penalty under the rules framed under the

6 AIR 1959 SC 375

Prison Act would not amount to prosecution as contemplated under Article 20(2) of the Constitution.

15 Another judgment of the Supreme Court is in the case of **Union of India and Ors. v. Sunil Kumar Sarkar**⁷. That was a case where the delinquent was found guilty and sentenced by the General Court Martial to R.I. for 6 months under Army Act. The disciplinary authorities had punished him by dismissing him from service under the rules for his misconduct. It was held that Court Martial proceedings and disciplinary proceedings deal with different aspects i.e. one under the Army Act and another under the Service law i.e. Central Civil Services (CCA) Rules under which disciplinary action was taken and therefore, the concurrent proceedings under the two i.e. Army Act and CCS (CCA) Rules would not amount to double jeopardy within the meaning of Article 20(2) of the Constitution.

16 In our view, applying the above principle in the present case, two actions taken against the prisoner, one

⁷ (2001) 3 SCC 414

of deducting the remission earned by him and the second of rejecting his applications for parole and furlough do not amount to double jeopardy within the meaning of Article 20(2) of the Constitution. This is in view of the clear dicta of the Supreme Court given by the Supreme Court as far back as the year 1953 in the case of Maqbool Hussain (supra) and thereafter in 1958 by the Constitution Bench of the Supreme Court in the case of Thomas Dana (Supra) and thereafter, in the judgment of the Supreme Court in Sunil Kumar's case (Supra) in the year 2001. So also, for the reasons stated earlier, the case of the petitioner is not covered by Section 300 of Cr.P.C.

17 This Court in four decisions to which one of us was a party (V.K. Tahilramani, J.) took the same view in similar circumstances. The three decisions are :- 1. **Anil Lala Saundade Vs State of Maharashtra**⁸, 2. **Niyaj Ahamad Abdul Jabbar Vs. State of Maharashtra**⁹. 3. **Akash @ Vijay Kumar Khandekar Vs State of Maharashtra & Anr.**¹⁰.

8 2003 ALL MR (Cri) 433

9 2011 ALL MR (Cri) 2509

10 2011 ALL MR (Cri) 3831

18 In the case of Anil Saundade (*supra*), the petitioner had escaped from lawful custody. On account of this, he was prosecuted under Section 224 of IPC and sentenced to one year of imprisonment and in addition his remission was deducted. In the said case also, the argument of double jeopardy was raised, however, the Court negated the said contention. In the case of Niyaj Ahamad (*supra*), the grievance of the petitioner was that on account of not doing work properly in prison and disobeying the orders of the Jail Authorities, he was transferred to special prison and in addition thereto, a period of 15 days was deducted from his remission which according to the petitioner therein amounted to double jeopardy. This Court relying on the decision in the case of Maqbool Hussain (*supra*) held that it was not a case of double jeopardy. In the case of Akash Khandekar (*supra*), the argument advanced on behalf of the petitioner was that it is a case of double jeopardy in the sense that apart from punishment of cutting of remission being imposed for overstay, the petitioner's application for parole was rejected. In the case of Akash (*supra*), relying on the

decision of the Supreme Court in the case of Maqbool Hussain (supra), the contention was negated.

19 In view of the above decisions, we find no merit in the contention by the petitioner that he is victim of double jeopardy, hence, petition is dismissed. Rule is discharged.

M.S.SONAK, J.

ACTING CHIEF JUSTICE