

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 1535 OF 2019

Satish Shankarrao Shinde,
 Age : Major, Occ. Nil Convict No. 6325,
 R/o. At present in central Prison,
 Aurangabad. ..PETITIONER

VERSUS

1. The State of Maharashtra,
 Through Secretary Home Department,
 Mantralaya, Mumbai.
2. The Dy. Inspector General
 Central Prison, Aurangabad.
3. The Superintendent,
 Central Prison, Aurangabad .. RESPONDENTS

...
Advocate for the Petitioner : Mr. B.B. Gunjal
A.P.P for respondent State : Mr. M.M. Nerlikar

...
AND

CRIMINAL WRIT PETITION NO. 1707 OF 2019

Nagnath S/o Bapurao Sontakke, (C-6738),
 Age : 34 Years, Occ. Convict,
 R/o. Village Pokharni, Taluka and Dist. Hingoli,
 At present Confined at Central Prison,
 Aurangabad. ... PETITIONER

VERSUS

1. The State of Maharashtra,
 Through D.I.G Prisons,
 Aurangabd.
2. The State of Maharashtra,
 Through Superintendent Central Prison,
 Aurangabad. .. RESPONDENTS

....
Advocate for the petitioner : Mr.Gunjal Bharati B.
A.P.P for Respondent-State : Mr. M.M.Nerlikar

**CORAM : T. V. NALWADE AND
S. M. GAVHANE, JJ.**

DATE : 26-11-2019.

JUDGMENT(PER T.V. NALWADE, J.] :-

1. Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2. The first proceeding is filed by the prisoner to challenge the order made by respondent No.2 i.e. Dy. Inspector General of Central Prison, Aurangabad dated 27.06.2019. By this order, the application filed by the petitioner for furlough is rejected, on the ground that there is adverse police report and also on the ground that in the year 2006, when he was released on furlough he turned up late by 802 days and on second occasion, in the year 2012 when he was released on furlough he turned up late by 580 days. On both the occasions, he was required to be arrested by the police to bring them back to the prison and it is observed that there is possibility that he may not turn up for under going remaining period of the sentence, if he is released on furlough. The officer has referred Rules 4(4) 4(10) 4(20) of Maharashtra Prison Rules, 1979.

3. In Writ Petition No. 1707 of 2019 furlough application of the petitioner is rejected by the authority, by the order dated 14.08.2019. In the rejection order the officer has mentioned the same rules. This prisoner had turned up late by 170 days when he was released on furlough leave in the year 2012, he was also required to be arrested by the police for bringing him back to the prison. In this case also there is adverse police report.

4. Rule 4(4) of aforesaid Rule is as under :-

“4. When prisoners shall not be granted furlough :-

The following categories of prisoners shall not be considered for release on furlough :-

(4) Prisoners whose release is not recommended in Greater Bombay by the Commissioner of Police and elsewhere, by the District Magistrate on the ground of public peace and tranquility.”

5. Ordinarily on the basis of the enquiry made with the witnesses such police report is given. It is not disputed that prisoner from both the cases have permanent place of residents and they have close relatives, to whom they will go, if furlough leave is granted. Considering the scheme of furlough leave and purpose behind it, the circumstance that witnesses have objections to release of such prisoners on

leave cannot sustain in law. Proper conditions can be imposed to take care of that apprehension and only on that ground furlough leave cannot be rejected.

6. Rule 4(10) of the Rule is as under :-

"4. Eligibility for furlough :- All Indian prisoners except from following categories whose annual conduct reports are good shall be eligible for furlough :-

(10) Prisoners who have at any time escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough."

7. The learned A.P.P. who opposed the application for the State submitted that in Rule 4, it is mentioned that only those prisoners who do not fall under the exception given in Rule 4 can be treated as eligible for getting furlough leave and the use of word "shall" in the beginning of Rule 4 shows that the requirements are mandatory and when the case falls under the exceptions mentioned in Rule 4 furlough cannot be granted in favour of such prisoner. In respect of Rule 4(4), it is already observed that adverse police report needs to have some justification. Thus, only because there is adverse police report,

the furlough leave cannot be rejected and the administrative order is subject to scrutiny and review of this Court. So far as Rule 4(10) is concerned, it can be said that there are two parts in this rule. The prisoners who have escaped or who have attempted to escape from lawful custody is first category and second category is of prisoners who have defaulted in any way in surrendering themselves at appropriate time, after release on parole or furlough. The present matter, falls under the second category. The learned counsel for the petitioner placed reliance on the Judgment of full bench of Gujarat High Court reported as **Bhikhabhai Devshi Versus State of Gujarat and others** (AIR 1987 GUJARAT 136). The same rules were before the full bench for consideration and the same argument was advanced for the State. Considering the scheme of the provisions and the purpose behind the rules and also considering the relevant provisions of prison Act the full bench of Gujarat High Court held that the word “shall” used in Rule 4(10) is not mandatory and he is not totally ineligible for release on furlough. It is laid down that the application of such prisoner needs to be considered on merits and cannot be rejected at the thresh hold. More observations in this regard can be found at paragraph No. 29 and they are as under :-

“ 29. As far as the first part of Rule 4(10) is concerned, in respect of prisoners who have escaped or attempted to escape, such prisoners, a class by themselves, cannot be trusted for being released on furlough and, therefore, in such cases, the prison authority would be justified in not considering their request for furlough. However, in case of late surrender, where there is no element of escape, but merely there is a delay in surrendering, the question will have to be examined on the facts and circumstances and merits of each case. A given case of a prisoner defaulting in timely surrender, who is wanted by the jail authorities and who is not available at the place where ordinarily he should be and who is apprehended by the police or who surrenders because of the chase by the authority, may fall under the first part where he cannot be trusted to be released on furlough again. But such cases are at the other extreme. ”

8. This Court had occasion to consider not only the aforesaid rule but also the case of Gujarat High Court of *Bhikhabhai Devshi Versus State of Gujarat and others* cited (supra). The relevant observations from the case reported as **Sitaram Rajaram Deokar Versus Deputy Inspector General of Prison, East Nagpur and Another** (2013 BCI 1253) are as under :-

“6. The petitioner was earlier released on furlough on 10th June, 2011 for two weeks but he had not surrendered voluntarily on the scheduled date and he was arrested by the police and brought back to the prison. Respondent No.2 has relied on the provisions of Rule 4(10) of the Prisons (Bombay Parole and Furlough) Rules, 1959 to reject the application of the petitioner on the ground of the above mentioned default on the part of the petitioner. The provisions of Rule 4(10) of the Prisons (Bombay Parole and Furlough) Rules, 1959 are considered in the case of Bhikhabhai Vs. State reported in AIR 1987 Gujarat 136 by Full Bench of Gujarat High Court and it is held that the word shall occurring in Rule 4 of the Rules is directory and not mandatory. The Full Bench of the Gujarat High Court in the above referred Judgment has laid down that the prisoner who commits default as contemplated by the provisions of Rule. 4(10) of the Prisons (Bombay Parole and Furlough) Rules, 1959 is not totally ineligible for being released on furlough and his application has to be considered on merits. The impugned order shows that the petitioner has undergone punishment for the period of three years ten months and one day at the time of making of the application.”

9. Thus, this Court has referred and followed the aforesaid decision of the full bench of Gujarat High Court for interpretation of the rule. In view of the aforesaid decision of this court delivered in **Sitaram Rajaram Deokar Versus Dy.**

Inspector General of Prison, East Nagpur and Another

case and purpose behind the scheme of the furlough, this Court holds that no other interpretation is possible. Though the word "shall" in Rule 4(10) is there, that needs to be read as "may" and every case needs to be scrutinized by the administrative authority to ascertain as to whether it is desirable or not to grant furlough leave on the ground given in Rule 4(10), particularly the second part.

10. It was submitted by the learned counsel of petitioner of proceeding No. 1707 of 2019 that this prisoner had turned up late only by 170 days and so the discretion ought to have been used in his favour. Only the period will not be a relevant matter for use of discretion. Other things which may includes the nature of offence, the motive, the person against whom the offence was committed may also be relevant in such cases. The most important thing which is required to be considered is whether the release will be in the interest of the society. The purpose behind the scheme is to see that the prisoner is allowed to mix in the society so that at the end when he comes out of the jail after serving the entire sentence, he knows the society well and he can adopt the changes which have taken place in the society. If that

opportunity is not there, it will be difficult for prisoner to mix in the society and that will create problems for the society also. If it is presumed that the rule is mandatory then the purpose of the scheme itself will be defeated. Ordinarily after serving three years of jail sentence the life convict becomes eligible to get furlough. If he falls in the category for which imprisonment provided is 26 years and he commits lapse when he get furlough on first occasion that is in the 4th year of the imprisonment, then it can be said that he will not get furlough leave for next more than 20 years if it is held that Rule is mandatory and that cannot be purpose of furlough scheme. For many reasons, there cannot be discrimination between the prisoners and ground that the prisoner did not turn up in time on two occasions, cannot be a ground. Similarly, it cannot be ground that prisoner turned up late like by more than 800 days and that cannot be circumstance to discriminate him against the prisoner who has turned up late by few days like 170 days. There can be many reasons due to which the prisoners may turn up late. The reason also needs to be considered by the authority. Even if, there was no reasons for turning up late, only on that ground the purpose of the scheme cannot be defeated. The authority can consider such case after sufficient

length of period from the date of the lapse and authority can again think over for giving one more opportunity to the prisoner to show that he will return to jail in time and he is no more danger to the society. If that is not done, the most of the prisoners will not get the opportunity to mix up in the society and see the changes which are taking place in the society when he is under going the jail sentence.

11. The learned A.P.P. placed reliance on the observations made by the Bombay High Court in the case reported as **Murlidhar Ramchandra Bhalerao Versus State of Maharashtra**, (2011 ALL MR (Cri.) 2132). The learned A.P.P. submitted that in this case, this Court has observed that if there is breach of the prison Rules, like the prisoner had not reported back to the prison after expiry of the furlough he does not deserve any sympathy. Those observations are general observations. In this reported case this Court did not interpret the aforesaid Rules. In the present matter this Court is accepting the interpretation already made and using the said interpretation. It is always desirable that such cases are separately considered on the facts and circumstances of those cases.

12. The learned A.P.P. placed reliance on some observations made by this Court while deciding the Criminal Writ Petition No. 761 of 2017 **Mohammad Ali Ismail Aamdare Versus The State of Maharashtra** decided on 28.02.2019 the observations are at para No. 10 is as under :-

“10. From the perusal of the above stated details regarding the release of other convicts on parole/furlough, prima facie it appears that there is an element of arbitrariness on the part of the Respondent Authorities in dealing the cases of those convicts vis-a-vis the petitioner. We direct that, henceforth the State Government and its officials shall take care and precaution so as to adhere to the relevant rules, regulations and procedure, and shall not give any occasion for arbitrary exercise of powers, while dealing with the prayers of the convicts for release on parole/furlough.”

13. There is no dispute about the aforesaid observations. There should not be no arbitrariness while using discretionary power. In this case also the point of interpretation of the rules was not involved. In that proceeding allegations were made by the petitioner that in many cases the authority had granted furlough leave even when the prisoners had not turned up to

prison in time and they had turned up late by more than two years and in one case the prisoner had overstayed for about 11 years but he was not granted furlough leave. Thus, there was allegation of discrimination and so the aforesaid observations were made.

14. This Court has already made observations with regard to the scheme given by rules and purpose of the scheme and that purpose cannot be defeated. This Court holds that the aforesaid observations made by this Court in Mohammad Ali Ismail Aamadare Versus The State of Maharashtra and others, case cannot come in the way of the authority for using the discretion given in aforesaid rule. The learned counsel for the petitioner placed reliance on many cases in which this Court has granted furlough to many prisoners even when they had turned up late. There is no need to mention all those cases. This Court holds that only for the second ground mentioned in the Rule 4(10) the furlough leave cannot be refused and the case of each prisoner needs to be consider separately on its own merits and proper justification needs to be given for refusal of the furlough leave. At the cost of repetition, this Court is observing that after sufficient time has passed since the date of lapse, it become duty of the authority to consider

the applications of such prisoners and on the basis of the conduct of the prisoner during the intervening period, from the date of lapse, the authority can be take proper decision. This Court holds that the authority needs to re-consider the matters in view of the aforesaid observations. In the result, following order :-

ORDER

1. Both the petitions are allowed.
2. The orders of rejection of furlough applications are hereby quashed and set-aside.
3. Matters are remanded back for fresh consideration. The matters are to be again considered on the basis of record, applications are to be again decided, in view of the observations made by this Court.
4. Rule is made absolute in those terms.

(S.M. GAVHANE, J.)

(T.V. NALAWADE, J.)