

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.841 OF 2021

Dnyaneshwar Suresh Borkar]
Aged : 41 years, Residing at Village Post Ambodi]
Taluka Purandar, Saswad, Pune]
Presently lodged in the Yerwada Central Jail,]
Pune]..... Petitioner.

Versus

- 1] The State of Maharashtra]
Through the Principal Secretary,]
Home Department]
Mantralaya, Mumbai-32]
2] The Additional Director General of Police]
and Inspector General, Prisons & Corrections,]
Maharashtra State,]
2nd Floor, Old Central Building, Pune-411001]
3] The Deputy Inspector General of Prisons,]
Western Division,]
Yerwada, Pune-411006]
4] The Superintendent]
Yerwada Central Prison]
Yerwada, Pune – 411006]..... Respondents.

Ms. Rebecca Gonsalvez for the Petitioner.
Mrs. M H Mhatre, APP for the Respondents/State.

CORAM : S. S. SHINDE,
N. J. JAMADAR, JJ

Reserved on : 25th August 2021
Pronounced on : 08th September 2021.

JUDGMENT : (PER S. S. SHINDE, J.)

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

2 By this Writ Petition filed under Article 226 of the Constitution of India, the Petitioner takes exception to the order dated 06/10/2020 passed by Respondent No.2 – The Additional Director General of Police and Inspector General, Prisons & Corrections confirming the order dated 01/04/2020 passed by the Respondent No.3 – The Deputy Inspector General of Prisons, Western Division, Yerwada thereby rejecting the application of the Petitioner for furlough.

3 The facts disclosed in the memo of Petition, can in brief be stated thus :-

The Petitioner was arrested on 08/02/2001 in Crime No.13 of 2001 of Saswad Police Station. The Petitioner (accused No.1), and co-accused – Amit @ Bapu Nanasaheb Bhandwalkar (accused No.2) were convicted by the learned Additional District and Sessions Judge, Pune by the judgment dated 18/12/2004 for the offences punishable under Sections 302, 364 and 201 of the Indian Penal Code. The Petitioner was sentenced to death for the offence punishable under Section 302 of the Indian Penal Code, while the co-accused was sentenced to suffer life imprisonment for the same offence. The case of

Accused No.3 was separated as he was juvenile in conflict with law. Both the Petitioner and co-accused were also sentenced to undergo imprisonment for life for the offence punishable under Section 364 of the Indian Penal Code and, to pay fine and in default sentence were also awarded. On the reference made by the learned Additional District and Sessions Judge, Pune, Confirmation Case No.1 of 2005 was registered in the High Court.

4 The Petitioner had filed Criminal Appeal No.618 of 2005 and co-accused filed Criminal Appeal No.38 of 2005 challenging their conviction and sentence in Sessions Case No.236 of 2001. This Court by the judgment dated 05/05/2006 passed in the Confirmation Case and the Criminal Appeals, confirmed the conviction of the Petitioner and the sentence imposed upon him. The Petitioner preferred Special Leave Petition bearing SLP (Cri.) No.3323/2006 in the Supreme Court, however, by order dated 21/07/2006 the Supreme Court dismissed the said special leave petition *in limine*. The Review Petition (Cri) No.337 of 2006 filed by the Petitioner was also dismissed by the Supreme Court vide order dated 30/11/2006. Thereafter the Petitioner filed Application being Criminal Miscellaneous Petition Nos.8635-8636/2016 (for short "Cri.MP") for reopening of Review Petition (Cri) No.337 of 2006. By order dated 12/11/2018 the Supreme Court allowed the said Criminal Misc. Petition and, the order dated 21/07/2006 dismissing the special leave petition and the order dated 30/11/2006 dismissing the review petition were set aside,

and leave to appeal was granted to the Petitioner. Thereafter the Petitioner filed Criminal Appeal No.1411 of 2018, which came to be partly allowed by the Supreme Court vide order dated 20/02/2019 and the sentence of death imposed on the Petitioner in the Sessions Case No.236/2001 was commuted to one of life imprisonment.

5 Thereafter the Petitioner filed an application for furlough. The said application came to be rejected by Respondent No.3 by order dated 01/04/2020. Thereafter Petitioner preferred an Appeal against the order of rejection of his application for furlough to Respondent No.2. During pendency of the said Appeal, the Petitioner filed an application for releasing him on emergency covid parole to Respondent No.4, which came to be rejected by Respondent No.4 vide order dated 25/09/2020. The Respondent No.2 by order dated 06/10/2020 dismissed the said Appeal filed by the Petitioner against rejection of his furlough application.

6 The learned counsel appearing for the Petitioner submitted that the Petitioner is a convict prisoner presently undergoing a sentence of life imprisonment in Yerwada Central Prison Pune, and he is seeking his release on furlough for the first time since the date of his incarceration i.e. since 08/02/2001. It is submitted that he has been in custody for more than 20 years and he has never been released on furlough leave. The conduct of the

Petitioner is good while he is in jail. It is further submitted that the mother of the Petitioner is 70 years of old lady and is ill and infirm, and therefore, she is not in a condition to visit her son in prison. She further submitted that if the Petitioner is released on furlough he will have opportunity to meet his mother and sister, and maintain a relationship with them, which facilitates the process of reformation and socialization, however, the Respondents/Authorities have failed to consider this fact while passing the impugned orders. The learned counsel appearing for the Petitioner, inviting our attention to the applications filed by the Petitioner to the Respondents/Authorities, and the impugned orders passed by them, submitted that though the Petitioner applied for his release on furlough in July 2019, the Respondent No.3 rejected the application for furlough filed by the Petitioner after about 9 months later i.e. on 01/04/2020, and the appeal filed against the said rejection, came to be dismissed by Respondent No.2 about 3 months later i.e. on 06/10/2020. She therefore submitted that the process of rejection of the application and appeal came to be completed more than one year later for no fault on his part. She also submitted as per Notification PAR 1007/Case 327/PRS3 dated 01/08/2007, the application for furlough or parole is required to be decided within 45 days from the date of its filing. She therefore submitted that the Respondents Authorities violated this Schedule and prevented the Petitioner from being released on furlough for the years 2019 and 2020. It is submitted that the complete copy of the report of Rajgad police station, on the basis of

which the impugned orders were passed, was not furnished to the Petitioner. She submitted that the police report is vague and, the impugned orders passed by the Respondents/Authorities without application of mind. She submitted that if Petitioner is released on furlough, he will reside with his sister at her house and will report to the local police station during his release on furlough. She further submitted that the Petitioner will give undertaking that he will not come in contact or approach the complainant in any way whatsoever during his release on furlough. It is further submitted that the co-accused Amit Bhandwalkar, who was convicted in the same sessions case, has been regularly released on furlough leave, and he was also granted emergency covid parole. She submitted that the apprehension expressed in the police report and the impugned orders that if the Petitioner is released on furlough, he is likely to abscond and will not surrender to the prison is totally baseless as there is no specific reason given by the Respondents Authorities in that regard while passing the orders. The learned counsel for the Petitioner further submitted that in RCC No.511 of 2004 the Petitioner was accused No.2 and the said Amit Bhandwalkar was accused No.1, however, though both of them had been convicted by the learned judge, the said Amit Bhandwalkar has been regularly released on parole and furlough. She therefore submitted that the impugned orders are discriminatory, arbitrary and unreasonable.. She further submitted on parity, the Petitioner is entitled for furlough. She lastly submitted that the impugned orders may be quashed and set aside by allowing this Writ Petition.

7 The learned APP appearing for the Respondents/State vehemently opposed the prayer of the Petitioner. The learned APP submitted that the Petitioner is convicted under Sections 302, 364 and 201 of the Indian Penal Code. There is a police report which is adverse to the Petitioner stating that there is strong possibility of Petitioner abusing, threatening and attacking the complainant, if he is released on furlough. She further submitted that, the apprehension expressed in the police report and the impugned orders that, if the Petitioner is released on furlough, he will not surrender to prison and there is chance of his absconding, appears to be reasonable. She therefore submitted that there is a negative police report which does not recommend the release of the Petitioner on furlough. She therefore submitted that the impugned orders are reasonable. She lastly submitted that the issue of parity does not arise at all as the case of the co-accused for furlough/parole was considered by the Respondents/Authorities independently. She therefore submitted that the Writ Petition may be dismissed.

8 We have given our due consideration to the rival submissions of the learned counsel appearing for the parties. With their able assistance we have perused the pleadings, grounds taken in the Petition and annexures thereto.

9 It is not in dispute that the Petitioner has been convicted by the Additional Sessions Judge, Pune for the offences punishable under Section 302 and sentenced him to death. As stated herein above, the said death sentence was confirmed by this Court by judgment dated 05/05/2006 in Confirmation Case No.1 of 2005, and the SLP filed by the Petitioner against confirmation of death sentence also came to be dismissed by the Supreme Court so also the Review Petition. It is required to be noted that thereafter the Petitioner filed Application before the Supreme Court for reopening of Review Petition, which Application came to be allowed by the Supreme Court and the orders dismissing the special leave petition and review petition came to be set aside and the Petitioner was granted leave to appeal. The Petitioner thereafter filed the Appeal, which came to be partly allowed by the Supreme Court by order dated 20/02/2019 and the sentence of death imposed on the Petitioner was commuted to one of life imprisonment. While commuting the sentence of death to one of life imprisonment, the Supreme Court in its judgment dated 20/02/2019 in Criminal Appeal No.1411 of 2018 observed as under :-

6. We have heard the learned counsel appearing on behalf of the respective parties and the prayer made by the learned counsel appearing on behalf of the appellant to commute the death sentence to life imprisonment.

6.1 Having heard learned counsel appearing on behalf of the parties on the sentence, we are of the opinion that, in the facts and circumstances of the case, capital punishment is not warranted. Striking the balance between the aggravating and mitigating circumstances,

we are of the opinion that mitigating circumstances are in favour of the accused while commuting the death sentence to life imprisonment. The mitigating circumstances in favour of the accused are that :

- a. the accused at the time of commission of the offence was aged of 22 years;*
- b. that, by now, he has spent 18 years in the jail;*
- c. that, while in jail, his conduct is good;*
- d. that, the accused has tried to join the society and has tried to become a civilized man and has completed his graduation in B.A. from jail. He has tried to become reformative;*
- e. that, from the poems, written by him in the jail, it appears that he has realised his mistake which was committed by him at the time when he was of young age and that he is reformative;*
- f. therefore the appellant can be reformed and rehabilitated.*

7. The above details show there is a possibility that accused would not commit similar criminal acts. That the accused would not be a continuing threat to the society. Considering the aforesaid facts and circumstances of the case and applying the law laid down by this Court in the case of Sunil (supra), we are of the opinion that in the facts and circumstances of the case, the decision of capital punishment is not warranted. We have considered each of the circumstance and the crime as well as the facts leading to the commission of the crime by the accused. Though, we acknowledge the gravity of the offence, we are unable to satisfy ourselves that this case would fall in the category of 'rarest of rare case' warranting the death sentence. The offence committed, undoubtedly, can be said to be brutal, but does not warrant death sentence. It is required to be noted that the accused was not a previous convict or a professional killer. At the time of commission of offence, he was 22 years of age. His jail conduct is also reported to be good.

8. Considering the aforesaid mitigating circumstances and considering the decision of this Court in Bachan Singh v. State of Punjab (1980) 2 SCC 684 as well as another decision of this Court in Shyam Singh alias Bhima v.

State of Madhya Pradesh (2017) 11 SCC 265 and the decision of this Court in Sunil (Supra), we think that it will be in the interest of justice to commute the death sentence to life imprisonment.

The Supreme Court has considered the mitigating circumstances which are in favour of the Petitioner while commuting the death sentence to life imprisonment. The Supreme Court considering the facts and circumstances of the case, came to a conclusion that the decision of capital punishment is not warranted, and partly allowed the said Appeal filed by the Petitioner.

10 It is required to be noted that though the learned JMFC, Pune convicted the Petitioner along with his co-accused Amit Bhadwalkar, who was accused No.1, and sentenced both of them to suffer two years imprisonment, the said co-accused Amit Bhadwalkar was granted furlough and parole leave.

11 As stated herein above, while rejecting the application of the Petitioner, the Respondents/Authorities observed that the Petitioner was convicted for an offences punishable under Section 302 and 364 of the Indian Penal Code. Rule 4 (4), (10) and (20) of the Prisons (Bombay Furlough and Parole) Rules, 1959 which forms the basis of rejection of the Petitioner's application reads thus :-

“4 Eligibility for furlough :-

All Indian prisoners except from following categories

whose annual conduct reports are good shall be eligible
for furlough :-

(1) to (3)

(4) Prisoners whose release is not recommended in Police
Commissionerate area by the Assistant Commissioner of
Police and elsewhere, by the Deputy Superintendent of
Police on the grounds of public peace and tranquility;

(5) to (9)

(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.

(11) to (19)

(20) Who in the opinion of police /prison authorities are likely
to jump furlough;

(21)"

12 The respondents have not brought on record documents showing
that the petitioner was earlier released on furlough or parole. It is not in
dispute that the convict has undergone more than 20 years imprisonment, and
he was never released on furlough/parole. At this juncture it would be apt to
reproduce herein below Rule 1(A) of the said Rule.

***[1(A). Objectives:-**

Furlough and Parole leaves to inmates are progressive measures of correctional services. The objectives of releasing a prisoner on leave are:-

- (a) To enable the inmate to maintain continuing with his family life and deal with family matters,*
- (b) To save him from evil effects of continuous prison life,*
- (c) To enable him to maintain and develop his self-confidence,*
- (d) To enable him to develop constructive hope and active interest in life.]*

The Rule 1(A) of the said Rule has been inserted by the Notification No. MIS-1316/C.R.669/16/PRS-3, dated 16.04.2018. Rule 3 of the said Rule mentions about when the prisoner may be granted furlough. In the facts of the present case, sub Rule 3(C) is relevant, which reads as under:-

***[3. When Prisoner may be granted furlough.**

(A) -----

(B)-----

- (C) A prisoner sentenced to imprisonment for a period of exceeding fourteen years,*
 - (1) Shall become eligible for furlough on completion of three years of actual imprisonment.*
 - (2) Shall become eligible for second release on furlough after completion of one year of actual imprisonment from the date of last return from furlough.*

- (3) *Shall become eligible for subsequent releases on furlough after completion of six months of actual imprisonment from the date of last return from furlough.*
- (4) *Prisoner shall not be given furlough exceeding 21 days in a calendar year for the first five years of his imprisonment and thereafter for the period not exceeding 28 days.*

13 Keeping in view the aforesaid provisions and in particular Rule 3(C)(1) of the said Rule, there is no doubt that the petitioner is entitled to be released on furlough.

14 In our opinion except general observations by Respondents/Authorities, nothing specific is brought on record to hold that in case, the Petitioner is released on furlough he is likely to jump furlough. Therefore, keeping in view the objectives of furlough leave to inmates, we are of the view that the petitioner is entitled to be released on furlough.

15 The fact that the Petitioner was never released on furlough is not in dispute, and therefore, expressing the apprehension that if he is released on furlough, he will mis-use such release, would not arise. The Petitioner is in custody for more than 20 years. The fact that the co-accused Amit Bhandwalkar, who was convicted in the same sessions case, was released on

furlough and emergency covid parole, is not disputed by the learned APP appearing for the Respondents/State.

16 Considering the facts and circumstances of the present case, we find considerable force in the submission of the learned counsel appearing for the Petitioner that rejecting the application of the Petitioner to release him on furlough, when the co-accused was granted furlough as well as emergency covid parole, would amount to discrimination, when both of them stand on same footing.

17 In so far as apprehension expressed in the police report that if the convict is released on furlough, there is a danger to the life of the complainant and there is possibility of his absconding is concerned, the learned counsel for the Petitioner during the course of arguments submitted that the Petitioner is ready to give undertaking and furnish a surety, if he is released on furlough.

18 For the reasons recorded in the foregoing paragraphs and considering the facts and circumstances of the present case, we are of the considered view that on the ground of parity as well as keeping in view the length of incarceration suffered by the Petitioner for 20 years, the Petitioner Dnyaneshwar Suresh Borkar deserves to be released on furlough. Hence the following order.

ORDER

A] The Writ Petition is allowed. The order dated 01/04/2020 passed by Respondent No.3 and the order dated 06/10/2020 passed by Respondent No.2 are quashed and set aside.

B] The Petitioner - Dnyaneshwar Suresh Borkar, presently lodged in Yerwad Central Prison, shall be released on furlough for the period stated in the Prison (Bombay Furlough and Parole) Rules, 1959, on following conditions:-

- (i) The Petitioner shall be released on furlough subject to the conditions which the competent authority may deem suitable to impose under Rule 10 of the Prisons (Bombay Furlough and Parole) Rules, 1959.
- (ii) The Petitioner will stay outside the jurisdiction of Saswad Police Station, during the period of furlough leave.
- (iii) The Petitioner shall not directly or indirectly contact or extend threats to the complainant/witnesses.
- (iv) The Petitioner shall also furnish an undertaking that he will reside

outside the jurisdiction of the Saswad Police Station and will not cause any danger to the safety and security of the complainant and other witnesses during the period of his furlough leave.

- (v) The Petitioner shall attend the nearest police station twice in a week during his furlough leave period.
- (vi) On completion of furlough period the Petitioner shall surrender to Yerwada Central Prison, Pune without any delay.
- (vii) Needless to mention that the Petitioner shall not misuse the liberty of his release on furlough and strictly abide by the terms and conditions imposed by the Respondents/Authorities.

D] Rule made absolute in above terms. The Writ Petition is accordingly disposed of.

[N. J. JAMADAR, J]

[S. S. SHINDE , J]