

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 200 OF 2021

Suhail Mohd. Kasam Shaikh
(brother of Zuber Mohd. Kasam
Shaikh, convict confined at Nashik
Road Central Prison, Nasik Road)
Aged 40 years, Occup. : Nil,
Residing at 525, Janta Sevak Society,
Mori Road, Mahim (West),
Mumbai-400 016.

...Petitioner

vs.

1. The State of Maharashtra.

2. The Superintendent,
Nasik Road Central Prison,
Nasik Road.

3. The D.I.G. (Prison)
Central Region, Harsul,
Aurangabad.

4. The Addl. D.G. (Police) & I.G.,
(Prison), State of Maharashtra,
Central Bldg., Pune-411 001.

...Respondents

Mr. Manas Gawankar for petitioner.
Mr. K.V. Saste, APP for the State.

CORAM : S.S. SHINDE &

N.J. JAMADAR, JJ.

Reserved for Judgment on : 9th July 2021.

Judgment Pronounced on : 3rd August 2021.

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JUDGMENT (PER N.J. JAMADAR, J.) :

1. Rule. Rule made returnable forthwith and, with the consent
of the learned counsels for the parties, heard finally.

2. The challenge in this petition under Article 226 of the Constitution is to the order dated 19th August 2020, passed by the respondent No.4-Additional D.G. (Police) & I.G. (Prison), Pune confirming the order dated 19th November 2019 passed by the D.I.G. (Prison), Central Region, Aurangabad-respondent No.3, whereby the prayer of Zuber Mohd. Kasam Shaikh, the convict, a brother of the petitioner, to grant furlough was rejected.

3. This petition which, in effect, represents a second round of litigation, arises in the backdrop of the following facts :-

(a) The convict was convicted by the Special Court, Greater Bombay, in MCOC Special Case No. 1 of 1999 by judgment and order dated 5th September 2000, for the offences punishable under section 302 of the Indian Penal Code, 1860 ('the Penal Code') and section 3(1)(i) of the Maharashtra Control of Organised Crime Act, 1999 ('MCOC Act') and sentenced to death.

(b) In Criminal Appeal No.679 of 2000 along with Confirmation Case No.1 of 2001, the convict came to be acquitted by this Court by order dated 6th August 2009.

(c) In Criminal Appeal No. 91-94 of 2006,

preferred by the State of Maharashtra, the aforesaid order of acquittal was set aside and the convict was convicted for the offences punishable under section 302 of the Penal Code and section 3(1)(i) of MCOC Act and sentenced to suffer, *inter-alia*, imprisonment for life.

(d) The convict surrendered on 6th August 2009. The convict had since been undergoing the sentence of imprisonment. In the meanwhile, on 20th July 2017, the convict was convicted by the learned Additional Chief Metropolitan Magistrate, Ahmedabad in Criminal Case No.185/2008 for the offences punishable under section 120-B, 465, 467, 471 and 114 of the Penal Code and section 12 of the Passport Act, 1950 and sentenced to suffer seven years imprisonment for the major offences.

(e) For completion of narration, it is necessary to note that the convict has already undergone the imprisonment pursuant to the conviction by the learned Additional Chief Metropolitan Magistrate, Ahmedabad in Criminal Case No.185/2008, as

certified vide communication dated 4th November 2017.

(f) The convict preferred an application for release on furlough. By order dated 18th March 2019, the request was turned down by the respondent No.3 as the police did not recommend the release of the convict on the ground of public peace and tranquility, within the meaning of sub-rule (4) of Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959 ("Rules, 1959").

(g) An appeal thereagainst was dismissed by the respondent No.4, by order dated 29th June 2019.

(h) The convict invoked the writ jurisdiction of this Court in Writ Petition No.4923 of 2019. By an order dated 6th November 2019, this Court quashed and set aside both the orders and directed the respondent No.3 to pass a fresh order within six weeks thereof.

(i) The respondent No.3 again negatived the request of the convict for grant of furlough by the impugned order, dated 19th November 2019 invoking Rule 4(4) and (20) of the Rules, 1959, citing adverse

police report and the apprehension of jumping the furlough, respectively. The appeal preferred by the convict met the same fate.

(j) Espousing the cause of the convict, the petitioner has again invoked the writ jurisdiction of this Court.

4. We have heard Mr. Manas Gawankar, the learned counsel for the petitioner and Mr. K. V. Saste, the learned APP for the State, at some length. With the assistance of the learned counsels, we have perused the material on record, including the reports and the details of incarceration furnished by the respondent No. 2- Superintendent, Nashik Road Central Prison.

5. Mr. Gawankar, the learned counsel for the petitioner strenuously urged that the authorities have fallen into a similar and familiar error in rejecting the prayer for release on furlough on bald and unsubstantiated grounds of adverse police report and apprehension of jumping the furlough. Mr. Gawankar laid emphasis on the fact that the authorities were not free to ascribe the very same reasons, which allegedly weighed with them in negating the prayer of the convict on the first instance, especially

after those orders were set aside and they were directed to take a decision afresh. Reiteration of the very same grounds, according to Mr. Gawankar, betrays a clear and manifest non-application of mind.

6. Mr. Gawankar would further urge that, on an analysis of the material, it becomes abundantly clear that both the grounds are not at all sustainable. No particulars are furnished which would justify adverse recommendation. Nor the apprehension of non-surrendering to prison is reasonable, if considered in the light of the fact that the convict was a free man from the date of his acquittal by this Court till he surrendered in deference to the order of the Supreme Court. This factor has not at all been considered by the authorities, urged Mr. Gawankar.

7. In opposition to this, Mr. Saste, the learned APP would urge that having regard to the serious offences, for which the convict was convicted by the Supreme Court, the apprehension on the part of the authorities that if the convict is released on furlough, it would lead to law and order problem within the limits of Mahim Police Station, which is a sensitive area, cannot be said to be unfounded. Likewise, in the backdrop of the circumstances of the case, there is no assurance that the convict would surrender to

prison. The authorities were, according to Mr. Saste, within their rights in declining to extend the benefit of furlough to the convict.

8. Sub-rules (4) and (20) of Rule 4, which have been invoked to deny furlough to the convict, read as under :-

“4. Eligibility for furlough :

All Indian Prisoners except from following categories whose annual conduct reports are good shall be eligible for furlough :-

.....

(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.

....

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

9. On a plain construction, under sub-rule(4) of Rule 4, furlough can be refused when the same is not recommended by the Commissioner of Police, in Mumbai, and under sub-rule (20), when the jurisdictional police and prison authorities entertained an apprehension that the convict is likely to jump furlough. These Rules are required to be construed in a pragmatic and meaningful manner. A decision not to extend the benefit of furlough deserves to be tested in the context of its reasonableness as well as on the touchstone of the philosophy which pervades the release of prisoners on furlough and parole. Mere formal compliance with

the statutory provisions in the sense that the jurisdictional police has not recommended the release or expressed an apprehension that the convict would not surrender, would militate against the objective of correctional therapy.

10. A profitable reference can be made to a judgment of the Supreme Court in the case of ***Asfaq Vs. State of Rajasthan & Ors.***¹, wherein the petitioner was convicted for the offences punishable under the Terrorist and Disruptive Activities (Prevention) Act, 1987. Expounding the physiology behind the release of the prisoners on parole and furlough, the Supreme Court observed as under :

“15 A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.

....

18 The provisions of parole and furlough, thus, provide for a humanistic approach towards those lodged in jails. Main purpose of such provisions is to afford to them an opportunity to solve their personal and family problems and to enable them to maintain their links with society. Even citizens of this country have a vested interest in preparing offenders for successful re-entry into society. Those who leave prison without strong networks of

1 (2017)15 SCC 55

support, without employment prospects, without a fundamental knowledge of the communities to which they will return, and without resources, stand a significantly higher chance of failure. When offenders revert to criminal activity upon release, they frequently do so because they lack hope of merging into society as accepted citizens. Furloughs or parole can help prepare offenders for success.

....

21 Another vital aspect that needs to be discussed is as to whether there can be any presumption that a person who is convicted of serious or heinous crime is to be, ipso facto, treated as a hardened criminal. Hardened criminal would be a person for whom it has become a habit or way of life and such a person would necessarily tend to commit crimes again and again. Obviously, if a person has committed a serious offence for which he is convicted, but at the same time it is also found that it is the only crime he has committed, he cannot be categorised as a hardened criminal. In his case consideration should be as to whether he is showing the signs to reform himself and become a good citizen or there are circumstances which would indicate that he has a tendency to commit the crime again or that he would be a threat to the society. Mere nature of the offence committed by him should not be a factor to deny the parole outrightly. Wherever a person convicted has suffered incarceration for a long time, he can be granted temporary parole, irrespective of the nature of offence for which he was sentenced. We may hasten to put a rider here, viz. in those cases where a person has been convicted for committing a serious offence, the competent authority, while examining such cases, can be well advised to have stricter standards in mind while judging their cases on the parameters of good conduct, habitual offender or while judging whether he could be considered highly dangerous or prejudicial to the public peace and tranquillity etc."

(emphasis supplied)

11. Release on parole and furlough serves dual interest. It provides the prisoner an opportunity to maintain the link with the society. It also serves the society's interest of assimilating the

prisoner into the society as a responsible citizen. From this standpoint, the seriousness of the offence for which the prisoner has been convicted and sentenced can not be, the be all and end all of the consideration. Antecedents and conduct of the prisoner, during the period of incarceration, and attendant circumstances play significant role.

12. On the aforesaid touchstone, reverting to the facts of the case, it is imperative to consider whether the authorities were justified in declining the benefit of furlough on the strength of the supposedly adverse recommendation. From the perusal of the material on record, including the report submitted by the Superintendent (Prison)-respondent No.2, what we gather is that the jurisdictional police gave a report that Mahim Police Station, within the limits of which the offence was committed by the convict, covers a sensitive area. If a person like the convict, who is undergoing sentence for a serious offence is released, the possibility of breach of law and order cannot be ruled out. Nor can it be assured that the proposed surety would be in a position to keep a tight leash on the convict.

13. We find that the aforesaid reason is extremely unsatisfactory. There is not a shred of material to indicate that

the apprehension on the part of the authorities is borne out by the relevant circumstances. No particulars which would justify the apprehension have been furnished. It was nothing more than a mere *ipse-dixit*.

14. This Court has, time and again, deprecated the practice of depriving a prisoner of the legitimate release on furlough by routinely ascribing the reason of adverse police report. A useful reference can be made to a Division Bench judgment in the case of ***Sanjay Kisan Kadse Vs. State of Maharashtra***², wherein this Court frowned upon the practice of rejecting the applications by ascribing *non-est* reasons. Paragraph Nos. 6 and 7 of the said judgment read as under :

“6 It is unfortunate that in many matters, the competent Authorities have passed orders rejecting applications of prisoners for furlough leave on the grounds which are non est. This court as well as other High Courts from time to time have issued various directions in this regard and also categorically observed about the material, which would be required to be considered by the competent Authorities while considering the applications for grant or refusal of furlough leave. Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959 clearly denotes contingencies in which furlough leave of the prisoner can be refused. Similarly, the competent Authorities are also required to consider the law laid down by the High Courts and the Apex Court in this regard and after such consideration, the competent Authorities are expected to pass orders one way or the other, which are sustainable in law.

7. Similarly, in many matters, it is noticed by us that the orders passed by the competent Authorities rejecting

2 2004(1) Mh.L.J. 789

the applications for furlough leave are in a very casual manner completely ignoring the provisions of Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959 and, therefore, the orders demonstrated total non-application of mind on the part of the competent Authorities and rendered them invalid in law. In many matters, the competent Authorities rejected the applications for furlough leave in the routine manner only on the basis of adverse Police reports, which are submitted on the basis of statements of witnesses of the opposite side and, therefore, as we have already observed hereinabove, such orders cannot be sustained. The competent Authorities, who are entrusted with the powers of grant or refusal of furlough leave, which is the right of the prisoner, are expected to apply their mind to the facts and circumstances of the case keeping in view the contingencies mentioned in Rule 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959 and only thereafter, should express their opinion in this regard. Similarly, mere observations in the Police report that there is a likelihood of breach of peace if prisoner is released on furlough leave should not be the formal expression only to deprive the prisoner from availing the furlough leave. The Police Authorities should be in a position to substantiate their opinion by giving valid reasons for the same. We expect that in future all these factors will be kept in mind by the competent Authorities while considering the applications for grant or refusal of furlough leave."

(emphasis supplied)

15. In the context of the seriousness of the offences, for which the convict has been convicted, and which constitutes the thrust of the resistance on the part of the State, a reference to another Division Bench judgment of this Court in the case of ***Mohamed Moin Faridulla Qureshi Vs. The State of Maharashtra & Ors.***³, pertaining to a convict in Bombay Bomb Blast Case, may be apposite. In the said case, after adverting to Rules 2 to 4 of the

³ 2009 SCC OnLine Bom 158

Rule, 1959, the Division Bench observed as under :

“6 We have already indicated from the text of the impugned order, the reasons recorded by the police authorities and Superintendent Prisons for negative recommendation. The Police authorities have simply said that the offence under Indian Penal Code and TADA Act is registered against the petitioner. DIG Prisons, in his order does not say that Commissioner of Police Bombay has recommended in the negative because Commissioner of Police Bombay apprehends danger of public tranquillity or public peace, in case the petitioner is released on furlough.

The Superintendent Prisons has also said that the petitioner is a convict in a serious offence. The text of the impugned order does not indicate that the Superintendent Prisons, to have reported the conduct of the prisoner unsatisfactory. The report of police authorities and Superintendent Prisons, as reflected in the text of impugned order, do not indicate that the adverse recommendation were founded on the reasons available under Sub Rule 4 and 6 of Rule 4 of the Prisons [Bombay Furlough and Parole] Rules 1959.

.....

8 If at all, the legislature desired that the prisoners in the serious matters like Bombay Bomb Blast Case, should not be entitled to liberty of enjoying parole or furlough, legislature could have amended Rule 4 of the Prisons [Bombay Furlough and Parole] Rules, 1959.

9 Since these Rules which are framed in exercise of powers conferred by clauses [5] and [28] of Section 59 of the Prisons Act, 1894 by the then Government of Bombay and since present Government of Maharashtra has not effected any amendment to these Rules, the statutory right of release on parole and furlough cannot be denied to the convicts of Bombay Bomb Blast Case, although that can be denied to the convicts under Bombay Prohibition Act.”

16. If we consider the facts of the case in the light of aforesaid legal position, the rejection of the prayer of the convict on the ground that an apprehension of breach of law and order was

voiced by the jurisdictional police, in our considered opinion, is legally unsustainable. The authorities, in our view, seem to have fallen in error, which Mr. Gawankar rightly urged to be, similar and familiar.

17. The second count, on which the prayer was denied, stands on an even weaker foundation. We have perused the chart of incarceration details. The convict has undergone 16 years and 6 months actual imprisonment. There is not a single penalty or prison offence to the credit of the convict. We find it rather difficult to appreciate as to on what basis the authorities could record that the convict would jump furlough.

18. Mr. Gawankar was fully justified in banking upon the fact that the convict was a free man from the date of his acquittal by this Court till he was convicted by the Supreme Court on 6th August 2009. It seems that the convict surrendered to prison on his own. This factor assumes critical significance. This conduct on the part of the convict, singularly dismantles the very basis of the apprehension that the convict may not surrender in the event of his release on furlough.

19. The conspectus of the aforesaid consideration is that both the grounds on which the request of the convict was negated,

are wholly unsustainable. We are, therefore, persuaded to quash the impugned orders and direct the release of the convict on furlough.

20. Hence, the following order :

O R D E R

- (i) The petition stands allowed.
- (ii) The impugned order, dated 19th November 2019, passed by the D.I.G. (Prison), Central Region, Aurangabad-respondent No.3, and the order dated 19th August 2020, passed by the Additional D.G. (Police) & I.G. (Prison)-respondent No.4-, Pune, stand quashed and set aside.
- (iii) It is directed that the convict-Zuber Mohd. Kasam Shaikh be released on furlough for a period of 14 days to be computed from the date of actual release on furnishing a surety in the sum of Rs.15,000/- to the satisfaction of the respondent No.2-The Superintendent, Nasik Road Central Prison and such other terms and conditions as the respondent No.2 may deem fit to impose in the circumstances of the case.

(iv) The convict shall mark his presence at Mahim Police Station, twice a week, during his stay at Mumbai.

(v) The convict shall surrender to Nashik Central Prison on the 15th day from the date of his actual release.

Rule made absolute in the aforesaid terms.

All concerned to act on an authenticated copy of this judgment.

(N. J. JAMADAR, J.)

(S. S. SHINDE, J.)