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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 214 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 : NO

PASHABHAI JAISHANKER NAIK

Versus

STATE OF GUJARAT

Appearance:

MRS MADHUBEN SHARMA for Petitioner

MR KAMAL MEHTA APP for Respondent No. 1

NOTICE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 28/05/98

CAV JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner-prisoner who is undergoing sentence inflicted upon him for the offence of murder, prays for being released on first furlough which

is refused by the Jail Authority.

2. After being served with the notice, the respondents appeared through the learned APP Mr. Kamal Mehta, who on their behalf has submitted that the petitioner was once released on parole on 3rd July, 1991. He thereafter did not report back in time and surrendered to the custody on 31st May, 1995. As he surrendered late by 3 years, 9 months and 24 days, Khatla proceedings were initiated against him under the provision of the Jail Manual. He was on 6th June, 1995 punished. The amounts of parole deposit were forfeited and whatever remission he was entitled to, was also cut-of. Because of his such wrong and punishment imposed, the petitioner was not entitled to the first furlough that became due in July, 1996. He has then urged to reject this application submitting that the prisoner who has misused his liberty is not entitled to furlough.

3. The learned advocate representing the petitioner has contended that for surrendering back to the custody late, after being released on parole in July, 1991, the petitioner was adequately punished. While imposing the punishment, forfeiture of furlough was not resorted to. When the authority, while imposing the punishment did not prefer to forfeit the furlough that might become due in future, it was not open to the authority to forfeit the furlough later on, on any count, as it would amount to double jeopardy.

4. When the prisoner misuses the liberty, the parole or furlough, if he prays for in future, can be refused provided refusal does not amount to double jeopardy. It is held by this Court in the case of Atulji Magaji v. State of Gujarat & Ors., 1984 GLH 139 that the prisoner, if he commits any wrong, cannot be punished twice under the Prisons {Bombay Furlough & Parole} Rule, 1959 and Rules under the Jail Manual. While imposing the punishment, it is open to the Jail Authority to impose as many punishments as available and permissible in law at a time while passing the order, but, once the order of punishment is passed and particular punishment is not imposed, the same cannot be imposed in future when the prisoner prays for parole or furlough, because a person cannot be punished twice for the same wrong or misconduct. The Supreme Court had an occasion to consider the question about double jeopardy in the case of State of Haryana v. Ghaseeta Ram {1997} 3 SCC 766 = AIR 1997 SC 1868, wherein the same principle is reiterated viz., once the prisoner is punished, he cannot be punished again for the same wrong or misconduct in

future. It may be mentioned that R. No. 1316 of Jail Rules precludes the Jail authority to punish the prisoners again for the same wrong after the chapter thereof is over or finally set at rest passing appropriate order as double jeopardy is condemned in law.

5. In this case formally parole was granted to the petitioner on 8th July, 1991. He had to surrender back to the jail custody on 8th August, 1991; instead that he surrendered late on 31st March, 1995. When he thus surrendered late by 3 years, 9 months and 24 days, Khatla proceedings were initiated against him. The jail authority for his such wrong i.e., misconduct imposed the punishment. While imposing the punishment, his remission was cut of and amounts of deposit were forfeited, but at that time, the Jail authority did not prefer to forfeit the furlough. After such order was passed on 7th June, 1995, in the month of July, 1996, when first furlough became due, the petitioner applied for the same but his request was turned down on the ground that because of his former misconduct namely late surrendering in May, 1995 his furlough was rejected. It, therefore, follows that the Jail authority overlooked the fact that the chaper relating to the wrong done was over after the punishment so imposed at the conclusion of Khatla proceedings, and Rule 1316 of the Jail Rules condemning double jeopardy had already come into play. The Jail authority ought not to have refused the furlough as the refusal tantamounts to double jeopardy which is not permissible in view of Rule 1316 of the Bombay Jail Manual. The said Rule in clear terms provide that that no prisoner shall be punished twice for the same offence. In this case, therefore, there being a double jeopardy order refusing to grant furlough is bad in law and the same is required to be quashed and set aside.

6. Faced with such a situation, Mr. Mehta learned APP pointed out one decision of this Court rendered in Special Civil Application No. 1560 of 1997 by the learned Single Judge of this Court on 15th December, 1997 wherein it is laid down that once the convict misuses the liberty granted to him, he is not entitled to claim furlough as of right simply on the ground that he has been already punished by cutting of the remission and forfeiting the deposits, the Jail authority is free to reject his application for furlough. The decision cited cannot be pressed into the services of the petitioner because of the decision of this Court rendered in the case of Atulji Magaji (Supra) by the Division Bench. It may be stated that the decision in the case of Atulji Magaji v. State of Gujarat & Ors. (Supra) is running

counter to the decision cited by Mr. Mehta, and therefore, the question arise which of the decisions will prevail. As per the law of precedent, I am bound to follow the decision of the larger Bench. The decision rendered in Special Civil Application No. 1560 of 1997 cited by Mr. Mehta, learned APP is rendered by a Single Judge Bench, while the decision rendered in Atulji Magaji's case is of a Division Bench. The decision in Atulji Magaji being of a larger Bench, must be followed as it shall prevail over the decision of the Single Bench. No case law is necessary to be cited on the law of precedent, but suffice it to refer the decision renderd in General Manager Telecom v. A. Srinivasa Rao & Ors., (1997) 8 SCC 767. In view of such law, the decision rendered by this Court in Atulji Magaji (Supra) shall have to be followed and not the decision rendered in Special Civil Application No. 1560 of 1997. Apart from such position, it may be stated that the decision of the Apex Court in the case of State of Haryana (Supra) has the upper hand and cannot be overlooked. Under Article 141 of the Indian Constitution, the decision of the Supreme court shall prevail over the decisions of the High Court. I am, therefore, bound to follow decision of the Supreme Court. Of course, the decision of the Supreme Court rendered in the case of State of Haryana v. Ghaseeta Ram (Supra) is relating to the provisions of Punjab Jail Manual but the principle enunciated therein will certainly apply as Rule 1316 of Bombay Jail Manual in no way runs counter to the alike provision in the Punjab Jail Manual. As per that decision, the principle of double jeopardy envisaged by Rule 1316 of the Bombay Jail Manual will come into play. In view of the decision of the Supreme Court which prevails and is binding to this Court, the decision of this Court rendered by the Single Judge Bench loses its governing applicability or binding effect on the ground of uniformity. Having been once punished holding Khatla proceedeings, the petitioner in view of above stated law and Rule ought not to have been punished again for the same wrong by imposing the punishment namely refusal to grant furlough. The principle of double jeopardy, therefore, comes into play, and on that count, the order refusing to grant furlough is required to be quashed, being illegal.

7. Mr. Mehta, learned APP at this stage draws my attention to another decision of this Court rendered by the Division Bench in Special Civil Application No. 328 of 1996 wherein the question for consideration was Whether for the wrong done by the prisoner, his furlough can be forfeited by way of punishment ? Considering the rules applicable, it is held that if the prisoner, while

in jail commits the wrong, it is open to the authority to forfeit the furlough. It does not lay down that double jeopardy i.e., imposition of punishment again for the same wrong is also permitted in law because that point having been not raised, it was not under consideration and no finding on that point is given. No doubt, as held in Special Civil Application No. 328 of 1996 and rules applicable, it is open to the Jail authority to forfeit the furlough for the misconduct or wrong on the part of the prisoner but in view of Rule 1316 of the Jail Manual, it is not at all open to the jail authority to impose double or multiple punishment. Here, in this case, when again punishment is imposed, about which Special Civil Application No. 328 of 1996 is silent and lays down nothing contrary to the decision rendered by this Court in Atulji Magaji's case (Supra), the decision in Special Civil Application No. 328 of 1996 is of no help to the respondents. Apart from such situtation, it may be stated that above referred decision of the Supreme Court governs the field as it upholds the principle of double jeopardy envisaged by Rule 1316 of Bombay Jail Manual.

8. Mr. Mehta also made a lame attempt to convince me citing the decision rendered by this Court in Special Civil Application No. 597 of 1991. In that case, two orders were challenged by the prisoner. At about 12.00 noon, the Circle Hawaldar found that the prisoner was sleeping after separating the bed of the convict Red cap Suresh Diga. That incident was reported to the jail authority for which Khatla proceedings were held and on 22nd September, 1990, the prisoner was punished by reverting him from the post of convict-oversee to ordinary prisoner for two years. That order was challenged. The second order was passed on 4th February, 1991 under which the furlough that became due on 31st December, 1990 was rejected because of misbehaviour by the prisoner in jail, which was having no nexus with the earlier wrong. In that case, the order refusing the furlough was upheld. Hence, Mr. Mehta, learned APP submits that in view of this decision there was no wrong on the part of the Jail Authority to pass the order and refuse the furlough that became due. It may be stated that the decision is mis-read and sought to be wrongly applied. In that case also, the principle of double jeopardy was considered observing that the prisoner cannot be punished twice. But if power refusing to release the prisoner on furlough is exercised on account of the conduct which would come under clause 6 Rule 4 and also the same being subsequent to the earlier wrong, it would not amount to punishment twice over. In that decision the principle of double jeopardy was considered

and found inapplicable as the puinishment forfeiting the furlough was imposed not qua earlier wrong for which punishment was already imposed but for the subsequent misconduct in jail. Consequently, the order of I.G (Prison) was upheld as it did not amount to double jeopardy. It may be noted that in that case also this Court affirmed the view of the double jeopardy which is made clear in the case of Atulji Magaji, but in that case the order was upheld because the principle of double jeopardy was not applicable. In the case on hand, when for the same wrong and not for another wrong the petitioner is being punished by refusing to grant furlough, the principle of double jeopardy will come into play and the decision cited is of no help to the respondents.

9. Attention to a decision in Bhikhabhai Devshi v. State of Gujarat & Ors., XXVII (2) : 1987 (2) GLR 1178 rendered by the Full Bench of this Court is also drawn by Mr. Kamal Mehta the learned APP, but the said decision is not helpful to him. In the decision cited, the decision in Atulji Magaji (Supra) is referred to in order to show that the view taken there-in supports the contention advanced on behalf of the petitioner in that case. In no way, view contrary to the view taken in Atulji Magaji case is taken in the decision cited. The principle of double jeopardy envisaged by Rule 1316 of the Bombay Jail Manual is reiterated or reaffirmed and not held to be inapplicable or to have been annulled or abrogated.

10. Lastly, my attention is drawn to a decision rendered by this Court in Special Civil Application Nos. 496/91 and 527/91 but for the aforesaid reasons, this decision is also not applicable. That decision is mainly on the point whether the prisoner who though eligible is not granted furlough for no fault on his part is entitled to carry forward the furlough not granted or does the furlough lapse ! It is not on the point of applicability of the principle of double jeopardy.

11. For the aforesaid reasons, the principle of double jeopardy envisaged by Rule 1316 is applicable, and so the order refusing to grant furlough is bad in law and the same being illegal is required to be quashed and set-aside.

12. In the result, this application is allowed. The order refusing to grant furlough is hereby quashed and set-aside. The petitioner is ordered to be released on furlough for 14 days, to be counted from the date of his

release on the following conditions that the petitioner shall :-

(a) make necessary declaration before the Jail Authority;

(b) execute the bond of Rs. 5000/= (Rupees Five Thousand only) or deposit in cash the sum of Rs. 5,000 (Rupees Five Thousand only) before the Jail Authority;

(c) furnish the detailed address of his residence to the Jailor;

(d) reside within the local limits of Ahmedabad District;

(e) give with full details viz., the name etc., of his relatives, ready to be the surety;

(f) mark his presence on every alternate day before Mahesana Taluka Police Station at any time between 9.00 a.m to 2.00 p.m.

(g) state before the Jail Authority about to and fro journey expenses; and

(h) provide other particulars as per the requirements of rules, if called upon to provide by Jail Authority;

(i) surrender to the Jail Authority on the expiry of the period of furlough;

(j) act as per other conditions (not inconsistent with above conditions and law and Rules applicable) imposed by the Jail authority.

13. The Jail Authority shall intimate the concerned authorities. In case the breach of any of the conditions is committed, it will be open to the Jail Authority to forfeit the amount of bond and impose any other penalty permissible in law and which is within his competence.

14. Rule is accordingly made absolute. Direct service permitted.

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Prakash*