

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 253/2021

- 1] **Asgar Kadar Sheikh,**
Convict No. 6473
- 2] **Mohd Yakub Abdul Majid Nagul,**
Convict No. C/8774,
- Both Presently at Central Prison,
Nagpur

.... **PETITIONER(S)**

// **VERSUS** //

Jail Superintendent,
Nagpur Central Jail, Nagpur

.... **RESPONDENT**

Shri M.N. Ali, Advocate for the petitioner(s)
Mrs. N.R. Tripathi, APP for the respondent

CORAM : V.M. DESHPANDE & AMIT B. BORKAR, JJ.
JUNE 19, 2021

JUDGMENT : (PER:- AMIT B. BORKAR, J.)

- 1] Heard.
- 2] **RULE.** Rule made returnable forthwith.

3] This case illustrates an attempt on the part of the advocate for the petitioners by making misleading statement which on the first blush appears to be innocuous but on deeper scrutiny reveals an attempt to twist facts to get favourable relief for his clients.

4] The petitioners are convicts for offences punishable under Sections 302, 304, 307, 324, 326, 435, 120B and 34 of the Indian Penal Code, Section 151 of the Railways Act and Section 4 of the Protection of Public Properties Act. The said case is popularly known as 1996 Bombay Blast case. After having undergone the actual imprisonment of 23 years by the petitioner no. 1 and 18 years by the petitioner no. 2, the petitioners filed an application before the respondent for their release on emergency parole as per the amended provisions of Rule 19(1)(C)(ii) of the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959. The application has been rejected by the impugned order dated 30/06/2020 mainly on the ground that the petitioners having been convicted under the Special Acts are not entitled to the benefit of emergency parole.

5] The petitioners have therefore filed the present petition challenging the order of rejection of emergency parole. The petitioners in para no. 17 of the petition have made categorical statement which reads as under :-

“17. It is submitted that, petitioners are eligible to be released on emergency parole for a period of 45 days as they have surrendered on due date on last two occasions and there is no other embargo on their release. Therefore, petitioners deserve to be released on emergency parole for a period of 45 days.”

6] It needs to be noted that the petitioners in para no. 3 of the petition have made a statement that the petitioner no. 1 has been released on parole and on each occasion, the petitioner no. 1 had surrendered on due date without there being a single day's delay and in para no. 6 of the petition have made a statement that the petitioner no. 2 had surrendered late by 11 days.

7] This Court on 18/03/2021 issued notice to the respondent. The respondent has filed affidavit-in-reply stating that insofar as the petitioner no. 1 is concerned, while he was released on parole leave of 10 days on 20/05/2011 he surrendered late by 1 day. It is stated that the petitioner no. 2 while he was released on parole leave of 30 days on 01/05/2010 surrendered himself late by 11 days. It is further stated that as per the provisions in Maharashtra Government Circular dated 08/05/2020, both the petitioners are not entitled to emergency leave for Covid-19 pandemic.

8] Shri M.N. Ali, Advocate for the petitioners placed reliance on unreported judgment of this Court in **Criminal W. P. No. 488/2020** (Mohd. Faruque Mohd. Yusuf vs. State of Maharashtra & ors.) by which this court remanded back the case of the co-accused to the jail authorities for fresh consideration. It is submitted that the petitioner in the said case being the co-convict along with present petitioners, same order needs to be passed in the present petition.

9] Relying on the statement made by learned advocate for the petitioners and to save the judicial time in dictating the judgment in open Court, it was pronounced that the petition stands partly allowed and similar order as passed in Criminal W.P. No. 488/2020 would be passed.

10] While dictating the judgment and on careful scrutiny of the annexures alongwith the averments in the petition, it is revealed that both the petitioners had surrendered late on earlier occasions. The petitioner no. 1 surrendered late by 1 day and the petitioner no. 2 surrendered late by 11 days. The Division Bench of this Court in the un-reported judgment in the case of **Milind Ashok Patil & ors. vs. State of Maharashtra & Ors. in Criminal Writ Petition-ASDB-LD-VC No. 65/2020**, has clearly laid down that those convicts who had surrendered late on earlier occasions are not entitled to emergency parole. Para no. 15 of the said judgment reads as under :-

“15. Thus, it is clear that the condition mentioned in the amended clause (C) (ii) of convict returning back on time on last 2 releases will be applicable only if the convict is released on 2 occasions either on furlough leave or parole leave or their applications are rejected on the ground that they are habitual offenders or likely to abscond. In this behalf, it is significant to note that the difference between Clause (C)(i) and (ii). The clause (c) (i) of the amendment which is applicable to convicted prisoners whose maximum punishment is 7 years or less provides that “application shall be favourably considered”; whereas clause (C) (ii) which is applicable to the prisoners whose maximum sentence is above 7 years provides that “application shall be appropriately considered”. To ensure that such convicts should not abscond, the said amended provision stipulates that once in every 30 days, the convicted prisoners shall report to the concerned police station within whose jurisdiction they are residing. If the convicts are not released on 2 occasions either on furlough or parole and/or their previous applications are not rejected either on the ground that they are habitual offenders or likely to abscond then the Authorities can still consider their applications for release on emergency parole. However, we make it clear that if the convicts are released on 2 occasions or on 1 occasion, either on parole or furlough previously and they are late in surrendering then they are not entitled for the benefit of the emergency parole. It is further clarified that the Authorities can impose suitable stringent conditions on the convicts who were never released on parole or furlough or released on 1 occasion and returned back within

time, if they are otherwise entitled for the benefit of emergency parole.”

The Full Bench of this Court in the case of **Pintu Uttam Sonale vs. State of Maharashtra** reported in **2020 (6) Mh.L.J. 627** in para no. 19 has observed as under:-

“19. In our opinion the language of the proviso clearly sets out that the provisions sub-rule (C) of Rule 19(1) of the 1959 Rules, would not apply to the prisoners convicted for various economic offences or bank scams or offences under some Special Acts (other than IPC) and some of which are illustratively mentioned by using the word "like" when the proviso refers to the Special Acts namely MCOC, PMLA, MPID, NDPS, UAPA etc. This illustrative reference is further qualified by use of the word "etc" which indicates that the reference to these Special Acts is not exhaustive. The proviso using the words "like" and "etc" is a significant indication of the legislative intent. The intention and object to insert the proviso appears to be quite clear that the provisions of the emergency parole as introduced by sub-rule (C) would not apply to the prisoners convicted of serious offences under the different Special Acts and who fall within the category as specified in sub-rule C(ii).”

11] We therefore placed the present matter on board for fresh hearing after having noticed that the petitioners are not eligible for being

released on emergency parole in view of judgment in the case of **Milind Ashok Patil** (supra) and **Pintu Uttam Sonale** (supra). On the said day, Shri M.N. Ali, learned advocate for the petitioners accepted that he is aware of the un-reported judgment of this Court in the case of **Milind Ashok Patil** (supra). He submitted that he is not aware of the Full Bench judgment of this Court in the case of **Pintu Uttam Sonale** (supra). Though the learned advocate accepted that he was aware of the legal position that a convict who had surrendered late on earlier occasion is not entitled for release on emergency parole, he did not disclose the said fact before this Court and relied upon the un-reported judgment of this Court in Criminal W.P. No. 488/2020. It needs to be noted that this Court in Criminal W.P. No. 488/2020 has made observations which would benefit the petitioner therein for being released on emergency parole after the jail authorities consider the matter afresh. It therefore appears that the advocate for the petitioners was aware of the position that this Court while passing the judgment in Criminal W.P. No. 488/2020 has made observations on merits of the said case. Therefore, though by the said judgment matter was remanded back but in the light of the observations made therein, the Jail Authorities had no discretion but to release the said petitioner on emergency parole. If we had accepted the request of advocate for the petitioners and passed order in terms of the order passed in Criminal W.P. No. 488/2020, it would have been construed as implied direction to the jail authorities to grant emergency

parole to the petitioners though they are not eligible for release on emergency parole.

12] On overall consideration of the circumstances stated above, we are of the view that the advocate for the petitioners had made an attempt to mislead this Court by suppressing the material fact that both the petitioners are not eligible for being released on emergency parole as they had surrendered late on earlier occasions when they were released on parole. The request of the advocate for the petitioners was for remanding the matter back to the jail authorities which on first blush appeared to be innocuous but in the light of the observations made on merits by this Court in Criminal W.P. No. 488/2020 leaves no discretion to the jail authorities to release the petitioners on emergency parole. We are therefore of the opinion that the advocate for the petitioners had tried to twist the relevant facts and suppressed the material fact to snatch favourable order.

13] When an advocate makes statement before the Court, it is assumed that it is made in his capacity as the officer of the Court and not an effort to get a favourable order by suppressing the material fact or binding precedent. Large number of matters involving intricate questions of law are often disposed of by Courts on the basis of the statement made by the advocate appearing for the parties. Normally the statement of advocate being

officer of the Court is accepted as true and correct. Notwithstanding the easy availability of numerous legal software for research, reliance was placed upon a judgment of this Court which was passed without noticing earlier Full Bench judgment. This is akin to relying on an overruled judgment which results in a waste of judicial time. We are of the view that in a given case, it may be due to negligence of the advocate, but the consequences would be an erroneous judgment having precedential value, possibly requiring constitution of Larger Bench to correct the error of law which crept in due to failure on the part of the advocate to perform his duty. Such failure in duty is a wrong against the justice delivery system in the country. We reiterate the duty of the advocate, at all levels, to double check and verify position of law and facts of the case before making any presentation to the Court. Time has come that message must be sent to each of the advocate playing vital role in justice delivery system to be responsible and careful in what he presents to the Court. As a responsible officer of the Court, the advocate owes a duty to the Court. He has to be fair to ensure that justice is done.

14] It is the duty of advocate to bring to the attention of the Court all the relevant precedents and orders, whether for or against his client's case. He must never be a party to deceiving the Court, even if his client would obtain some advantage or favourable order. Advocates are a class with a unique complex of duties to their clients and to the Court. An advocate

cannot have regard solely to the instructions or even always to the narrow interests of his client. Quick decisions must be reached in Court and an advocate should not be inhibited from taking a free and independent decision, even against immediate instructions, and should not be afraid of freely meeting his obligations. He might, in some cases, be tempted to take the safe course, which might not be in the interests of his client and of the Court. This would upset the whole basis of the administration of justice and of the rule of law. The duty which the advocate owes to the Court is that he must be honest in his representation of the case. He should always remember that precedents are more efficacious than arguments. Even if there is any decision against him, it is the duty of the advocate to bring it to the notice of the Court. He may later on distinguish it on the facts of particular case, or even contend that the decision does not lay down correct law. A lawyer must not hesitate in telling the Court the correct position of law when it is indisputable. A view of the law which is a binding precedent even if it is not in favour of his client, must be brought to the notice of Court. This obligation of an Advocate flows from the confidence reposed by the Court in the advocate appearing for either of the side. An Advocate, being an officer of Court, must bring to notice of the Court the correct position of law whether for or against either party.

15] Mr. Justice Crampton, an Irish Judge, said in R. v. O'Connell [7 Irish Law Reports 313], Irish Law Reports, at p. 313:

“The advocate is a representative but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law, he will not wilfully misstate the facts, though it be to gain the case for his client. He will ever bear in mind that if he be an advocate of an individual and retained and remunerated often inadequately, for valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice and there is no Crown or other license which in any case or for any party or purpose can discharge him from that primary and paramount retainer.”

16] This Court has time and again emphasized the need of citing judgments which may be against the interest of client by rising to the occasion as an officer of the Court. The case of **Heena Nikhil Dharja vs. Kokilaben Kirtikumar Nayak** reported in **(2017) 2 Bom CR 65** is one of such case where single judge of this Court (G. S Patel, J.) in his distinctive style observed as under:

“35. Wholly unrelated to any preliminary issue or the question of limitation, or to any estate, partition or administration action, is the decision of AM Khanwilkar J. (as he then was) in Chandrakant Govind Sutar v. MK Associates [2003 (1) Mh.L.J. 1011] Counsel for the petitioner raised certain contentions on

the maintainability of a civil revision application. Khanwilkar J. pronounced his judgement in open Court, finding for the petitioner. Immediately thereafter, counsel for the petitioner brought to the Court's notice that certain relevant decisions on maintainability had not been placed. He requested that the judgement be not signed and instead kept for re-hearing on the question of maintainability. At that fresh hearing, petitioner's counsel placed decisions that clinched the issue — against the petitioner. The civil revision application was dismissed. The counsel in question was A.S. Oka, now Mr. Justice Oka, and this is what Khanwilkar J. was moved to observe in the concluding paragraph of his judgement:

*9. While parting I would like to make a special mention regarding the fairness of Mr. Oka, Advocate. He conducted the matter with a sense of detachment. In his own inimitable style he did the wonderful act of balancing of his duty to his client and as an officer of the Court concerned in the administration of justice. He has fully discharged his overriding duty to the Court to the standards of his profession, and to the public, by not withholding authorities which go against his client. As Lord Denning MR in *Randel v. W.* (1996) 3 All E. R. 657 observed:*

“Counsel has time and again to choose between his duty to his client and his duty to the Court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. Whereas when the Advocate puts his first duty to the Court, he has nothing to fear. But it is a mistake to suppose that he (the Advocate) is the mouthpiece of his client to say what he wants. The Code which obligates the Advocate to disregard the

instructions of his client, if they conflict with his duty to the Court, is not a code of law — it is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.”

This view is quoted with approval by the Apex Court in Re. T.V Choudhary, [1987] 3 SCR 146 (E.S. Reddi v. Chief Secretary, Government of AP).”

17] In view of aforesaid facts and circumstances, the petitioners having surrendered late and having been convicted under the Special Acts namely the Railways Act and the Protection of Public Properties Act which in the context of other offences alleged against the petitioners become serious offences are not eligible for being released on emergency parole.

18] We are therefore satisfied that there is no merit in the petition and the same is **dismissed**. Rule is discharged.

(JUDGE)

(JUDGE)

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