

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP No. 32263 -2018(O&M)
Date of decision: 16.05.2019

Sukhvir Singh alias Sukha

.....Petitioner

versus

State of Punjab and others

.....Respondents

CORAM: Hon'ble Mr.Justice Kuldeep Singh

Present: Mr.Nandan Jindal, Advocate for the petitioner
Mr.Sandeep S. Deol, DAG Punjab

1. *Whether Reporters of Local Newspapers may be allowed to see the judgment?*
2. *To be referred to the Reporters or not ?*
3. *Whether the judgment should be reported in the Digest?*

Kuldeep Singh, J.

The petitioner has sought the quashing of order dated 22.11.2018 (Annexure P5), whereby parole of the petitioner has been declined on the ground that he falls under the definition of Hardcore Criminal as per Section 5(A)(a) of the Punjab Good Conduct Prisoners (Temporary Release) Act, 2015.

Petitioner was convicted in FIR No.93 dated 9.9.2008 registered under Sections 302, 363, 376, 177, 201 read with Section 34 at Police Station Khamanon, District Fatehgarh Sahib vide order dated 25.2.2010 passed by learned Additional Sessions Judge, Fatehgarh Sahib. He is now undergoing life imprisonment. His appeal is lying admitted and pending before this Court.

According to the petitioner, he has already enjoyed 11 paroles

at different times and has not committed any jail offence. There is no complaint against him. However, in the year 2016, an amendment was made in Punjab Good Conduct Prisoners (Temporary Release) Act, 1988, wherein it was provided that a person who has been convicted under Section 302 read with Section 376 IPC is not entitled for parole and for remission. Definition of Hardcore Criminal was inserted for the first time, whereby a person convicted under Section 302 read with Section 376 IPC was held to be not entitled for remission also. The petitioner states that the said policy is illegal and cannot be applied to the petitioner.

The State in its reply has affirmed that the petitioner was convicted under Sections 302, 363, 376, 201 and 177 IPC read with Section 34 IPC and is undergoing imprisonment for life. It is stated that as per Section 5A clause (b) of the Punjab Good Conduct Prisoners (Temporary Release) Amendment Act, 2015, a Hardcore Prisoner may be allowed to be temporarily released on the grounds specified in Clause (a) or clause (b) of sub-section 1 of Section 3 of the said Act. However, extra conditions may be imposed on the prisoner at the time of temporary release or furlough after considering all the facts and circumstances of the case. State has referred to the definition of Hardcore Prisoner, which includes a person convicted under Section 376 read with Section 302 IPC. It is stated that the petitioner falls in the category of Hardcore Prisoner and cannot be released on parole.

I have heard learned counsel for the parties and have also carefully gone through the file.

Learned counsel for the petitioner has vehemently argued that the petitioner was released on parole for 11 times from the years 2010 to 2016, as per detailed certificate issued by the jail authorities (Annexure P1).

He never misused the parole. He never committed any jail offence and his conduct in the jail is good.

Admittedly, the Punjab Good Conduct Prisoners (Temporary Release) Amendment Act, 2015 came into operation from January 7, 2016, in which clause (aa) has been inserted, which defined the Hardcore Prisoner as under:-

"(aa)"hardcore prisoner" means a person confined in prison under a sentence of imprisonment, who has been convicted of-
(i) an offence of rape with murder under section 376 read with section 302 of the Indian Penal Code, 1860;
(ii) an offence punishable under section 14 of the Protection of Children from Sexual Offences Act, 2012;

Similarly, after Section 5, Section 5A has been added in the Principal Act as under:-

"5-A Prisoner not entitled to be released in certain cases.
Notwithstanding anything contained in sections 3 and 4,- (a) no prisoner shall be entitled to be released under this Act to whom the death sentence has been awarded or is a hardcore, prisoner;
(b) Notwithstanding anything contained in clause (a), hardcore prisoner may be allowed to be released temporarily on the ground specified in clause (a) or clause (b) of sub-section (1) of section (3). However, extra conditions may be imposed on the prisoner at the time of temporary release or furlough after considering all the facts and circumstances of the case."

The plea of the State is that at the time of consideration of case of the petitioner for parole, the said amendment had come into force and therefore, his case cannot be considered in view of the amendment in the Act.

On the other hand, learned counsel for the petitioner contends that the Act, which is applicable at the time of his conviction, is to apply in

his case.

The question raised before this Court is as to 'whether in case of parole, the Act, which is applicable at the time of conviction will apply or the Act, which is applicable at the time of consideration of application for parole will apply?'

Learned counsel for the petitioner has relied upon the Division Bench authority of this Court in Sonu @ Arun vs. State of Haryana and others (CRWP No.1078 of 2014) decided on 9.2.2015. Perusal of the said authority shows that it pertains to recovery of mobile phone in the prison. Said recovery was made before the amendment of 2012 came into operation. For the recovery of cellphone, a criminal case was also registered. The person possessing cellphone was treated in the category of Hardcore Prisoner. Therefore, the Court considering facts and circumstances of the case held that the penal provision for enhancing sentence cannot be applied retrospectively.

However, in the present case, it is not a case of application of the penal provision retrospectively.

Further, reliance has been placed on the authority of a Single Bench of this Court in Chandi Ram vs. State of Haryana and others, (CWP No.33429 of 2018) decided on 12.4.2019.

The question, as to whether the parole is to be governed by the existing rules or by the law prevailing at the time of conviction, was considered by this Court in Ajay Jadeja alias Janak vs. State of Haryana and others, (Crl.W.P. No.2104 of 2012) decided on 14.12.2012.

A Division Bench of this Court, while considering as to whether parole is substantive right or it is a concession granted by the

Government observed as under:-

*10. The judgments, relied upon by learned counsel for the petitioner are not applicable in the present case. In **State of Haryana and others v. Jagdish** (supra), the issue of pre-mature release of a convict was in question. In this regard, it was observed by the Hon'ble Supreme Court that case of the convict for his pre-mature release is to be considered on the basis of the instructions/rules existing on the date of conviction and the said vested right could not have been taken away on the basis of the subsequent policy restricting the right of pre-mature release, while observing that the State authority is under an obligation to at least exercise its discretion in relation to an honest expectation perceived by the convict, at the time of his conviction that his case for pre-mature release would be considered after serving the sentence, prescribed in the short sentencing policy existing on that date. There is a difference between pre-mature release and temporary release. Pre-mature release of a convict is a vested right whereas the temporary release is a concession and not a vested right. Therefore, the said decision would not help the petitioner. The case of **Bhola Ram** (supra) is with regard to grant of remission under the Punjab Grant of Remission of Punishment Policy, 2010. It was held in that case that the said benefit is to be granted prospectively and not retrospectively. The said policy was held to be applicable prospectively and not retrospectively. Therefore, the said decision has no bearing on the issue involved in the present case.*

Regarding prospective or retrospective operation of the Act and whether it is vested right to get temporary release, the Court observed as under and accordingly dismissed the said petition:-

11. The test to determine whether a particular amendment would operate prospective or retrospective depends upon the question whether it affects vested right of a person. No

prisoner has a vested right to get the benefit of temporary release on parole. It is a concession, which is given to a prisoner on fulfilling certain conditions. If on the date of making an application for grant of temporary release, a prisoner fulfills all the conditions applicable in his case, he can be considered for such concession for a limited period. The petitioner, being a hardcore prisoner is not entitled for the said concession. He cannot be granted this concession merely because he was convicted prior to insertion of Section 5A in the Principal Act. In case of a hardcore prisoner, who is involved in many serious crimes, liberal approach cannot be adopted.

The matter was also examined by another Division Bench of this Court in Vakil Raj vs. State of Haryana and others, 2016(2) R.C.R. (Criminal) 1040, wherein the Court considered earlier case law on the point and observed as under:-

23. The argument that amending Act would not be applicable to the convicts, who stand convicted prior to the insertion of Clause (aa) in Section 2, is again not tenable. The Division Bench of this Court in Jagpreet Singh's case (supra) has referred to judgments of Hon'ble Supreme Court in Varinder Singh Vs. State of Punjab & another (2014) 3 SCC 151 and Harjit Singh Vs. State of Punjab (2011) 4 SCC 441. However, Varinder Singh's case (supra) pertains to a conviction of a jail offence under Section 45 of the Prisons Act, 1894, whereas in Harjit Singh's case (supra), again the question was of enhancement of a sentence for an offence under Section 18 of Narcotic Drugs & Psychotropic Substances Act, 1985 by virtue of notification dated 18.11.2009. Thus, both the judgments have no applicability to the facts of the present case. The issue raised in the present case is not of conviction, but of grant of parole, which is a concession, as laid down in Ajay Jadeja's case (supra) relied

upon by the learned State counsel. The amended definition would be applicable to all convicts, who were convicted prior to amendment and insertion of Clause (aa) in Section 2 of the Act. The grant of parole is to be considered as per law applicable on the date of consideration of parole.

After going through the case law on the point and considering provisions, I am of the view that parole is not a matter of right. It is not the vested right. It is a concession granted by the Government to temporarily release the prisoner on parole or on furlough. However, nobody can insist that he is entitled to same as a matter of right. State is to consider all facts and circumstances, including the law and Rules prevailing at the time of passing of such order. Therefore, I am of the view that law prevailing at the time of consideration of application for parole or furlough is to apply to decide as to whether parole or furlough is to be granted or not?

In the present case, amendment came into force on January 7, 2016. The petitioner was convicted under Section 376 read with Section 302 IPC and he was ordered to be treated as Hardcore Prisoner. Under Clause 5A, as reproduced above, there is no absolute bar to the release of such prisoner. However, he can only be released on the grounds mentioned in Clause (a) or Clause (b) of sub-section 1 of Section 3 and the Government is competent to impose extra conditions at the time of such temporary release. Said amendment has not been challenged in the present petition. Therefore, the said amendment will apply to the case of the petitioner. Even though the petitioner was earlier released on 11 times on parole but now, in view of the amendment, his case falls under the category of Hardcore Prisoner. His case also does not fall under any of the clauses mentioned in Section 5A of the said Act. Therefore, the Government was

justified in refusing to release the petitioner on parole.

There is no illegality or infirmity in the impugned order dated 22.11.2018 (Annexure P5).

Accordingly, the present petition is dismissed.

16.05.2019
gk

(Kuldip Singh)
Judge

Whether speaking/ reasoned:	Yes
Whether Reportable:	Yes