

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.644 OF 2021

Sardar S/o Shahvali Khan (C-6608),
Age-65 years, Occu:Convict,
R/o-Room No.10/11 Gowawala Chal,
LBS Road, Kurla West, Mumbai-70,
At present confined in Central Jail,
Harsul, Aurangabad.

...PETITIONER

VERSUS

Superintendent, Central Prison,
Harsul, Aurangabad.

...RESPONDENT

...
Mr.Rupesh A. Jaiswal Advocate for Petitioner.
Mr.G.O. Wattamwar, A.P.P. for Respondent.
...

**CORAM: V.K. JADHAV AND
SANDIPKUMAR C. MORE, JJ.**

DATE : 28th OCTOBER, 2021

ORDER :

1. By consent of the parties, heard finally at the admission stage.
2. This is a third successive writ petition by the petitioner challenging the order passed by the jail authority rejecting the

application of the petitioner – convict seeking emergency covid parole.

3. By order dated 9th September 2020 this Court [Coram: T.V. Nalawade and M.G. Sewlikar, JJ.] in Criminal Writ Petition No. 520 of 2020 dismissed the writ petition of the present petitioner by observing that the petitioner is a convict under the provisions of TADA and sentenced to life imprisonment and though specifically TADA is not mentioned in the notification, the Special Acts are mentioned in minutes of meeting of High Power Committee, dated 10th May, 2020. It is further observed that in the amendment to the Rule 4 of the Rules, in clause No.12, it is mentioned that prisoners, who are considered dangerous or have been involved in serious prison violence and who are convicted under Special Acts like Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS), rape etc., are not entitled to get the benefit of Rule 4. It is also observed by the Court that Rule 4, which needs to be read with Rule 19 and it can be said that in Rule 4, initially there was no category like pandemic situation created by COVID-19 virus. Only due to Government Notification dated 9th May, 2020, the prisoners can be considered for giving them emergency parole and such parole is subject to

the condition mentioned in the notification itself. It is further observed that, in view of this circumstance and aforesaid provisions, it cannot be said that vested right is given to the prisoners to get parole and some definite exceptions are created by the State. It is observed in the said order that the list of Special Acts given in the notification is not exhaustive and other special enactments which are similar in nature need to be considered.

4. The petitioner has, thereafter, again approached this Court by filing Criminal Writ Petition No. 1645 of 2020 seeking direction to the State Government through the High Power Committee created under the directions of the Supreme Court in *Suo Motu* Criminal Writ Petition No. 1 of 2020 to take decision on the representation of the petitioner dated 16th October 2020. In the said representation the petitioner has requested to consider his age and also previous conduct in jail and also his conduct after release on parole and furlough. By order dated 16th December 2020, this Court [Coram: T.V. Nalawade and M.G. Sewlikar, JJ.] dismissed the said writ petition.

5. Mr. Jaiswal, learned counsel for the petitioner has pointed out that this Court [Coram: S.S. Shinde and R.G. Avachat, JJ.] by order dated 7th February 2019 in Criminal Writ Petition No. 33 of 2019 and Criminal Writ Petition No. 136 of 2019, has granted furlough leave to the co-accused of the present petitioner and being aggrieved by the same, the State has preferred Special Leave to Appeal (Criminal) No. 7192 of 2019 before the Supreme Court. The Supreme Court has observed that special leave to appeal was filed long after the expiry of 28 days from the date of the aforesaid order and in the meanwhile the convict had duly been released on furlough due to his mother's illness. It is further observed that the convict was released on parole for a period of 28 days and those 28 days were also over and convict was now in the custody. The Supreme Court has, thus observed that the special leave petition is, thus, infructuous and accordingly dismissed the same. However, the Supreme Court has made it clear that all the questions of law raised in the special leave petition are kept open.

6. Learned counsel for the petitioner submits that High Power Committee has issued certain guidelines in terms of the decision taken in the meeting dated 11th May 2021 and clause 5 of

Paragraph 16 is relevant for the present matter. The same is reproduced herein:-

“(V) Applications by the prisoners who fall in the category as determined by the HPC and who are 65 years of age and above and having co-morbidities [as spelt out by Indian Council for Medical Research (ICMR)], shall be considered more sympathetically notwithstanding the rejection of their earlier Application, if any.”

7. Learned counsel for the petitioner submits that the petitioner falls in the said category as determined by the High Power Committee as he is more than 65 years of age and entitled for the emergency covid parole. Learned counsel submits, in addition to that the petitioner is suffering from arthritics and other illness.

8. Learned APP submits that being aggrieved by the order passed by this Court (Coram: T.V. Nalawade and M.G. Sewlikar, JJ.), dated 16th December 2020, in Criminal Writ Petition No. 1645 of 2020, referred above, the petitioner herein has approached to the Supreme Court by filing Special Leave to Appeal (Criminal) No. 1062 of 2021, and after some arguments

the petitioner withdrew the petition by stating that the issue of Covid-19 norms now does not survive. The petitioner has also made a statement before the Supreme Court that he will file the application for parole in usual course as per the norms.

9. Learned APP submits that in Criminal Writ Petition No.2501 of 2021 (Sahebrao Kaluram Bhintade vs. The State of Maharashtra), in the identical facts, the Division Bench of this Court, [Coram: S.S. Shinde and N.J. Jamdar, JJ.], in Para 16 of the Judgment and order dated 16th September 2021, has observed thus:-

“16. On a plain reading of the aforesaid guidelines, we find it rather difficult to accede to the submission on behalf of the petitioner that by virtue of the aforesaid guidelines, the HPC resolved to carve out a sub-category, out of the excluded category of prisoners under proviso to Rule 19(1)(C)(ii), who would be entitled to be released on interim bail or emergency parole, if they are above 65 years of age and have co-morbidities. In the face of reiteration of categorization in clause (I) and clause (v) of the guidelines, as extracted above, it may not be permissible to hold that the rigour of the proviso to Rule 19(1)(C)(ii) gets diluted if a prisoner is above 65 years of age and suffering from co-morbidities.”

10. We have considered the submissions advanced and also gone through the observations made by this Court in the petitions filed by the petitioner on earlier occasions. As observed earlier, When this Court has dismissed Criminal Writ Petition No. 1645 of 2020, filed by the petitioner, the petitioner has approached the Supreme Court by filing Special Leave to Appeal (Criminal) No. 1062 of 2021 and by order dated 11th February 2021, the Supreme Court has disposed of the said petition as withdrawn. The petitioner herein has made statement that as the issue of Covid-19 norms does not really now survive, he will apply for parole in usual course as per the norms. Even then, by filing present writ petition the petitioner is again seeking emergency parole leave by challenging the earlier order passed by the jail authority.

11. As observed earlier, Division Bench of this Court in Criminal Writ Petition No.2501 of 2021, in the identical facts, has held that, it may not be permissible to hold that the rigour of the proviso to Rule 19(1)(C)(ii) of Prisons (Bombay Furlough and Parole) Rules, 1959 gets diluted if a prisoner is above 65 years of age and suffering from co-morbidities.

12. In the recent case, bearing Criminal Appeal No. 1159 of 2021 (State of Gujarat and another vs. Narayan @ Narayan Sai @ Mota Bhagwan Asaram @ Asumal Harpalani, the Supreme Court, vide order dated 20th October 2021, has made following observations:-

“15. From a reading of the above provisions it is evident that the Bombay Furlough and Parole Rules do not confer a legal right on a prisoner to be released on furlough. The grant of furlough is regulated by Rule 3 and Rule 4. While Rule 3 provides the eligibility criteria for grant of furlough for prisoners serving different lengths of imprisonment, Rule 4 imposes limitations. The use of the expression “may be released” in Rule 3 indicates the absence of an absolute right. This is further emphasised in Rule 17 which states that said Rules do not confer a legal right on a prisoner to claim to release on furlough. Thus the grant of release on furlough is a discretionary remedy circumscribed by Rules 3 and 4 extracted above.”

13. It is thus clear that grant of release on furlough is discretionary remedy circumscribed by Rules 3 and 4 of the Prisons (Bombay Furlough and Parole) Rules, 1959 and in terms of Rule 19 of the Rules, the said provisions are made applicable

to parole. Thus, considering the entire aspect of the case and particularly the view taken by this Court in Criminal Writ Petition No. 2501 of 2021 (Sahebrao Kaluram Bhintade vs. The State of Maharashtra and others) and in terms of ratio laid down by the Supreme Court in Criminal Appeal No. 1159 of 2021 (State of Gujarat and another vs. Narayan @ Narayan Sai @ Mota Bhagwan Asaram @ Asumal Harpalani, we are of the considered opinion that this writ petition is liable to be dismissed. It is, however, open for the petitioner to approach the authority concerned by filing an application for parole in usual course as per the norms. Hence the following order:-

ORDER

. Criminal Writ Petition is hereby dismissed.

[SANDIPKUMAR C. MORE]
JUDGE

[V.K. JADHAV]
JUDGE