

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.2386 OF 2021**

Futermal Kapoorji Borana
Age 42 years, Occu. Prisoner Convict
No.C-5163, At present lodged in Central
Prison, Nashik, permanent address :
Hanuman ji ki gali, At post Bankali,
Tehsil : Sumerpur, Dist. Pali
(Rajashthan)

...Petitioner

Versus

1. The State of Maharashtra
Through its Principal Secretary, Home
Department, Mantralaya, Mumbai – 32.
2. The Divsisional Commissioner,
Nashik Division, Nashik,
Office at Commissioner Officer Nashik
Road, Nashi.
3. The Deputy Inspector General of Police
(Prison), Central Division, Central
Prison, Harsul, Aurangabad
4. The Superintendent of Prison, Central
Prison, Nashik Road, Nashik

...Respondents

Mr. M. M. Choudhari, for the Petitioner.
Mr. S. R. Shinde, APP for the State/Respondent no.1.

**CORAM: S. S. SHINDE &
N. J. JAMADAR, JJ.**

**RESERVED ON: 6th JULY, 2021.
PRONOUNCED ON: 9th JULY, 2021.**

JUDGMENT:- PER : N. J. JAMADAR, J.

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

2. By this petition under Article 226 of the Constitution of India, the petitioner – convict assails the order dated 17th May, 2021, passed by the Superintendent, Nashik Road Central Prison – respondent no.4, whereby the application of the petitioner for release on emergency parole, in the wake of Covid-19 Pandemic, in accordance with the Rule 19(1)(c)(ii) of The Prisons (Bombay Furlough and Parole) Rules, 1959 (“the Rules, 1959”), came to be rejected.

3. The petition presents second round of litigation. Initially, application of the petitioner for emergency parole was rejected by respondent no.4 by order dated 1st December, 2020. Two grounds were ascribed. First, the petitioner, having been convicted for the offences punishable under Sections 395 and 396 of the Indian Penal Code, 1860 (“the Penal Code”), was not entitled to be released on emergency parole in view of the interdict contained in Rule 4(2) of the Rules, 1959. Second, the petitioner had not returned to prison, on time, when he was released on parole leave, on the previous occasions.

4. The petitioner assailed the aforesaid order in Criminal Writ Petition No.444 of 2021. This Court by order dated 8th March, 2021, found no substance in the petition and it was dismissed.

5. An application, being Interim Application No.1338 of 2021, was preferred by the petitioner seeking recall of the said judgment and order dated 8th March, 2021. Since the prayer in the application was in the nature of review, this Court declined to entertain the application. It was, however, clarified that the dismissal of the said application and above numbered writ petition would not come in the way of the petitioner – applicant moving a fresh application before the concerned authority for grant of emergency parole. Armed with the said liberty the petitioner again preferred an application for emergency parole, on 3rd May, 2021.

6. By the impugned order, the application came to be rejected on the following grounds.

“4. As per Government of Maharashtra Notification dt.08.05.2020 u/s.19(1)(c)(c) & (2) only that prisoners can get 45 days emergency parole leave, those who have more than 7 years imprisonment and those who have gone on leave twice (furlough or parole) and surrender on due date. You were released on parole leave in the year 2005 and you surrendered 07 days late, in the year 2007 and you surrendered 203 days late, in the year 2009, you surrendered on due date, in the year 2012, you surrendered 01 day late, in the year 2013, you surrendered 04 days late, in the year 2015, you surrendered on due date, in the year 2017, you surrendered on due date.

5. You are undergoing Life sentence in sections 396, 395, 449 I.P.C. As per Maharashtra Prison Manual 1979 & as per Government of Maharashtra Notification dt.16.04.2018 u/s.4(2) the prisoners those who are convicted under Sections 392 IPC to 402 IPC are not liable for leave. Hence, your request for to release on emergency parole leave is rejected.”

7. Being aggrieved, the petitioner has again invoked the writ jurisdiction of this Court.

8. We have heard Mr. Choudhari, the learned Counsel for the petitioner and Mr. Shinde, the learned APP for the State/Respondents, at some length.

9. Mr. Choudhari, the learned Counsel for the petitioner would urge that respondent no.4 fell in error in rejecting the application for emergency parole on the very same ground on which the earlier request was negated by order dated 2nd December, 2020, (which was the subject matter of the challenge in Writ Petition No.444 of 2021), despite the direction by this Court in the order dated 29th March, 2021, in Interim Application No.1338 of 2021, to consider the said prayer on its own merits. Mr. Choudhari made an earnest endeavour to demonstrate that both the grounds, on which the request for release on emergency parole is turned down, are legally unsustainable. The fact that the petitioner had reported late by a few days, when he was released on parole, on the previous occasions, could not have been arrayed against the petitioner as the period of remission was correspondingly reduced. Even otherwise, that cannot be a justifiable ground to refuse emergency parole,

having regard to the period of actual imprisonment undergone by the petitioner, urged Mr. Choudhari.

10. The very fact that the petitioner was released on parole, in the past, on multiple occasions, renders the decision to deny parole, on the ground that the petitioner has been convicted for the offences punishable under Sections 395 and 396 of the Penal Code, vulnerable, canvassed Mr. Choudhari. In order to lend support to this submission, Mr. Choudhari placed reliance on a judgment of this Court in the case of ***Santosh Mahadeo Shinde vs. The State of Maharashtra [Criminal Writ Petition (ST) NO.4216 of 2020]***, wherein this Court found that the denial of the benefit of the amended Rule 19(1)(c) of the Rules, 1959, to a prisoner, who was convicted for the offence punishable under Section 394 of the Penal Code, on the strength of Rule 4(2) of the Rules, 1959, would be unfair and unreasonable. Reliance was also placed on another judgment of this Court in the case of ***Babasaheb Kondiba Bhosle vs. The State of Maharashtra [Criminal Writ Petition/LDVC/164 of 2020]***.

11. In opposition to this, Mr. Shinde, the learned APP invited the attention of the Court to the judgment in Writ Petition No.444 of 2021, dated 8th March, 2021, especially the observations in paragraphs 8 and 9 thereof. It was urged that

both the grounds, on which the earlier application for release on emergency parole was rejected, were found justifiable by this Court. In the circumstances, according to Mr. Shinde, the instant petition does not deserve to be entertained, despite afresh rejection of an identical prayer.

12. In view of the exigency of the situation which arose on account of Covid-19 Pandemic and decongest the prisons as the threat of spread of contagion amongst the prisoners was imminent, the Prisons Rules, 1959, were amended by the State of Maharashtra. Rule 19 providing for release of the prisoners on emergency parole came to be amended by adding Clause (C), which reads as under;

“(C) On declaration of epidemic under the Epidemic Diseases Act, 1897, by State Government:

(i) For convicted Prisoners whose maximum punishment is 7 years or less, on their application shall be favourably considered for release on emergency parole by the Superintendent of Prison for a period of 45 days or till such time that the State Government withdraws the Notification issued under the Epidemics Diseases Act, 1897, whichever is earlier. The initial period of 45 days shall stand extended periodically in blocks of 30 days each, till such time that the said Notification is in force (in the event the said Notification is not issued within the first 45 days.) The convicted prisoners shall report to the concerned police station within whose jurisdiction they are residing once in every 30 days.

(ii) For convicted prisoners whose maximum sentence is above 7 years shall on their application be appropriately considered for release on emergency parole by Superintendent of Prison, if the convict has returned to prison on time on last 2 releases (whether

on parole or furlough), for the period of 45 days or till such time that the State Government withdraws the Notification issued under the Epidemics Diseases Act, 1897, whichever is earlier. The initial period of 45 days shall stand extended periodically in blocks of 30 days each, till such time that the said Notification is in force (in the event the said Notification is not issued within the first 45 days). The convicted prisoners shall report to the concerned police station within whose jurisdiction they are residing, once in every 30 days.

Provided that the aforesaid directions shall not apply to convicted prisoners convicted for serious economic offences or bank scams or offences under Special Acts (other than IPC) like MCOC, PMLA, MPID, NDPS, UAPA etc. (which provide for additional restrictions on grant of bail in addition to those under the Code of Criminal Procedure, 1973 (2 of 1974) and also presently to foreign nationals and prisoners having their place of residence out of the State of Maharashtra.”

13. For the purpose of release on emergency parole, the convicted prisoners have been divided in two classes. One, the convicts, who have been sentenced to suffer imprisonment upto 7 years or less. Two, the convicts, who have been sentenced to suffer imprisonment above 7 years. In the latter case, there is an additional condition that the convict should have returned to prison on time on two previous releases, either on furlough or parole. The proviso to Clause (C) disentitles certain classes of prisoners from the benefit thereof, having regard to the seriousness and gravity of the offences, especially under the Special Acts.

14. In the instant case, the report submitted by respondent no.4 indicates that as of 30th June, 2021, the petitioner has undergone 19 years 1 month actual imprisonment. It further indicates that, in the past, the petitioner was released on seven occasions. On the last two occasions, the petitioner returned to person on time. Indeed, the petitioner had returned late on four occasions before the year 2015. However, on the last two occasions i.e. in the year 2015 and 2017, the petitioner did return on time. In terms of Sub-clause (ii) of Clause (C) of amended Rule 19(1) of the Rules, 1959, the propensity of the convict not returning to the prison on time is required to be judged on the basis of the conduct of the convict on immediately preceding two releases. The authorities, in our view, were not justified in taking into account the delay in returning to prison on occasions previous to the last two releases. The conduct proximate to the time of release to judge the possible future conduct of the convict has a rational. Thus, the rejection of the request on the basis of late returning to prison, beyond the immediate past two releases, which was nothing but a historical fact, is legally unsustainable.

15. The second ground of rejection also appears to be infirm. The fact that the petitioner has undergone actual

imprisonment of 19 years and 1 month cannot be lost sight of. Indisputably, the petitioner was released on seven occasions during the period of said incarceration. Moreover, the object behind incorporation of the special provision to release the convicted prisoners on emergency parole, in the wake of Covid-19 Pandemic, also needs to be kept in view. Rule 19(1)(C) is required to be construed in such fashion that it advances the object of decongesting the prisons and arresting the rapid spread of contagion. The proviso to Clause (C) enumerates the cases in which the benefit thereof cannot be granted. In this view of the matter a very strict construction, even while considering the application for release on emergency parole, may run counter to the object sought to be achieved by introduction of Clause (C). A pragmatic approach would be to construct the said clause liberally and give it a purposive interpretation.

16. On the aforesaid touchstone, in the face of indisputable facts that the petitioner has already undergone more than 19 years of the actual imprisonment and had been released, in the past, on seven occasions, the denial of the benefit of emergency parole, in our view, would be unjust and unreasonable. Hence, we are inclined to allow the petition.

17. Thus, the following order:

: ORDER :

- (i) The petition stands allowed.
 - (ii) The impugned order dated 17th May, 2021, passed by respondent no.4, stands quashed and set aside.
 - (iii) The petitioner, Futermal Kapoorji Borana, be released on emergency parole on usual terms and conditions, as respondent no.4 may deem fit and proper to impose under the circumstances of the case.
 - (iv) The petitioner shall strictly abide by the conditions which may be imposed by respondent no.4.
 - (v) Necessary order to release the petitioner on emergency parole be passed by respondent no.4 on or before 17th July, 2021.
 - (vi) Registry shall communicate this order to respondent no.4, by fax and e-mail as well.
18. Rule made absolute in aforesaid terms.

[N. J. JAMADAR, J.]

[S. S. SHINDE, J.]