

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 2826 OF 2021

Ankit Umakant Sharma
(Petitioner's brother Amit
S/o. Umakant Sharma,
Convict No. 141, confined at
Open Jail, Kalamba, Kolhapur,
Age : 19 years, Occu. : Student,
R/o. Adarsh Vidhayalaya, Bolin Supara
Road, Near Ram Mandir,
Virar West.

.... Petitioner

Versus

State of Maharashtra
Through Superintendent,
Open Jail, Kalamba, Kolhapur.

.... Respondent

Mr. Rupesh A. Jaiswal for petitioner.

Mrs. S.D. Shinde, APP for State.

CORAM : S. S. SHINDE &

N.J. JAMADAR, JJ.

Reserved for Judgment on : 15th September 2021.

Judgment Pronounced on : 22nd September 2021.

JUDGMENT : (PER N.J. JAMADAR, J.)

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

2. This petition under Article 226 of the Constitution of India assails the legality and validity of the order dated 18th June 2021, passed by the respondent-Superintendent, Kolhapur District Open

Prison, Kalamba, whereby the application of the petitioner for releasing him on emergency parole, came to be rejected.

3. The petition arises in the backdrop of the following facts :

(a) The petitioner came to be convicted for the offence punishable under section 302 of the Indian Penal Code, 1860 ('the Penal Code') in Sessions Case No.2 of 2013 by learned Sessions Judge, Vasai, by a judgment and order dated 9th September 2019. The petitioner had been an under-trial prisoner since 12th June 2012. The petitioner has undergone more than 8 years of imprisonment. In the wake of Covid-19 Pandemic, the petitioner applied for emergency parole.

(b) By the impugned order dated 18th June 2021, the Superintendent, Kolhapur District Open Prison, Kalamba was persuaded to reject the application opining that the petitioner has been found guilty of a grave offence and the situation which arose on account of Covid-19 Pandemic, is under control at the said prison. The Superintendent adverted to para Nos. 4 and 8(v) of the Minutes of the High

Power Committee meeting held on 25th March 2020 to lend support to aforesaid decision. It was, *inter-alia*, observed that there was not a single inmate infected by Covid-19 contagion. Social distancing norms were being observed fully and adequate provisions have been made to keep suspected inmates in isolation and also for treatment. Being aggrieved, the petitioner has invoked the writ jurisdiction of this Court.

4. We have heard Mr. Rupesh Jaiswal, the learned counsel for the petitioner and Mrs. S.D. Shinde, the learned APP for the State. With the assistance of the learned counsels for the parties, we have perused the material on record including the report submitted by the Superintendent, Prisons, to which a chart indicating the details of incarceration is annexed.

5. Mr. Jaiswal, the learned counsel for the petitioner submitted that the Superintendent, Prisons committed a grave error in rejecting the application of the petitioner for release on emergency parole on the ground that the petitioner is convicted for a grave offence, though the offence for which the petitioner has been found guilty, is not one of the excluded categories enumerated in the

proviso to Rule 19(1)(C)(ii) of the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959 ('the Rules, 1959'). The impugned decision is in clear violation of the aforesaid rules.

6. In opposition to this, Mrs. Shinde, the learned APP submitted that having regard to the nature of the accusation and the offence for which the petitioner has been found guilty and the prevailing circumstances at Kolhapur District Open Prison, Kalamba, the Superintendent, Prison, has justifiably declined to release the petitioner on emergency parole. In the backdrop of the precautions which have been taken by the Prison administration, at this juncture, according to Mrs. Shinde, no interference is warranted in exercise of writ jurisdiction.

7. Evidently, the Superintendent, Kolhapur District Open Prison, Kalamba rejected the application on the premise that the petitioner has been found guilty of a grave offence. Support was sought to be drawn from the following Clauses of the minutes of the meeting of the High Power Committee, dated 25th March 2020 constituted pursuant to the directions of the Supreme Court, in the wake of Covid-19 Pandemic :

"4. "In determining "the class" or "the category" of the prisoners who can be so released, the said order itself provides the various factors that can be taken into

consideration. These factors may be summarized as under :

- (a) Nature of offence*
- (b) Severity of offence*

8(v) This decision shall apply to only such prisoners, which in the opinion of the concerned Jailor, keeping in view the overall infrastructure available at the concerned jail and the number of prisoners, it is not practically possible to maintain the required social-distance between the prisoners."

8. Conversely, the Superintendent has not at all adverted to Rule 19(1)(C) of the Rules, 1959. Clause (C) came to be inserted in Rule 19(1) of the Maharashtra Prisons (Bombay Furlough and Parole), Rules, 1959, vide Notification dated 8th May 2021. Amended Rule 19(1)(C) of the Rules 1959 reads as under :

"19. When a prisoner may be released on emergency parole :

(1) Emergency Parole :-

...

(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 release (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"

(emphasis supplied)

9. The Rule making authority, has carved out two classes of prisoners, on the basis of the punishment imposed upon them. The Proviso to Rule 19(1)(C) excludes the prisoners, who have been convicted for the serious economic offences or bank scams or offences under Special Acts (other than IPC) like MCOC, PMLA, MPID, NDPS, UAPA, etc., from the applicability of the rule which enables the Superintendent, Prison to release the prisoners on

emergency parole.

10. It appears that the Superintendent, Prison, lost sight of the fact that post-amendment in the Prison Rules, 1959, the entitlement of the petitioner for release on emergency parole ought to have been tested in the backdrop of Rule 19(1)(C) of the Rules, which came to be promulgated subsequent to the aforesaid guidelines issued by the High Power Committee. The Superintendent, Prisons, thus, could not have declined to release the petitioner on emergency parole on the count that the petitioner was found guilty of a grave offence by drawing support and sustenance from the afore-extracted guidelines contained in the minutes of the meeting of the High Power Committee. If the case of a prisoner does not fall within the Proviso to Clause (C) of Rule 19(1) of Rules 1959, the Authority is not empowered to reject the application on the count that the petitioner has been found guilty of an offence which is otherwise grave. We find substance in the submission of Mr. Jaiswal that such a course of action would bring in a subjective element and would also be susceptible to arbitrariness.

11. For the foregoing reasons, we deem it appropriate to quash and set aside the impugned order, dated 18th June 2021 and remit

the application back to the Superintendent, Kolhapur District Open Prison, Kalamba for a fresh consideration. We make it clear that it will not, however, be open to the Superintendent, Prison, to reject the application on the ground that the petitioner has been found guilty of a grave offence.

12. Hence, the following order :

O R D E R

- (i) The petition stands partly allowed.
- (ii) The impugned order dated 18th June 2021 passed by the Superintendent, Kolhapur District Open Prison, Kalamba, stands quashed and set aside.
- (iii) The application of the petitioner dated 24th May 2021 for release on emergency parole stands remitted back to the Superintendent, Kolhapur District Open Prison, Kalamba, for a fresh decision.
- (iv) The Superintendent, Kolhapur District Open Prison, Kalamba, shall take a decision on the aforesaid application of the petitioner, as expeditiously as possible, and preferably within a period of two weeks from the date of communication

of this order. It will not, however, be open to the Superintendent, Prison Kolhapur to reject the application on the ground that the petitioner has been found guilty of a grave offence.

Rule made absolute in the aforesaid terms.

All concerned to act on an authenticated copy of this order.

[N.J. JAMADAR, J.]

[S.S. SHINDE, J.]