IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL WRIT PETITION NO. 772 OF 2021.

Shoyab Mehtab Ali,
Aged 26 years, resident of
[redacted]. ... PETITIONER.

VERSUS

1.Divisional Commissioner,
Amravati Division, Amravati.

2.Superintendent of Jail,
Central Prison, Amravati.. ... RESPONDENTS.

Mr. S.R. Jaiswal, Advocate for the Petitioner.
Shri M.J. Khan, A.P.P. for Respondents.

CORAM : VINAY JOSHI AND
VALMIKI SA MENEZES, JJ.

CLOSED FOR JUDGMENT ON : 09.02.2023.
JUDGMENT PRONOUNCED ON : 21.02.2023.

JUDGMENT (PER VINAY JOSHI, J.) :

Considering the controversy involved in the matter, and by consent of the learned Counsel appearing for the respective parties, Criminal Writ Petition is taken up for final disposal at the stage of admission by issuing **Rule**, making the same returnable forthwith.

2. The petitioner has challenged the order dated 14.07.2020 passed by respondent no.1 Divisional Commissioner, Amravati Division, Amravati rejecting grant of regular parole in terms of Rule 19[3] of the Maharashtra Prison (Parole and Furlough) Rules. The petitioner was convicted for the offence punishable under Sections 302 and 397 of the Indian Penal Code (I.P.C.). He was ordered to undergo imprisonment for life for the offence punishable under Section 302 of the I.P.C. and to undergo rigorous imprisonment for 10 years for the offence punishable under Section 397 of the I.P.C.

3. The petitioner has sought regular parole on account of serious illness of his father. In support of said contention he has

produced medical certificate. The petitioner is in jail from 30.06.2013, and thus according to him, including the period of set off and remission, he has undergone sentence for 10 years, therefore eligible for grant of parole leave.

4. Respondent no.1 Authority has rejected parole leave on the ground of adverse police report and the petitioner has not completed 10 years of imprisonment, meaning thereby he could not meet the eligibility criteria for regular parole.

5. The State resisted the petition by filing reply affidavit. The main resistance is on the ground of in-eligibility of the petitioner on account of non-fulfillment of the eligibility criteria in terms of Rule 2 [4] of the Prisons (Bombay Furlough and Parole) Rules, 1959 (hereinafter referred to as **"the Rules"** for short). It has been submitted that a person convicted for the offence punishable under Section 392 to 402 have been exempted from the eligibility criteria, provided that they have not completed the stipulated sentence for respective Sections. In short it has been submitted that since the petitioner has not completed 10 years of actual

imprisonment which was imposed on him for the offence punishable under Section 397 of the Indian Penal Code, he is not eligible.

6. On the other hand, the learned Counsel for the petitioner would contend that the petitioner has already completed 10 years of imprisonment including the period of set off and remission. He has attracted our attention to paragraph no.2 of the affidavit-in-reply wherein reference has been made about certificate issued by the jail authorities stating that the petitioner has undergone 10 years 1 month and 26 days imprisonment including set off and remission earned by the petitioner.

7. The learned A.P.P. would submit that the period of set off and remission can not be considered for calculation, as the said aspect is to be considered at the time of actual release. In other words, he would submit that the actual period of incarceration shall be considered for the purpose of Rule 4[2] of the Rules.

8. In resistance the petitioner would submit that he was sentenced for 10 years imprisonment for the offence punishable

under Section 397 of the Indian Penal Code. Had it been the fact that he was only convicted under said section, then by the time he would have been released, and therefore, the period is to be calculated by including set off and remission. In support of said contention he has relied on the decision of this Court in case of **Gorakh @ Baba Patole .vrs. Government of Maharashtra – 1993 [2] Mh.L.J. 1423**.

9. As against this, the learned A.P.P. by placing reliance on the decision of this Court in case of **Jalindarsingh Ajitsingh Kalyani .vrs. The State of Maharashtra – 2017 All MR (Cri) 4373**, to state that Rule 4[2] of the Rules would be attracted even if the convict has undergone imprisonment under said Sections. Likewise he relied on the decision of this Court in case of **Kamal Mayaram Kanojiya .vrs. The State of Maharashtra and others – 2013 All MR (Cri) 983**, wherein it has been held that due to bar created under Rule 4[2], the person convicted for commission of offence under Sections 392 to 402 is not eligible for grant of furlough. Moreover, the learned A.P.P. has relied on the decision of Gujarat High Court in

case of **Juvansingh Lakhubhai Jadeja .vrs. State of Gujarat – 1972 LawSuit(Guj) 32**, to state that the constitutional validity of Rule 4[2] of the Rules has been upheld.

10. So far as submission regarding validity of Rule 4[2] is concerned, there is no dispute. In above referred case of **Kamal Mayaram Kanojiya**, it has been simply held that Rule 4[2] debars a convict from seeking furlough in case of conviction under Section 392 to 402 of the Indian Penal Code. We have no doubt in our mind about the validity and applicability of Rule 4[2] of the Rules. However, the peculiar question falls for consideration is – Whether after undergoing sentence awarded for Section 397, can the prisoner still be debarred on the ground that his conviction falls within the rigor of Rule 4[2] of the Rules.

11. In above referred case of **Gorakh Patole,** the same issue fell for consideration before this Court. The then accused was convicted for the offence punishable under Sections 397 and 302 of the Indian Penal Code. The accused was sentenced to undergo imprisonment for a period of 7 years for the offence punishable

under Section 397, and to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code. These two sentences have been ordered to run concurrently. After completing 7 years of imprisonment the convict applied for grant of furlough. In that situation this Court has expressed that since the convict has undergone punishment imposed for Section 397 of the Code, the bar would not apply. The relevant portion of paragraph no.3 of the decision reads as below :

> "..... *On undergoing the imprisonment of seven years, the petitioner would cease to be a convict under section 397, Indian Penal Code. Had he been convicted only of offence under Section 397, he would have been a free bird. His continuation in the portals of jail is because of sentence under Section 302, Indian Penal Code. He does not continue to be a prisoner falling under category [2] of Rule 4 only because of concurrent nature of the other sentence undergoing which does not disqualify him from furlough leave. Contrary interpretation of Rule 4[2] would be against the letter as well as spirit of the Rules."*

12. Though the learned A.P.P. has relied on a contrary view taken by this Court in above referred case of **Jalindarsingh Ajitsingh Kalyani**, however, the position has now been changed. The said decision was rendered in the year 2017 interpreting Rule 4[2] of the Rules, which reads as below :

> "*4[2] Prisoners convicted for offence under Section 392 to 402 [both inclusive] of the Indian Penal Code."*

The said Rule 4[2] has been substituted by notification dated 16.04.2018, which reads as below :

> "*4[2] Prisoners convicted for offence under Section 392 to 402 [both inclusive] of the Indian Penal Code [Prisoners may be eligible for furlough after completion of stipulated sentence in the respective Section]."*

Thus, the substituted Rule carves out an exception that on completion of stipulated sentence for respective section, the prisoner would be eligible for grant of furlough leave. The said substitution was post decision in case of **Jalindarsingh Ajitsingh Kalyani** [supra], and therefore, the said decision would not help the State in any manner.

13. The learned A.P.P. would submit that though substituted Rule permits release on furlough after completion of sentence imposed by Section 397 of the Code, however, he would submit that the period of set off and remission cannot be calculated. According to him the said period shall be calculated at the time of actual release and not earlier than that. In other words he would submit that the prisoner has undergone actual imprisonment for 9 years, 3 months and 10 days, and therefore, presently he is not eligible in terms of Rule 4[2] of the Rules.

14. We are not in agreement with the said submission since the analogy applied by this Court in above referred decision of **Gorakh Patole** would squarely apply in the situation at hand. As per the reply-affidavit, the prisoner has undergone 10 years 1 month and 26 days of imprisonment, including set off and remission earned by him. In above decision, it has been observed that after completion of period of imprisonment imposed for the offence of Section 397 of the Code, the prisoner would cease to be a convict under Section 397 of the Code, and would have been freed if not convicted under Section

302 of the Code. Herein also if the prisoner was convicted only for the offence under Section 397 of the Code, then certainly the period of set off and remission would have been calculated on which he would have been released. Only because the prisoner is sentenced for life imprisonment for Section 302 of the Code, he is in jail. Therefore, while applying Rule 4[2] of the Rules, one has to calculate the period by including the period of set off and remission earned by the petitioner. Therefore, as admittedly the petitioner has undergone the entire period awarded for the offence punishable under Section 397 of the Code, he is eligible for furlough leave.

15. The Authority has also rejected petitioners' urge on the ground that there is adverse police report against the petitioner. It is reflected in the impugned order that the petitioner is resident of Uttrakhand State, aged 26 years, and therefore, after release there is every possibility of his abscondence. We do not find any logic that only because the petitioner is a young fellow, he would abscond. There is no regional restriction to consider petitioners case, if otherwise found suitable.

16. The learned Counsel for the petitioner has relied on the decision of this Court in case of **Kisan Soma Rathod vrs. The State of Maharashtra and another – 2017 [5] Mh.L.J. (Cri) 796**, to contend that mere adverse report, without any supporting material, is not worth to be considered. No other adverse circumstances have been brought to our notice so as to deny petitioner's right. It has been submitted that during last 10 years not on a single occasion, petitioner was released on either furlough or parole. The Supreme Court in case of **Asfaq .vrs. State of Rajasthan and others – 2017 AIR [SC] 4986**, has emphasized the necessity of grant of parole and furlough with an object to afford an opportunity to the prisoner to solve their family problems and to enable them to maintain links with the society.

17. In conclusion, since the petitioner has already undergone the imprisonment of 10 years, which was imposed for the offence punishable under Section 397 of the Code, he would come out of the rigor of Rule 4[2] of the Rules, and thus, is entitled for regular parole as prayed for. We may state that the reason of fathers illness

has not been disputed, either by the police or State. In view of that the impugned order date 14.07.2021 passed by the Divisional Commissioner, Amravati Division, Amravati is unsustainable in law and therefore, the same is quashed and set aside. We hold that the petitioner is entitled to regular parole for the period as may be permissible in law. The Authority shall release the petitioner on regular parole by imposing usual terms and conditions as he may deem fit. The authority shall pass appropriate orders within a period of two weeks from the receipt of this order.

18. Criminal Writ Petition is allowed and disposed of accordingly. Rule is made absolute in the aforesaid terms with no order as to costs.

JUDGE **JUDGE**