

Gwalior, dated 9-8-2021

Shri Prashant Sharma, Counsel for the applicant

Shri Vivek Khedkar, Counsel for the respondent

Heard finally.

1. This application under Section 482 of Cr.P.C. has been filed for bringing a fact on record that the applicant is on parole and the said period has not expired, but still, without mentioning the fact that the applicant is on parole granted in view of Covid 19 Pandemic, he filed M.Cr.C. No.35888 of 2021 for grant of bail under Section 439 of Cr.P.C., which was allowed by order dated 30-7-2021 under an impression that the applicant is in actual custody for a period of 6 months.
2. The necessary facts for disposal of the present application in short are that the applicant was taken into custody in crime No. 438/2020 registered by Police Station Gwalior, Distt. Gwalior for offence under Sections 406, 420 of I.P.C.
3. Two bail applications of the applicant were already rejected and he filed third bail application which was registered as M.Cr.C.No. 35888 of 2021. The main ground for filing 3rd bail application was the period of actual custody.
4. As the fact of release of the applicant on parole was neither pleaded in the bail application, nor was brought to the notice of this Court, therefore, under an impression that the applicant is in actual custody of 6 months, he was granted bail.

5. The undisputed fact is that the applicant was already released on parole on 19-5-2021 which is effective till 16-8-2021 and M.Cr.C. No. 35888/2021 was filed on 15-7-2021 on the ground of period of actual detention.

7. The moot question for consideration is that whether the application under Section 439 of Cr.P.C. is maintainable when the applicant is on parole granted in compliance of order passed by the Supreme Court in the case of **In Re: Contagion of Covid 19 virus in prisons (Suo Motu Writ Petition (c) : 1/2020)** or not?

8. It is submitted by Shri Sharma, that custody doesnot mean that an applicant must be behind the bars but even when a person is on bail or parole, still he would continue to remain under the control of the Court and therefore, the application under Section 439 of Cr.P.C. is maintainable. To buttress his contentions, the Counsel for the applicant has relied upon the judgments passed by the Supreme Court in the case of **State of Haryana Vs. Dinesh Kumar** reported in **(2008) 3 SCC 222**, **Sundeep Kumar Bafna Vs. State of Maharashtra and another** reported in **(2014) 16 SCC 623**, **Kanaksinh Mohansinh Mangrola Vs. State of Gujarat** reported in **(2006) 9 SCC 540**, **Sunil Fulchand Shah Vs. Union of India and others** reported in **(2000) 3 SCC 409**.

9. Per contra, it is submitted by the Counsel for the respondent, that so long as the applicant is not in actual custody, the application under Section 439 of Cr.P.C. is not maintainable. To buttress his

contentions, he relied upon the judgment passed by the Supreme Court in the case of **Niranjan Singh Vs. Prabhakar** reported in **AIR 1980 SC 785**, **Sunita Devi Vs. State of Bihar and another** reported in **(2005) 1 SCC 608**, and the order passed by a Co-ordinate Bench of this Court in the case of passed on in **M.Cr.C. No 1837 of 2021**.

10. Heard the learned Counsel for the parties.

11. The moot question for consideration is that whether an undertrial, who has been granted parole in compliance of the orders passed by the Supreme Court, as well as High Court of Madhya Pradesh from time to time in the wake of Covid 19 Pandemic, can be treated to be in custody while he is on parole or before maintaining his application under Section 439 of Cr.P.C., he has to surrender.

12. Although Section 31-A of Prisoner's Act throw some light in respect of convicted prisoners but Section 31-A of Prisoner's Act, 1990 has no application on the undertrial prisoners. Similarly, the State of Madhya Pradesh has framed M.P. Prisoner's Leave Rules, 1989, but the said Rules are also applicable to convicted prisoner's only. However, in order to verify as to whether the period of leave/parole granted to an undertrial prisoner, can be counted for the purposes of detention/sentence or not, this Court can certainly take guidance from Section 31-A of Prisoner's Act, 1900. Further, while imposing sentence at the time of judgment, the period undergone by the accused is always taken into consideration.

13. Section 31-A(4) of Prisoner's Act, 1900 reads as under :

31-A(4). The period of release of a Prisoner under Sub-Section (1) shall not count towards the total period of his sentence.

14. It is submitted by Shri Sharma, that although a prisoner might be on parole but so long as he remains under the Control of the Court or the authorities, then he has to be treated as under Custody. The Supreme Court in the case of **Sunil Fulchand Shah (Supra)** has held as under :

30. Since release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instructions, has to be *included* as a part of the total period of detention because of the very nature of parole. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period — it does not interrupt the period of detention — it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody. Thus, in cases which are covered by Section 12 of COFEPOSA, the period of temporary release would be governed by the conditions of release whether contained in the order or the rules or instructions and where the conditions do not prescribe it as a condition that the period during which the detenu is out of custody, should be

excluded from the total period of detention, it should be counted towards the total period of detention for the simple reason that during the period of temporary release the detenu is deemed to be in constructive custody. In cases falling outside Section 12, if the interruption of detention is by means not authorised by law, then the period during which the detenu has been at liberty, cannot be counted towards period of detention while computing the total period of detention and that period has to be excluded while computing the period of detention. The answer to the question, therefore, is that the period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention.

15. The Supreme Court in the case of **Sunil Fulchand Shah (Supra)** was dealing with a case, where a person was released on Parole in exercise of power under Section 12 of COFEPOSA Act. Section 12 of COFEPOSA Act reads as under :

12. Temporary release of persons detained.—(1) The Central Government may, at any time, direct that any person detained in pursuance of a detention order made by that Government or an officer subordinate to that Government or by a State Government or by an officer subordinate to a State Government, may be released for any specified period either without condition or upon such conditions specified in the direction as that person accepts, and may, at any time, cancel his release.

(1-A) A State Government may, at any time, direct that any person detained in pursuance of a detention order made by that Government or by an officer subordinate to that Government may be released for any specified period either without condition or upon such conditions specified in the direction as that person accepts, and may, at any time, cancel his release.

(2) In directing the release of any person under sub-section (1) or sub-section (1-A), the Government directing the release], may require him to enter into a bond with sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) or sub-section (1-A)] shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(5) If any person released under sub-section (1) or sub-section (1-A)] fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

(6) Notwithstanding anything contained in any other law and save as otherwise provided in this section, no person against whom a detention order made under this Act is in force shall be released whether on bail or bail bond or otherwise.

16. From the plain reading of the above Section, it is clear that there is no provision to the effect that the period of parole shall not be taken into consideration, while counting the period of detention. Further, in the case of **Sunil Fulchand Shah (Supra)**, the Supreme Court had observed that if the parole is outside the purview of Section 12 of COFEPOSA Act, then the period of parole shall not be included in the period of detention.

17. It is not the case of the applicant, that in the parole order, it is mentioned that the period of parole shall be counted towards the period of detention. M.P. Prisoner's Leave Rules, 1989, which are framed under Section 31-A of Prisoner's Act, 1900 deal with leave. There is no provision in M.P. Prisoner's Leave Rules, 1989 to the effect that the period of leave shall be counted while computing the period of sentence.

18. Thus, it is clear that the period of parole cannot be counted towards the period of detention.

19. Further, the Supreme Court in the case of **State of Haryana Vs. Mohinder Singh** reported in **(2000) 3 SCC 394** after considering the provisions of Section 3 of Haryana Good Conduct Prisoner's (Temporary Release) Act, 1988 has held as under :

18. It would be thus seen that when a prisoner is on parole his period of release does not count towards the total period of sentence while when he is on furlough he is eligible to have the period of release counted towards the total period of his sentence undergone by him.

20. It is next contended by the Counsel for the applicant, that in the case of **Kanaksinh Mohansinh Mangrola (Supra)**, the Supreme Court has held that if a person is on temporary bail, then he can be said to be in custody and accordingly, application under Section 439 of Cr.P.C. is maintainable.

21. The Supreme Court in the case of **Mohinder Singh (Supra)** has held as under :

10. The terms bail, furlough and parole have different connotations. Bail is well understood in criminal jurisprudence. Provisions of bail are contained in Chapter XXXIII of the Code. It is granted by the officer in charge of a police station or by the court when a person is arrested and is accused of an offence other than a non-bailable offence. The court grants bail when a person apprehends arrest in case of a non-bailable offence or is arrested for a non-bailable offence. When a person is convicted of an offence he can be released on bail by the appellate court till his appeal is decided. If he is acquitted his bail bonds are discharged and if appeal dismissed he is taken into custody. Bail can be granted subject to conditions. It does not appear to be quite material that during the pendency of appeal though his sentence is suspended he nevertheless remains a

convict. For the exercise of powers under Section 432 it may perhaps be relevant that the State Government may remit the whole or any part of the punishment to which a person has been sentenced even though his appeal against conviction and sentence was pending at that time. Appeal in that case might have to abate inasmuch as the person convicted has to accept the conditions on which the State Government remits the whole or part of his punishment.

22. The Supreme Court in the case of **Sunil Fulchand Shah**

(Supra) has held as under :

24. Bail and parole have different connotations in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word “bail” is surety. In *Halsbury’s Laws of England*, the following observation succinctly brings out the effect of bail:

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned.

25. “Parole”, however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. The dictionary meaning of “parole” is:

The Concise Oxford Dictionary — (New Edition)

“The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence, on the promise of good behaviour; such a promise; a word of honour.”

Black’s Law Dictionary — (6th Edition)

“Release from jail, prison or other confinement after

actually serving part of sentence; Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order.”

According to *The Law Lexicon*, “parole” has been defined as:

“A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole.”

According to *Words and Phrases*:

“ ‘Parole’ ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. *People ex rel Rainone v. Murphy*.

‘Parole’ does not vacate sentence imposed, but is merely a conditional suspension of sentence. *Wooden v. Goheen*.

A ‘parole’ is not a ‘suspension of sentence’, but is a substitution, during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within specified prison bounds outside the prison, for confinement within the prison adjudged by the court. *Jenkins v. Madigan*.

A ‘parole’ does not suspend or curtail the sentence originally imposed by the court as contrasted with a ‘commutation of sentence’ which actually modifies it.”

26. In this country, there are no statutory provisions dealing with the question of grant of parole. The Code of Criminal Procedure does not contain any provision for grant of parole. By administrative instructions, however, rules have been framed in various States, regulating the grant of parole. Thus, the action for grant of parole is generally speaking, an administrative action. The distinction between grant of bail and parole has been clearly brought out in the judgment of this Court in *State of Haryana v. Mohinder Singh* to which one of us (Wadhwa, J.) was a party. That distinction is explicit and I respectfully agree with that distinction.

27. Thus, it is seen that “parole” is a form of “temporary release” from custody, which does not suspend the sentence or the period of detention, but provides conditional release from custody and changes the mode of undergoing the sentence.

23. Thus, it is clear that “Bail” and “Parole” are two different connotations. The judgment in the case of **Kanaksinh Mohansinh Mangrola (Supra)** was dealing with a situation where the accused was on temporary bail and not Parole. Therefore, the said judgment shall not apply to the facts of the case.

24. The Supreme Court in the case of **Niranjan Singh & anr Vs. Prabhakar Rajaram Kharote and others** reported in **AIR 1980 SC 785** has held as under :

8. Custody, in the context of S. 439, (we are not, be it noted, dealing with anticipatory bail under S. 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

25. It is next contended by the Counsel for the applicant, that co-ordinate Bench of this Court in the case of **Budh Singh Baghel Vs. State of M.P.** by order dated **23 July 2020** passed in **M.Cr.C. No. 18164 of 2020** has held that where a person has been released on parole, then his application under Section 439 of Cr.P.C. is maintainable even in absence of surrender.

26. Consider the submissions made by the Counsel for the applicant. In the case of **Budh Singh Baghel (Supra)**, the co-ordinate bench of this Court has relied upon the judgment passed by the Supreme Court in the case of **Kanaksinh Mohansinh Mangrola (Supra)**. As already pointed out, there is a difference between “interim bail” and “Parole”. Therefore, the law laid down by the Supreme Court in the case of **Kanaksinh Mohansinh Mangrola**

(Supra) will not be applicable to the situation in hand. Further, the effect of Section 31-A(4) of Prisoner's Act has also not been taken into consideration. Thus, respectfully, it is held that the judgment passed in the case of **Budh Singh Baghel (Supra)** is *per-incurriam*.

27. No other argument has been advanced by the Counsel for the applicant.

28. Considering the totality of facts and circumstances of the case, this Court is of the considered opinion, that since, the applicant has been released on parole in the wake of Covid 19 Pandemic, therefore, it cannot be said that he is in custody, and accordingly, an application under Section 439 of Cr.P.C. is not maintainable, unless and until his surrenders before the Trial Court.

29. Accordingly, it is held that M.Cr.C. No. 35888/2021 filed by the applicant was not maintainable as the same has been filed after his release on parole and in fact the applicant is still on parole. Accordingly, the order dated 30-7-2021 passed by this Court in M.Cr.C. No.35888/2021 is hereby **recalled**. However, liberty is granted to the applicant to revive his prayer for bail after surrendering before the Trial Court.

30. Thus, whenever an application under Section 439 of Cr.P.C. is filed, the applicant(s) must declare that he/they are not on parole.

31. With aforesaid observations, the application is finally **disposed of**.

32. Office is directed to keep a copy of this Order in the file of

M.Cr.C. No. 35888/2021.

(G.S. Ahluwalia)
Judge