# Rohit @ Kalia Vs State Of Haryana And Others

## Criminal Writ Petition No. 4219 Of 2020

**Court:** High Court Of Punjab And Haryana At Chandigarh

**Date of Decision:** Aug. 26, 2020

**Acts Referred:**
Indian Penal Code, 1860 â€" Section 34, 307, 392, 397#Arms Act, 1959 â€" Section 25, 54, 59#Haryana Good Conduct Prisoners (Temporary Release) Amended Act, 2012 â€" Section 1, 2(aa)(i), 2(aa)(iv)#Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 â€" Section 3, 4, 5(A)(2), 5A, 5(2)#Constitution Of India, 1950 â€" Article 226, 227

**Hon'ble Judges:** G.S. Sandhawalia, J

**Bench:** Single Bench

**Advocate:** Saurabh Dalal, Rajeev Goel

**Final Decision:** Allowed

## Judgement

G.S. Sandhawalia, J

1. In the present criminal writ petition filed under Articles 226/227 of the Constitution of India, the petitioner challenges the order dated 04.06.2020

(Annexure P-1) passed by the District Magistrate, Rewari, whereby his request for release on parole has been rejected.

2. The reasoning which weighed with the concerned respondent to reject the request was that the petitioner-convict has not completed 5 years of

conviction as per the Amended Parole Act, 2015 and did not fulfill the terms and conditions of the Act. Reliance was placed upon the letter of the

DGP Jail dated 06.07.2016 that if a convict is found in possession of mobile phone and his case cannot be considered for grant of parole unless and

until he fulfills the terms and conditions of the Prisoners Act or he is acquitted by the Court. Resultantly, while agreeing the report of the

Superintendent of Jail, the application for furlough of the petitioner was rejected.

3. The said order is sought to be justified by filing the reply by way of affidavit of Mr. Anil Kumar, Deputy Superintendent, District Prisoner, Jhajjar,

wherein certain other facts and issues have been raised, which were not taken into consideration by the District Magistrate. Therefore, this Court

prima facie is of the opinion that the order as such suffers from perversity to the extent that the reasoning aspect as such is missing in the order, as

same order is based on the report of the Superintendent of Jail. The said respondent has not applied his free, independent and judicial mind to the

application alongwith the relevant statutory provisions. This would be clear from the relevant part of the order, which could be termed as the reasoned

part apart from the facts, which have been noted in a paragraph above of the said order. The relevant part of the order reads as under:-

Ã¢â‚¬Å“I have carefully perused the report of the Superintendent of Jail, Jhajjar and the application of convict. As per the report of the Superintendent of

Jail, the convict has not completed the period of 5 years of conviction as per the Amended Parole Act 2015 and does not fulfill the terms and

conditions of the Amended Parole Act. The Director Jails, Haryana has clarified by issuing letter no.22999/23018 DGP/jail/2016/G1 dated 06.07.2016

that convict found in possession of mobile phone cannot be considered for grant of parole unless and until the convict fulfills the terms and conditions

of the Prisoners Act or the convict is acquitted by the Hon'ble Court. Therefore, I, Yashendra Singh, IAS, District Magistrate, Rewari, keeping in

view the facts and circumstances of the case, I agree with the report of the Superintendent, District Jail, Jhajjar and reject the application of Furlough

of the convict. The convict may be apprised of this decision.Ã¢â‚¬â€‹

4. In the petition it has been specifically pleaded that the petitioner has been convicted for 10 years imprisonment in FIR No.82 dated 27.09.2011

under Section 307, 34 IPC and under Section 25 of the Arms Act registered at Police Station GRP, Rewari. The judgment was passed on 30.1.2013

as per custody certificate. It has further been averred that there was 4 jail offences on the part of the petitioner, as 4 times phones had been

recovered and three FIRs have been registered. Out of the same in two cases he is on bail and has undergone conviction in FIR No.306 dated

24.12.2014. The prayer for furlough had been declined by the District Magistrate on the ground that the petitioner has not undergone 5 years after

conviction in jail offence as per the Amended Parole Act, 2015. It is submitted that he is the only son of his aged parents who are suffering from

various ailments and there is no one to take care of the aged parents. The medical record of the petitioner's father has been appended as Annexure P-

2.

5. In the written statement filed the stand taken is that parole/furlough is only a concession for good conduct of a prisoner and no prisoner can claim it

as a matter of right. The conduct and behaviour of the prisoner inside the prison has to be taken into consideration, as punishment for prison offences

is a tool in the hands of Prison Administration against the bad conduct exhibited by aberrant and violent inmates. In spite of the Prison Inmate Calling

System facilities having been provided to the prisoners since the year 2014, whereby the prisoner's can talk to their family members or advocates five

minutes a day on two specified numbers, after due verification, the mobile phones were recovered on 25.06.2012, 09.08.2015, 30.10.2017, 16.11.2017.

Thus, reliance has been placed upon Section 2 (aa) (i) 1 & (iv) of the Haryana Good Conduct Prisoners (Temporary Release) Amended Act, 2012 &

2013 to contend the petitioner falls within the ambit of a hardcore prisoner.

6. It is also averred that the petitioner had been sentenced in FIR No.49 dated 13.03.2010 under Sections 392, 397, 34 IPC and Sections 25, 54, and 59

of Arms Act had been convicted for 2 years R.I with fine of Rs.4,000/- on 03.09.2012. His sentence in FIR No.82 dated 27.09.2011 under Sections

307, 34 IPC and Sections 25, 54 and 59 of Arms Act registered at Police Station GRP, Rewari for 10 years R.I, started only on 03.04.2017 after the

expiry of the sentence in FIR No.49. Therefore, while placing reliance upon Section 5A (2), wherein it has been averred that a convict hardcore

prisoner who had not been awarded death penalty may be allowed parole/furlough after completion of 5 years imprisonment, has apparently weighed

with the District Magistrate also while passing the impugned order.

7. In the written statement it has further been averred that the petitioner has undergone 4 years 5 months and 21 days on 02.04.2017 and there are

three cases of mobile phones still pending against him. The mother of the petitioner being present at home was there to look after her husband and,

therefore, on account of the report of the SHO, Police Station City, Rewari that the petitioner may abscond after release, has been again relied on,

which though is not the reasoning given or accepted by the District Magistrate.

8. Thus, the State has tried to set up and supplemented the reasons given by the District Magistrate, which are strictly not permissible, specially when

an order is under challenge. It is settled principle that an statutory order passed without having sufficient reasoning cannot be supplemented by filing a

written statement. Reliance can be placed upon the judgment passed by the Apex Court in 'Mohinder Singh Gill Vs. Chief Election Commissioner,

New Delhi and others', 1978 SC 851. The relevant part of the said judgment reads as under:-

Ã¢â‚¬Å“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by

the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the

beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out.

9. In 'Dipak Babaria and another Vs. State of Gujarat and others', (2014) 3 SCC 502, the said view was reiterated. The relevant part of the said

judgment reads as under:-

Ã¢â‚¬Å“57. That apart it has to be examined whether the Government had given sufficient reasons for the order it passed, at the time of passing such

order. The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent

affidavits as laid down by this Court long back in Commissioner of Police, Bombay vs. Gordhandas Bhanji reported in AIR 1952 SC 16 in the

following words:-

Ã¢â‚¬Å“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer

making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have

public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with

reference to the language used in the order itself.Ã¢â‚¬â€‹

10. Therefore, on this account the justification given in the written statement cannot now be accepted.

11. It is settled principle that the statutory order passed under the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 has to be passed

on the basis of the provisions as such. The District Magistrate has to apply its mind independently and not rely blindly upon the report of the

Superintendent of the Jail. The factum of the petitioner being in detention since 2010 is not disputed, as per the custody certificate also, which has now

been placed on record, which would go on to show that the custody as under trial in FIR No.49 started on 26.03.2010.

12. A perusal of the custody certificate would go on to show that the petitioner's sentence as such started on 03.04.2017 in FIR No.82 after the

sentence had expired in an FIR No.49/2010, wherein he had been convicted on 03.09.2012 and he was taken into custody in the said case on

26.03.2010 till 10.09.2011 as a undertrial. He again remained in custody from 08.11.2011 to 07.05.2013 in FIR No.377 and from

14. 05.2013 he was in custody as an undertrial in FIR No.266.

13. Prima facie once the petitioner has been in imprisonment for more than 5 years, the benefit of under Section 5A would necessary flow. These

facts have to be taken into consideration by the respondent while deciding the application for parole/furlough.

Provisions of Section 5A of the Act reads as under:-

Ã¢â‚¬Å“5A. Special Provisions for temporary release of hardcore prisoners:- Notwithstanding anything contained in sections 3 and 4, no hardcore prisoner

shall be entitled to temporary release or furlough :

Provided that a hardcore prisoners may be released on temporary basis to attend the marriage of his grand child or sibling, or death of his grand

parent, parent, grand parent-in-laws, parent-in-laws, sibling, spouse, child or grand child under an armed police escort, for a period of forty-eight hours,

to be decided by the concerned superintendent of Jail:

Provided further that a hardcore prisoner may be released on temporary basis to attend the marriage of his daughter for ninety-six hours and for the

marriage of his son for seventy-two hours under an armed police escort, to be decided by the concerned Superintendent of Jail. He shall intimate

within twenty-four hours, the concerned District Magistrate and superintendent of Police in this regard with full particulars of the hardcore prisoner

being so released.

(2) Notwithstanding anything contained in sub-section

(1) a convicted hardcore prisoner who has not been awarded death penalty, may be entitled for temporary release or furlough only if he has completed

his five years imprisonment and has not been awarded any major punishment by the Superintendent of Jail, as judicially appraised by the concerned

District and Sessions Judge :

Provided that the five years imprisonment period shall not include imprisonment during trial period for more than two years, while counting five years

of imprisonment:

Provided further that if the prisoner so released under this sub-section violates any condition of temporary release or furlough, he shall be debarred

from such release in future.Ã¢â‚¬â€‹

14. The said provisions were also subject matter of consideration in the case of 'Surjeet Singh Vs. State of Haryana and others', 2018

(1) RCR (Criminal) 497, wherein the question as to how to compute the period of 5 years while granting the parole/furlough to a hardcore prisoner

which was subject matter of consideration. In the said case, the convict had been awarded sentence of 10 years on 13.02.2001. He had undergone 5

years 3 months 21 days as on 17.03.2017, which included under trial period of 6 months 2 days. Recovery of a mobile phone had been effected on

13.07.2016 and, therefore, the Commissioner Hisar Division had come to the conclusion that he had not completed 5 years imprisonment as per the

provisions of sub-Section 2, as the 5 years would start from 13.07.2016. Resultantly, it was held that once there is inclusion of under trial period of

maximum 2 years as provided under the Act, the 5 years period cannot be counted from the date the prisoner has fallen in the category of hardcore

prisoner. Relevant paragraphs of the said judgment read as under:-

Ã¢â‚¬Å“6. On perusal of sub-section (2) of Section 5A of the Act of 1988, I nowhere find this embargo that five years period is to be computed after a

prisoner has fallen in the category of hardcore prisoner. Sub-section (2) of Section 5A of the Act of 1988 bars grant of parole or furlough till a

prisoner has completed his five years of imprisonment and has not been awarded any major punishment by the Superintendent of Jail, as judicially

appraised by the concerned District and Sessions Judge. The five years period of imprisonment may include two years imprisonment during trial. If,

the contention of learned State counsel be accepted that five years imprisonment is to be counted from the day a prisoner has fallen in the category of

hardcore prisoner after recovery of a mobile phone or under other terms and conditions as laid down in the Act, then the question, which arises for

consideration is, as to how the period of two years imprisonment during trial may be included in that period of five years bar in granting parole or

furlough. The plain and simple interpretation of Section 5A (2) of the Act of 1988 is that a prisoner, who has fallen in the category of hardcore

prisoner, shall not be entitled to temporary release or furlough till he completes five years imprisonment including maximum of two years imprisonment

during trial. The restriction has been imposed for inclusion of under-trial period of maximum of two years and period of detention more than 2 years

during trial is to be ignored. Admittedly, the petitioner has not been awarded any punishment by the Superintendent of Jail. For the alleged recovery of

mobile phone an FIR was registered for which he has been convicted by the trial Court. The punishment awarded by the trial Court is not the

punishment awarded by the Superintendent of Jail.

7. As a sequel of my above discussion, I find no merit in the submissions of learned State counsel that period of five years imprisonment for grant of

parole or furlough is to be counted from the date the prisoner has fallen in the category of hardcore prisoner. The petitioner, who has already

completed more than 5 years imprisonment which does not include more than two years imprisonment as under-trial, has become entitled to grant of

parole/furlough as per provisions of Section 5A of the Act of 1988. Consequently, petition is allowed and order dated

4. 11.2016, passed by Commissioner, Hisar Division is set aside with direction to reconsider case of petitioner for grant of parole/furlough as per

provisions of the Act of 1988, within a period of six weeks of the receipt of copy of this order.Ã¢â‚¬â€‹

15. Thus, these necessary aspects have to be gone into by the District Magistrate as to whether there is any bar under Section 5A, keeping in view

the detention period of the petitioner, which is apparently from 26.03.2010 It is settled principle that administrative order has to be reasonable and the

authorities are to take into consideration all the relevant facts and exclude irrelevant facts from consideration. The decision would neither be perverse

nor irrational, improper or contradictory, to which no person properly advised on the facts would reach at.

16. It has time and again been held that the reasons would give clarity in the order and in the absence of the same, the order will not be sustainable.

Reliance can be placed upon the judgment of the Apex Court passed in 'Union of India and others Vs. Jai Parkash Singh', 2007 AIR (SC) 1363.

Relevant observations reads as under:-

Ã¢â‚¬Å“7. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief,

in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has

rendered the High Court's judgment not sustainable.

8. Even in respect of administrative orders Lord Denning M.R. in Breen v. Amalgamated Engineering Union (1971 (1) All England Reporter 1148)

observed ""The giving of reasons is one of the fundamentals of good administration"". In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 LCR

120) it was observed : ""Failure to give reasons amounts to denial of justice"". Reasons are live links between the mind of the decision taker to the

controversy in question and the decision or conclusion arrived at"". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is

that if the decision reveals the ""inscrutable face of the sphinx"", it can, by its silence, render it virtually impossible for the Courts to perform their

appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound

judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court.

Another rationale is that the affected party can known why the decision has gone against him. One of the salutary requirements of natural justice is

spelling out reasons for the order made, in other words, a speaking out. The ""inscrutable face of a sphinx"" is ordinarily incongruous with a judicial or

quashi-judicial performance.Ã¢â‚¬â€‹

17. In such circumstances this Court is of the opinion that the said order dated 04.06.2020 (Annexure P-1) needs to be revisited by the competent

authority, after keeping in mind the above observations. Accordingly, the same is set aside and a direction is issued to the District Magistrate, Rewari

to re-consider the issue within a period of 4 weeks from the receipt of the certified copy of this order.

18. The petition stands allowed in the above terms.