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

CRIMINAL WRIT PETITION ST. NO. 3206 OF 2020

Pintu s/o. Uttam Sonale (C-10855)
Age : 31 years, Occ. Convict,
R/o. Mantha, Tal. Hathgaon,
Dist. Nanded,
At present confined at Central Prison Nasik .. Petitioner

V/s.

The State of Maharashtra
through Superintendent,
Nasik Central Prison, Nasik .. Respondent

Mr. Rupesh A. Jaiswal for the Petitioner.
Mr. K.V. Saste, APP for the State.

**CORAM : S.S.SHINDE &
M.S.KARNIK, JJ.**

DATE : OCTOBER 26, 2020

P.C.:-

The petitioner, a convict for the offences punishable under Section 376 of the Indian Penal Code ('IPC' for short) and Sections 3, 4, 5 of the Protection of Children against Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act' for short) has preferred this Petition under Article 226 of the Constitution of India praying for his release on emergency (Covid-19) parole.

2. The petitioner was arrested on 7/12/2013 for the above mentioned offences and by the judgment and order rendered by the Additional Sessions Judge, Nanded was sentenced to undergo imprisonment for 10 years for the offences punishable under Section 376 of the IPC and Sections 3,4, 5 of the POCSO Act.

3. The learned counsel for the petitioner submitted that the petitioner was once released on parole for attending marriage on 10/4/2019 and he surrendered on time i.e. on 20/4/2019. Learned counsel invited our attention to the Rule 19 (1) (C) of the "The Maharashtra Prisons (Mumbai Furlough and Parole (Amendment) Rules, 2020 (hereinafter referred to as "the said Rules" for short) which is extracted in paragraph 8 of this order and especially the proviso thereof to submit that as the petitioner is not convicted under the provisions of MCOC, PMLA, MPID, NDPS, UAPA, the condition precedent to release the petitioner on parole as classified by the High Powered Committee stands satisfied. In his submission, the benefit of Clause (1) and (2) of Rule 19 is available to the petitioner as POCSO Act is not specified as a Special Act in the proviso.

4. Learned counsel would submit that admittedly the petitioner is not released on parole or furlough on at least two

occasions prior to moving the application for release on emergency (Covid-19) parole. This is one of the ground for rejection of the application.

5. Learned counsel for the petitioner would further submit that the petitioner has undergone 6 years and 9 months of actual imprisonment and including remission he has undergone 8 years of imprisonment, thus, has undergone his substantial part of sentence and his conduct in jail is good.

6. Learned counsel invited our attention to the impugned order dated 31/8/2020 as regards the second ground on which the application is rejected by the competent authority which is that as the petitioner has been convicted under the provisions of the POCSO Act and sentenced to suffer imprisonment for a term exceeding 7 years, he is not eligible for the benefit of the State Government Notification dated 8/5/2020. Inviting our attention to the Notification dated 8/5/2020, the learned counsel would submit that the said Notification nowhere stipulates that the conviction of more than 7 years imprisonment under the POCSO Act is an impediment to deprive the petitioner benefit of emergency (Covid-19) parole. In support of his submission, learned counsel for the petitioner relied upon the decision of this

Court in the case of **Kalyan s/o. Bansidharrao Renge Vs. The State of Maharashtra & anr.**¹ to contend that even in respect of a conviction by a trial Court for the offence punishable under Section 376 (2) (g) of the IPC where a sentence of 10 years of Rigorous Imprisonment has been awarded, this Court directed release of the convict on emergency parole of 45 days.

7. Learned counsel also relied upon the decision of this Court in **Vijendra Malaram Ranwa vs. State of Maharashtra & anr.**² to contend that though the petitioner – convict therein was convicted for the offences punishable under Section 6,10,12 of the POCSO Act, considering the language of proviso of Rule 19 (1) (C) of the “The Maharashtra Prisons (Mumbai Furlough and Parole (Amendment) Rules, 2020 (hereinafter called as “the said Rules” for short) and particularly in view of the fact that the offence under POCSO Act is not mentioned in the proviso as a bar for grant of parole, this Court directed the release of the petitioner on parole. He, therefore, would submit that the issue is no more *res-integra* and therefore, there cannot be an impediment for releasing the petitioner on parole only because he is convicted for the offences punishable under the POCSO Act.

1 Criminal Writ Petition No.ASDB-LD-VC-265/2020

2 Criminal LD-VC Writ Petition no. 112/2020-Nagpur Bench

8. The learned APP on the other hand would submit that the petitioner having been convicted for serious offences under the POCSO Act which is a Special Act within the meaning of the proviso of Rule 19 (1) (C) of the said Rules, the petitioner is not entitled to the relief of emergency parole.

9. After the matter was argued on the last date, we came across the following decisions rendered by this Court which in our opinion have an important bearing on the controversy involved in the present case viz. (i) **National Alliance for People's Movements vs. The State of Maharashtra & ors.**³, (ii) **Sardar s/o. Shawali Khan vs. The State of Maharashtra & anr.**⁴ and (iii) **Shubham s/o. Devidas Gajbhare vs. The State of Maharashtra**⁵.

10. When the matter was listed today, we brought to the notice of learned counsel for petitioner the decision of this Court in the case of **Subham s/o. Devidas Gajbhare**. Learned counsel for the petitioner had himself appeared in the case of **Subham s/o. Devidas Gajbhare**. This Court considered the provisions of Rule 4(21) of the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959 which shows that when there is a conviction for

3 PIL-CJ-LD-VC-NO.44/2020

4 Criminal Writ Petition No.520/2020 (Aurangabad Bench)

5 Criminal Writ Petition No. 1135/2020 (Aurangabad Bench)

sexual offences against minor then benefit of furlough cannot be given to such a prisoner. This Court considered the guidelines dated 11th May, 2020 of the High Powered Committee wherein it has been advised not to give benefit of emergency (Covid-19) parole when conviction is for the offence punishable under Section 366(A) and also under Section 376 of the IPC. It is observed that in Rule 4(12), rape is also covered and so such convict is not entitled to get benefit of the parole and furlough. We find that the issue involved in **Subham s/o. Devidas Gajbhare**'s case is similar to the one in the present case. As learned counsel for the petitioner had appeared in **Subham s/o. Devidas Gajbhare**'s case which was decided as recently as on 13th October, 2020, following the best practices of the Bar, we would have expected the Counsel for the petitioner to have brought this decision to our notice though the same is adverse to the petitioner's cause. Learned counsel for the petitioner has tendered apology for the same. Be that as it may, we proceed to deal with the issue in the light of the decisions above stated.

11. The Government of Maharashtra made the rules called "The Maharashtra Prisons (Mumbai Furlough and Parole (Amendment) Rules, 2020 thereby amending sub-Rule (1) of Rule 19 of the Maharashtra Prisons (Mumbai Furlough and Parole)

Rules, 1959. The following Clause was added after Clause (B) in sub-Rule (1) of Rule 19 of the said Rules as by way of an amendment :

“(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 favourable 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 ever 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”.

(emphasis supplied)

12. This Court in the case of **Vijendra Malaram Ranwa** (supra), considering the language of the proviso of the amended Rules and particularly in view of the fact that the offence under the POCSO Act is not mentioned in the proviso to Rule 19(1)(C) of the said Rules, was of the opinion that there should not be any impediment for releasing the petitioner on parole. It appears that the guidelines dated 11/5/2020 of the HPC were not placed for consideration before this Court when **Vijendra Malaram Ranwa** was decided.

13. Before we advert to the decision of this Court in the case of **National Alliance for People’s Movements**, it would be

pertinent to consider the decision in the case of **Sardar s/o. Shawali Khan**. The petitioner – convict claimed the benefit of the Notification dated 8/5/2020 contending that the proviso would not cover the cases of the prisoners convicted for the offences under the provisions of the Terrorists and Disruptive Activities Act ('TADA' for short). In paragraph 5 it is held thus :-

“5. In the present matter, the petitioners are claiming the benefit of the Government Notification dated 8th May, 2020. In the said notification, there is a proviso and the said proviso is that the prisoners convicted for serious economic offences or bank scams or offences under Special Acts (other than Indian Penal Code) like MCOC, PMLA, MPID, NDPS, UAPA, etc. (which provide for additional restrictions on grant of bail in addition to those restriction available under the Criminal Procedure Code, 1973) and also presently to foreign nationals and prisoners having their place of residence out of the State of Maharashtra will not be entitled to get the benefit of this notification. Admittedly, the petitioners are the convicts under the provisions of TADA and they are sentenced to life imprisonment. Though specifically TADA is not mentioned in the notification, the Special Acts are mentioned in minutes of meeting of High Power Committee, dated 10th May, 2020. In the amendment to the Rule 4 of the Rules, in clause No.12, it is mentioned that prisoners, who are considered dangerous or have been involved in serious prison violence and who are convicted under Special Acts like Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS), rape, etc. are not entitled to get the benefit of Rule

4. Rule 4, which needs to be read with Rule 19 and it can be said that in Rule 4, initially there was no category like pandemic situation created by COVID-19 virus. Only due to Government Notification dated 8 th May, 2020, the prisoners can be considered for giving them emergency parole and such parole is subject to the condition mentioned in the notification itself. In view of this circumstance and aforesaid provisions, it cannot be said that vested right is given to the prisoners to get parole and some definite exceptions are created by the State. The words used in proviso are “ like and etc.”. Thus, the list of Special Acts given in the notification is not exhaustive and other special enactments which are similar in nature need to be considered and the authority has the power to say that TADA convict is also not entitled to get the benefit of Government Notification dated 8th May, 2020. For all these reasons, this Court hold that there is no need to interfere in the order made by the respondent. In the result, both the petitions stand dismissed.”

(emphasis supplied)

14. It is thus seen that the decision in **Vijendra Malaram Ranwa** (supra) was not placed for consideration of this Court when **‘Sardar s/o. Shawali Khan’** came to be decided.

15. Thereafter, in **Shubham s/o. Devidas Gajbhare** this Court had an occasion to consider whether the petitioner who was convicted for the offences punishable under Section 363,

366(A) and 376 of the IPC is entitled to the benefit of the emergency (Covid-19) parole. A reference was made to some cases decided by the Nagpur Bench in which relief of emergency parole was given even though there was conviction for the offence of rape. Their Lordships considering the guidelines of the High Powered Committee dated 11/5/2020 and in the light of the Rule 4 (21) of the said Rules were of the opinion that the petitioner was not entitled to the benefit of emergency (Covid-19) parole. We may reproduce the order passed in **Subham's** case which reads thus:

“The petition is filed to challenge the order made by the respondent by which emergency parole is refused to the petitioner. Though no specific ground is mentioned, in the column of offences for which which sentence is given, it is mentioned that he is convicted for offences punishable Under Sections 363, 366(A) and 376 of the Indian Penal Code. Last time, it was submitted by the learned Counsel by relying on the some cases decided by the Nagpur Bench of the Bombay High Court, in which relief of emergency parole was given even when there was conviction for offence of rape, the petitioner is entitled for emergency parole. This Court has already held that though the term used is ‘emergency parole’ in Notification dated 8th May 2020, the other conditions mentioned in it show that prisoner needs to complete the term during which he could have availed either parole or furlough at least on two occasions. Furlough can be availed only when prisoner

completes jail term of three years.

In view of the nature of conditions imposed in Notification dated 8th May 2020, the Rules of Parole and Furlough need to be seen for consideration of emergency parole under the Notification dated 8th May 2020. Rule 4(21) of the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959 shows that when there is conviction for Sexual Offences against minor then benefit of the furlough cannot be given to such a prisoner. Today, the learned Addl. Public Prosecutor produced on record the new guidelines given by the High Power Committee constituted for present purpose. The guidelines dated 11th May 2020 show that the Committee has advised not to give benefit when conviction is for offence punishable U/S. 366(A) and also U/S. 376 of I.P.C. In Rule 4(12), rape is also covered and so such convict is not entitled to get benefit of the parole and furlough. In view of these circumstances, this Court holds that no error can be found in the order made by the respondent. The writ petition stands dismissed.”

(emphasis supplied)

16. We may now refer to the decision of the Division Bench of this Court in **National Alliance for People’s Movements** (supra). Before Their Lordships lay a challenge to the exclusion of the prisoners convicted under the Special Acts from the benefit of release on emergency (Covid-19) parole in the context of the High Powered Committee guidelines in that, the decision will not apply to the convicts booked under TADA, MCOC, PMLA, MPID,

NDPS, POTA, UAPA, POCSO Act, etc. or prisoners convicted thereunder. After an elaborate examination whether the classification of the offences under the Special Acts satisfied the requirements of the reasonable classification, this Court in paragraphs 22, 23 and 24 held thus :

“22. For the purpose of examining whether the classification of offences under the Special Acts satisfies the requirement of reasonable classification, it is necessary to see the purposes for which some of such Special Acts were enacted.

(i) The MCOC Act was enacted to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang.

(ii) The TADA was enacted to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities.

(iii) The POTA was enacted to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith.

(iv) The UAPA was enacted to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities.

(v) The PMLA was enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering. Section 3 thereof provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the

proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

(vi) The Explosive Substances Act inter alia provides punishment for causing or attempt to cause explosion likely to endanger life or property. The explosive substance/ special category explosive substance mentioned in the said enactment includes RDX, PETN, HMX, TNT, NTP, CE etc.

(vii) The Anti-Hijacking Act, 2016 was enacted for dealing with the unlawful acts of seizure or exercise of control of aircraft which jeopardize safety of persons and property.

(viii) The NDPS Act was enacted to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances to provide for the forfeiture of property derived from, or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith.

(ix) The MPID Act was enacted to protect the interest of depositors in the Financial Establishments and matter relating thereto.

(x) The POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

23. We have set out herein above the purpose for which the said Special Acts were enacted as the same clearly

justifies their classification as category to which the benefit of the emergency bail/parole is denied, as done by the HPC. These offences are totally different from offences punishable under the IPC, and commission of the said offences affects the entire nation.

24. It is true that acts of commission/omission amounting to crime in terms of the extant laws are regarded as offences against the society; however, it is to be noted that the offences under Special Acts like MCOC Act, TADA, POTA, UAPA, PMLA, Explosive Substances Act, Anti Hijacking Act etc. all are against the nation and affects the very foundation of the State. Offences, which are sought to be checked by these Special Acts, cripple the economy of the State as well as the nation and affect the economic interest of the citizens. The said Special Acts excluded by the HPC from giving benefit from the emergency parole/bail are enactments relating to terrorist activities, relating to economic offences, socio-economic offences, crimes against women and children etc. The purposes for which the said Special Enactments were enacted as set out hereinabove clearly shows that the nature of offence and severity of the offence contemplated by these special enactments is totally different from the IPC offences. The submission of Mr. Talekar that there are no special provisions made to deal with the bail applications for the offences falling under some of the Special Acts and the provisions of the Cr.P.C. are applicable, is not at all relevant aspect as what is contemplated by the Supreme Court is, classification of prisoners for giving benefit of emergency parole/bail inter alia on the basis of nature of offence

and/or severity of the offence. Therefore, the submission that the classification or the categorization of these offences separately from other offences and labelling them as not eligible for release on emergency bail/parole is contrary to the rights of prisoners guaranteed by Article 14, is without any substance.”

(emphasis supplied)

17. In a separate concurring opinion rendered by His Lordship The Chief Justice in '**National Alliance for People's Movements**', this Court noted the strong exception taken by the learned counsel for the petitioner to the HPC carving out certain offences which, according to it, would not qualify for interim bail and emergency parole during the pandemic as this determination is manifestly arbitrary, thus violating Article 14 of the Constitution, and contrary to tests of rationality and proportionality applied by the Supreme Court. This contention has been dealt with in paragraphs 4.4 and 4.5 which read thus :-

“4.4. The HPC while proceeding to comply with the orders of the Supreme Court, as of necessity, had to create groups ~ one group including classes of home inmates who could be considered for temporary release on bail/parole and the other, not entitled to such release ~ or else all the inmates of the correctional homes would have to be released in view of the pandemic. The intelligible differentia is provided by classification of alleged offenders charged with offences that could be characterised as anti-national ~ those aiming

to destabilize the economy of the country and/or forming a potential threat to the unity, integrity and sovereignty of the nation and/or by their criminal acts making themselves liable to be proceeded under the special enactments. In the opinion of the HPC, these inmates form part of the 'excepted category' who should continue to remain behind the bars despite the object of decongestion of correctional homes that the Supreme Court had in mind as well as to deny them the benefit of release looking at the object of prevention of activities directed towards causing economic loss, questioning and disrupting the sovereignty and territorial integrity of India and the nature of aggravated offence towards women and children. Manifestation of a fine balance is, thus, conspicuous by its presence.

4.5. To my mind, it could not have been and was never the intention of the Supreme Court that the pandemic notwithstanding, those awaiting trial because of their involvement in serious economic offences/socio-economic offences, offences aimed at subverting the unity, integrity and sovereignty of India, offences against women and children, etc. or those convicted for such offences should be temporarily released, ignoring the nature and the gravity of the offences with which they have either been charged or convicted. That is precisely the reason as to why the HPC was guided to bear in mind the nature of the offence and the severity of the offence. The order dated April 13, 2020 is eloquent that "certain prisoners" are to be released. In that view of the matter, the contention that unreasonable classification has been made is thoroughly misconceived."

(emphasis supplied by us)

18. The decision in **National Alliance for People's Movements'** was challenged before the Apex Court by way of **Special Leave Petition (Cri) No. 4116 of 2020** in the case of **National Alliance for People's Movements and others vs. State of Maharashtra & others**⁶. The Apex Court by its judgment dated 22nd September, 2020 dismissed the Petition with observation that the petitioners are at liberty to submit representation to the HPC which would look into the same and arrive at a conclusion at its discretion depending on the need or otherwise to modify its guidelines.

19. We are of the opinion that the decision rendered in the case of **National Alliance for People's Movements** (supra) has an important bearing on the issue raised in this Petition. We also notice that there is an apparent conflict in the decision rendered by the Division Bench in **Vijendra Malaram Ranwa's** case and the one decided by the Co-ordinate Bench in the case of **'Sardar s/o. Shawali Khan'**. Like the 'TADA', 'POCSO' is a Special Act. In **'Vijendra Malaram Ranwa's** case it is held that as the offence under POCSO Act is not mentioned in the proviso which bars for grant of parole, the petitioner is entitled for release on emergency parole. However, in **'Sardar s/o. Shawali**

6 2020 SCC Online SC 763

Khan' this Court was of the opinion that the words used in proviso are "like and etc.", thus, the list of Special Acts given in the Notification is not exhaustive and other special enactments which are similar in nature needs to be considered and the authority has the power to say that TADA convict is also not entitled to get the benefit of Government Notification dated 8th May, 2020.

20. It is thus seen that the POCSO Act too is a Special Act like TADA. The decision in '**National Alliance for People's Movements'** has already stated the purpose for which the Special Acts were enacted. In Clause (x) of the paragraph 22 it is mentioned that the POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. The purpose for which TADA was enacted as the Special Act is also discussed.

21. No doubt, '**Vijendra Malaram Ranwa's'** case dealt with the offences punishable under POCSO Act whereas '**Sardar s/o. Shawali Khan'** dealt with offences punishable under TADA. Both being special Acts, we find conflicting decisions in '**Vijendra**

Malaram Ranwa' & 'Sardar s/o. Shawali Khan'. In view of this conflict, a reference of the present Petition to a Full Bench is necessitated. The issue 'whether a prisoner convicted under the Special Act viz. POCSO Act is eligible to be released on emergency (Covid-19) parole in terms of Rule 19 (1) (C) of the said Rules', in our opinion, needs to be authoritatively settled in view of the difference of opinion. The office to place the matter before the Hon'ble Chief Justice on the administrative side.

22. This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(M.S.KARNIK, J.)

(S.S.SHINDE, J.)