IN THE HIGH COURT OF ORISSA AT CUTTACK

WPCRL No.72 of 2023

Durga Prasad Jena … **Petitioner**

Mr. Samvit Mohanty, Advocate.

-versus-

State of Odisha & others …. **Opp. Parties.**

Mrs. Saswata Patnaik,
Addl. Government Advocate.

CORAM:
JUSTICE S.K. SAHOO
JUSTICE CHITTARANJAN DASH

ORDER
07.11.2023

Order No.

09. This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Heard learned counsel for the petitioner and learned counsel for the State.

This writ petition in the nature of habeas corpus has been filed by the petitioner Durga Prasad Jena for passing appropriate order/direction to release him from illegal confinement by declaring that the period of special parole to be treated as period of custody.

It is the case of the petitioner that in connection with Bhograi P.S. Case No.144 dated 08.10.2015 registered under sections 376(2)(d)(i)/323/109 of the Indian Penal Code and section 4 of the POCSO Act, the petitioner was taken into judicial custody on 11.10.2015 and he was directed to be released on bail on 23.05.2017. The learned trial Court, i.e., Additional Sessions Judge –

cum- Special Judge, Balasore in Special Case No.245 of 2015 charged the appellant under sections 376(2)(d)(i)/506 of the I.P.C. and section 4 of the POCSO Act and vide impugned judgment and order dated 30.01.2018 has been pleased to hold the appellant guilty under the offences charged and sentenced him to R.I. for a period of three years and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo further R.I. for a period of three months for the offence under section 506 of the I.P.C., to undergo R.I. for a period of ten years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default to undergo further R.I. for a period of six months for the offence under section 376(2)(d)(i) of the I.P.C. and in view of section 42 of the POCSO Act, no separate sentence has been awarded for the offence under section 4 of the POCSO Act.

The petitioner challenged the impugned judgment and order passed by the learned trial Court before this Court in CRLA No.105 of 2018 and the same was disposed of on 12.10.2022 and this Court set aside the conviction of the appellant under section 376(2)(d)(i) of the I.P.C. and section 4 of the POCSO Act instead convicted him under section 10 of the POCSO Act and his conviction under section 506 of the I.P.C. was also confirmed and the petitioner was sentenced to undergo R.I. for a period of six years and to pay a fine of Rs.10,000/- (rupees ten thousand), in default to undergo further R.I. for a period of three months for the offence under section 10 of the POCSO Act and to undergo R.I. for a period of one year and to pay a fine of Rs.5,000/- (rupees five thousand), in

default, to undergo further R.I. for a period of two months for the offence under section 506 of the I.P.C. and the substantive sentences were directed to run concurrently.

This Court further observed, after verification of the Court records and after hearing learned counsel for the respective parties that since the petitioner was taken into judicial custody on 11.10.2015 and he was directed to be released on bail on 25.03.2017 and after pronouncement of the judgment by the learned trial Court, he was again taken into judicial custody on 30.01.2018 and since then he is in judicial custody and as such has remained in judicial custody for more than six years. However, this Court further observed that the period of detention already undergone by the petitioner either during trial or pendency of the appeal should be set off against the terms of imprisonment as imposed above under section 428 of the Cr.P.C.

Learned counsel for the petitioner submitted that the petitioner was released on special parole on 20.06.2021 on account of outbreak of the COVID-19 pandemic and at the time of pronouncement of the judgment by this Court in CRLA No.105 of 2018 on 12.10.2022, the said fact was not brought to the notice of this Court. However, since this Court has already observed that the petitioner has remained in judicial custody for more than six years and the State has not filed any application for correction of that portion of the order, the petitioner cannot be taken into custody even though he has not actually undergone the sentence period as imposed by this Court as per the judgment passed in

CRLA No.105 of 2018. Learned counsel for the petitioner further submitted that the petitioner was taken into judicial custody on 31.03.2023 in spite of the observation passed in the criminal appeal filed by the petitioner and therefore, the same is illegal and the petitioner should be immediately released from illegal confinement by declaring that the period of special parole be treated as period of custody.

Learned Additional Government Advocate on the other hand submitted that while adjudicating the criminal appeal by this Court, it was not brought to the notice of this Court by either side that the petitioner has been released on special parole on 02.06.2021 and this Court, after going through the records, found that since the petitioner has not been released on bail by the appellate Court, made the observation that he has remained in custody for more than six years. In fact, the petitioner had not remained in judicial custody for more than six years. However, since the observation of this Court is very clear in the subsequent paragraph that the period of detention already undergone by the petitioner either during trial or pendency of the appeal shall be set off against the terms of imprisonment as imposed under section 428 of the Cr.P.C. and the petitioner has not undergone six years of substantive sentence as imposed by this Court in the criminal appeal, rightly he was taken into judicial custody again on 31.03.2023 to serve out the remaining part of the sentence. Therefore, it cannot be said that the petitioner is illegally confined and as such no relief can be granted to the petitioner. Learned counsel for

the State relied upon the decision of the Supreme Court in the cases of **Anil Kumar -Vrs.- State of Haryana & others reported in (2023) Supreme Court Cases OnLine SC 334** and **Rohan Dhungat and others -Vrs.- The State of Goa and others reported in (2023) Supreme Court Cases OnLine SC 16.**

In the case of **Anil Kumar** (supra), the Supreme Court has held as follows:

> "13. At this stage, it is required to be noted that vires of Section 3(3) of the Act, 1988 was challenged before this Court and by judgment and order passed in Avtar Singh (supra), this Court has upheld the vires of Section 3(3) of the Act, 1988.
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> 14. Subsequently, in the case of Mohinder Singh (supra), this Court has specifically observed and held that the period of parole shall not be counted towards the total period of sentence. It is observed and held that when a prisoner is on parole his period of release does not count towards the total period of sentence."

In the case of **Rohan Dhungat** (supra), the Supreme Court has held as follows:

> "18. If the submission on behalf of the prisoners that the period of parole is to be included while considering 14 years of actual imprisonment is accepted, in that case, any prisoner who may be influential may get the parole for number of times as there is no restrictions and it can be granted number of times and if the submission on behalf of the prisoners is accepted, it may defeat the very object and purpose of actual imprisonment. We are of the firm view that for the purpose of considering actual imprisonment, the period of parole is to be excluded. We are in

complete agreement with the view taken by the High Court holding so."

Therefore, in view of the settled position of law, the special parole period, which was granted in favour of the petitioner on account of COVID-19 pandemic cannot be taken into account for determining the actual period of imprisonment. There is no dispute that the said fact was not brought to this Court while adjudicating the criminal appeal and since this Court has already made the observation that the period of detention already undergone by the petitioner either during trial or pendency of the trial be set off against the terms of imprisonment imposed section 428 of the Cr.P.C. and since the petitioner has not undergone the substantive sentence of six years as imposed by this Court after modifying the order of the learned trial Court, rightly the petitioner was taken into judicial custody on 31.03.2023 to serve out the remaining part of the sentence.

Accordingly, the contention of the learned counsel for the petitioner that there has been illegal confinement is not acceptable and in view of the state of affairs, we find no merits in the WPCRL, which is accordingly dismissed.

(S.K. Sahoo)
Judge

(Chittaranjan Dash)
Judge