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THE HIGH COURT OF MADHYA PRADESH: JABALPUR

(Division Bench)

WP No.9320/2021

(IN REFERENCE (SUO MOTU) Vs THE STATE OF MADHYA PRADESH AND OTHERS)

With

WP No.8391/2020

(MADHURI KRISHNASWAMI Vs THE STATE OF MADHYA PRADESH AND OTHERS)

Coram:

Hon'ble Mr. Justice Mohammad Rafiq, Chief Justice
Hon'ble Mr. Justice Atul Sreedharan, Judge

Presence :

Mr. Sankalp Kochar, Advocate appeared as *Amicus Curiae* in W.P. No.9320/2021.

Mr. Chander Uday Singh, Senior Advocate with Mr. Bhavil Pandey, Ms. Nikita Sonwane and Ms. Aditi Pradhan, Advocates for the petitioner in W.P. No.8391/2020.

Mr. Pushendra Yadav, Additional Advocate General for the respondent-State along with Mr. Arvind Kumar, Director General of Prisons and Mr. Sanjay Pandey, Deputy Inspector General of Jails.

Mrs. Giribala Singh, Member Secretary, M.P. State Legal Services Authority, Jabalpur.

Whether approved for reporting: **Yes**

Heard through Video Conferencing.

ORDER (Oral)

(17.05.2021)

Per: Mohammad Rafiq, Chief Justice:

This Court on 07.05.2021, taking into consideration the circumstances prevailing in the State following the second wave of

Covid-19 pandemic, had taken *suo motu* cognizance of the overcrowded jails in the State of Madhya Pradesh and passed certain orders. On the same date, the Supreme Court also in continuation with its earlier order in **Re: Contagion of Covid-19 Virus in Prisons Suo Moto Writ Petition (Civil) No.1/2020**, passed a fresh order directing *inter alia* that the High Powered Committees constituted by the State Governments shall consider release of prisoners by adopting the guidelines followed by them last year, at the earliest and further directed that all those inmates, who were granted parole in pursuance to the earlier order of the Supreme Court, should be again released on parole for a period of 90 days in order to tide over the pandemic. This Court on 10.05.2021, on the submissions made given by the learned *Amicus Curiae*, learned Advocate General and the Director General of Prisons, had passed the following order:-

“15. Having heard the learned *Amicus Curiae* and the learned Additional Advocate General, this Court, in view of extraordinary situation prevailing in the State, deems it appropriate to direct the respondents to place before the High Powered Committee the following suggestions given by both the Director General of Prisons and the learned *Amicus Curiae*:

I. For convicted prisoners:

The jail authorities should consider granting emergent parole, of atleast 90 days, on usual conditions to the following categories of prisoners:

- i. All male prisoners, who are more than 60 years of age;
- ii. All female prisoners, who are more than 45 years of age;

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- iii. All female prisoners, regardless of their age, who are lodged in jail alongwith with their minor children;
- iv. All female prisoners who are carrying pregnancy of whatever duration;
- v. All prisoners on the basis of medical certification found to be suffering from cancer, serious heart ailments such as having: (i) undergone bypass surgery, (ii) valve replacement surgery, (iii) HIV, (iv) Cancer, (v) Chronic Kidney Dysfunction (UTPs requiring Dialysis), (vi) Hepatitis B or C, (vii) Asthma, (viii) Tuberculoses and (ix) disablement of body to the extent of 40% or more;

II. For under-trial prisoners:

- i. The Superintendent of the concerned Jail, should, in respect of those under-trial prisoners, who are facing trial for the offence punishable up to maximum of seven years, with or without fine, obtain their applications for interim bail and forward the same to the District and Session Judge concerned, who shall have the same considered and decided within four days for their release on temporary bail for atleast a period of 90 days, on execution of bail bond and surety, as may be deemed appropriate;
- ii. The Superintendent of Jail, should in respect of those under-trial prisoners, who are covered by the SOP issued by the National Legal Services Authority in December, 2018, obtain their applications for grant of interim bail and similarly forward the same to the District and Session Judge concerned, who shall have the same considered and decided within four days for their release on temporary bail for atleast a period of 90 days, on execution of bail bond and surety, as may be deemed appropriate. In this regard, the assistance of

the District Legal Services Authority may be taken if necessary;

- iii. The following category of under-trial prisoners, may not however be considered for release on interim/temporary bail:-
 - a. those under trial prisoners, who are now in custody for an offence committed by them during the period of interim bail earlier granted to them; and
 - b. those under trial prisoners, who were granted interim bail on the basis of criteria adopted earlier but failed to surrender in time in terms of the bail order and were taken in custody, pursuant to execution of non-bailable warrant.

The meeting of the High Powered Committee for this purpose be convened on 12.05.2021 at the time fixed by the Executive Chairman of the M.P. State Legal Services Authority, either by physical or virtual mode, as may be deemed possible.”

2. Mr. Chander Uday Singh, learned Senior Counsel and Mr. Sankalp Kochar, learned *Amicus Curiae*, have submitted that despite recommendations of the High Powered Committee in its recent meeting held on 12.05.2021, the number of prisoners lodged in different jails of the State of Madhya Pradesh, which was 45,582 on 07.05.2021, as against their total capacity of 28,675, is not going to be substantially reduced. Therefore, the desired object of decongesting the jails may not be achieved. They both suggested that the High Powered Committee ought to consider recommending release of all such convicts on parole, who have either served out one-third of the substantive sentence awarded to them or if sentenced to life imprisonment, have completed incarceration of seven years or more.

Additionally, the learned Senior Counsel and learned *Amicus Curiae* suggested that the High Powered Committee ought to also consider recommending release of all such under-trial prisoners on interim bail, who are facing trial for offences exclusively triable by the Court of Magistrate regardless of the outer limit of the sentence. Third suggestion given by them is that the High Powered Committee should also consider recommending release of all women prisoners, both convicts and under-trial, regardless of the offence for which they have been convicted and the sentence awarded to them or the maximum sentence that may be awarded to them upon conviction.

3. Learned Additional Advocate General and the Director General of Prisons have submitted that they will collate the data under all these three categories and provide the same to the High Powered Committee within a period of three days, for their consideration.

4. The Member Secretary, M.P. State Legal Services Authority, Jabalpur submitted that soon after the receipt of the data covering the aforesaid three categories, request will be made to the Executive Chairman of the M.P. State Legal Services Authority to hold the meeting of the High Powered Committee, for their consideration.

5. The High Powered Committee upon production of necessary data before it, shall in its wisdom, consider the suggestions objectively and shall make its recommendation with or without any modification/conditions, as it may deem fit.

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6. Mr. Chander Uday Singh, learned Senior Counsel and Mr. Sankalp Kochar, learned *Amicus Curiae*, have submitted that despite direction issued by the Supreme Court in **Arnesh Kumar vs. State of Bihar and another (2014) 8 SCC 273**, the police in the State is not following the guidelines given in paras 8.1 to 8.4 and paras 11.1 to 11.8 of the said judgment. This explains why there was an enormous increase of approximately 8,000 under-trial prisoners in different jails of the State during the period of lockdown even after release of about 7,500 prisoners-convicts on parole and UTPs on interim bail, pursuant to earlier order passed by the Supreme Court on 23.03.2020.

7. Mr. Pushpendra Yadav, learned Additional Advocate General submitted that steps are being taken to release convicts on parole as per the recent recommendation of the High Powered Committee. As regards UTPs, applications have been moved before the concerned Courts and orders for grant of interim bail to them are likely to be passed shortly. On the question of compliance of directions of the Supreme Court in **Arnesh Kumar (supra)**, learned Additional Advocate General submitted that he will have to seek instructions in the matter to find out whether the Director General of Police has issued general instructions to all the police stations to adhere to the mandatory guidelines issued by the Supreme Court in paras 8.1 to 8.4 and paras 11.1 to 11.8 of its decision in **Arnesh Kumar (supra)**.

8. The Supreme Court in **Arnesh Kumar (supra)** categorically observed that the law mandates that the police officer, before making

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arrest of an accused, against whom a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, should record his satisfaction as mandated by Section 41 of the Code of Criminal Procedure (for short the “Code”) that his arrest is necessary (i) to prevent such person from committing any further offence; (ii) for proper investigation of the offence; (iii) to prevent such person from causing the evidence of the offence to disappear or tampering with evidence; (iv) to prevent such person from making any inducement, threat or promise to any witness from disclosing facts to the court or to the police officer & (v) and that unless such person is arrested, his presence in the court when required cannot be secured. The Supreme Court therefore observed that before a Magistrate authorizes detention under Section 167 of the Code, he has to be first satisfied that the arrest made is legal and in accordance with law and all the constitutional rights of the person arrested have been safeguarded. If in his opinion, the arrest does not satisfy the requirements of Section 41 of the Code, the Magistrate is duty-bound not to authorize his further detention and release the accused after recording his own satisfaction which shall never be based on the ipse dixit of the police officer. The Supreme Court further highlighted the importance of Section 41-A of the Code which was inserted by Section 6 of the Code of Criminal Procedure (Amendment) Act, 2008 (No.5 of 2009) providing that in all cases where the arrest of a person is not required as per Section 41(1) of the Code, the police officer is

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required to issue notice directing the accused person to appear before him at specific place and time. If such accused complies with the terms of notice, the law further mandates that he shall not be arrested, unless the reasons are recorded by the police officer that the arrest is necessary. At this stage also the condition precedent for causing arrest, as envisaged in Section 41 of the Code, has to be complied with, which shall be subject to the same scrutiny by the Magistrate as aforesaid. The Supreme Court deprecated the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 of the Code for effecting arrest. The Supreme Court observed that it seems that police has not learnt its lesson; the lesson implicit and embodied in the Code and is persisting with its colonial approach despite six decades of independence, as the power of arrest is being used as a tool of harassment and oppression of the citizen, which is “one of the lucrative sources of police corruption”. All these directions issued by the Supreme Court were intended to put a check on the arbitrary power of police in mechanically arresting a citizen accused of committing offences of rather lesser gravity, either without adequate sensitivity or with oblique motive.

9. In view of what has been noticed above, we direct the Director General of Police to immediately issue fresh direction to all the Police Stations in the State to adhere to the guidelines issued by the Supreme Court in **Arnesh Kumar (supra)** in letter and spirit. We also direct that all the Judicial Magistrates, upon the accused being produced before them by the police for authorizing further detention, shall

mandatorily examine whether or not stipulations contained in both Sections 41 and 41A of the Code, have been followed and if, for reasons to be recorded in writing, the Judicial Magistrate concerned is satisfied that mandate of both or any of those provisions, has not been complied with by the police, he/she shall refuse to authorize further detention of the accused and shall direct immediate release of the accused. Even otherwise, if any arrest has been made without adherence to the aforesaid guidelines, the accused concerned would be entitled to directly apply to the court of competent jurisdiction for his regular bail on this ground alone.

10. We direct the Registrar General of the High Court to again circulate the copy of the judgment of the Supreme Court in **Arnesh Kumar (supra)** alongwith copy of this order to all the District Judges of the State, for being served upon the Judicial Magistrates in their respective judgeships. We also require the Director of the State Judicial Academy to organize online/virtual programme, in a cluster of districts or division-wise, in batches, for sensitizing, not only the Judicial Magistrates but also the police officers, in tandem with the M.P. Police Academy. The Director of the M.P. Police Academy shall in this connection coordinate with the Director of State Judicial Academy to work out the modalities for sensitizing the police officers of the State. The Director General of Police shall also be responsible for compliance of this direction.

11. Learned Senior Counsel and learned *Amicus Curiae* also invited attention of this Court to the order passed by the Supreme Court on 03.04.2020 in ***Suo Motu Writ Petition (Civil) No.4 of 2020 (In Re Contagion of Covid 19 Virus in Children Protection Homes)*** whereby all the Juvenile Justice Boards (JJB) and Children's Courts were directed to proactively consider whether a child or children should be kept in the Child Care Institutions considering the best interest, health and safety concerns, which also included a direction that for the children alleged to be in conflict with law, residing in Observation Homes, the Juvenile Justice Boards shall consider taking steps to release them on bail, unless there are clear and valid reasons for the application of the proviso to Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short "the JJ Act").

12. We direct the Member Secretary of the M.P. State Legal Services Authority, Jabalpur to require the Member Secretaries of the respective District Legal Services Authorities to move an appropriate application through their Legal Aid Counsels before the respective Juvenile Justice Boards on behalf of the children in conflict with law, for their release from Observation Homes across the State, who shall consider the application and decide the same within a period of three days from the date of its filing in the light of the observations made by the Supreme Court in the aforesaid order dated 03.04.2020 passed in ***Suo Motu Writ Petition (Civil) No.4 of 2020 (supra)***, especially, taking into consideration the proviso to Section 12 of the JJ Act.

13. Let a copy of this order be forwarded to the Director General of Police, State of M.P., Bhopal; Director General of Prisons, Bhopal; Member Secretary, M.P. State Legal Services Authority, Jabalpur; Director, M.P. State Judicial Academy, Jabalpur; Director, M.P. Police Academy, Bhopal and the Registrar General of M.P. High Court, Jabalpur for necessary action.

Matters to come up on **31.05.2021**.

(Mohammad Rafiq)
Chief Justice

(Atul Sreedharan)
Vacation Judge

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