

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: April 12, 2021

Decided on: 6th July 2021

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W.P.(CRL.) 798/2021

VIRENDER

..... Petitioner

Represented by: Ms.Manika Tripathy Pandey,
Advocate.

versus

STATE (GNCT) OF DELHI

..... Respondent

Represented by: Mr.Ranbir Singh Kundu, Additional
Standing Counsel for State and
Mr.Piyush Singhal, Advocate with
Mr.Sandeep Goel, Director General
(Prisons), Tihar (through video
conferencing).

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By this petition, the petitioner seeks a writ of mandamus directing the respondent to release the petitioner forthwith in view of completion of his substantive sentence as well as sentence in default of payment of fine.
2. The petitioner was convicted for offences punishable under Section 363 IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012 (in short, 'POCSO Act') vide the judgment dated 24th October, 2019 and sentenced to undergo rigorous imprisonment for 7 years and a fine of ₹50,000/-, in default whereof, to undergo simple imprisonment for 2 months for offence punishable under Section 4 of the POCSO Act and rigorous

imprisonment for a period of 1 year for offence punishable under Section 363 IPC vide order dated 25th October, 2019.

3. The petitioner was in custody when due to Covid-19, the Delhi Government issued a notification dated 23rd March, 2020, constituting a High Powered Committee which decided to release prisoners on emergency parole and pursuant thereof, the petitioner was released on emergency parole for a period of eight weeks on 22nd August, 2020 which was continued from time to time. Vide the order of the Home Department, Govt. of NCT dated 8th January, 2021, all convicts released on emergency parole were directed to surrender to custody as the emergency parole was not extended further. Thus the petitioner surrendered on 21st February, 2021. As per the petitioner, since the notification of the Govt. of NCT releasing the prisoners on emergency parole noted that the period of parole will be counted as period undergone, petitioner's substantive sentence completed on 27th December, 2020 and since the petitioner was on emergency parole thereafter also, according to the petitioner, he was undergoing sentence in default of payment of fine and when the petitioner surrendered on 21st February, 2021, he had undergone substantial sentence in default of fine and he ought to have been released on 27th February, 2021 having undergone simple imprisonment for a period of 2 months in default of payment of fine as well. Since the Superintendent, Tihar Jail failed to release the petitioner on 28th February, 2021, the petitioner preferred the present petition which was got drafted on 10th March, 2021. However, the Superintendent Jail took his own time and kept the petition pending which was finally listed before this Court on 9th April, 2021 when this Court issued notice to the Director General (Prisons) and also sought his presence through video conferencing.

4. Grievance of the petitioner in the present petition is two-fold. Firstly; that his petition challenging the inaction of the Superintendent Jail was not got listed and deliberately kept back by the Superintendent jail so as to frustrate the filing of the petition and Secondly; since the petitioner had undergone substantial sentence in default of payment of fine as well while on emergency parole, the petitioner ought to have been released on 28th February, 2021 immediately after his surrender. The petitioner also has a grievance that though every jail petition, as per the Rules, is required to be accompanied by the nominal roll, the present petition was not even accompanied by the nominal roll.

5. A reply affidavit has been filed by the Director General (Prisons), Tihar as also the nominal roll of the petitioner. At the outset, the Director General (Prisons) states that when the petition was filed by the petitioner claiming that he was entitled to be released, the Superintendent Jail looked into the petition and found that there was no application made in this regard to the Prison Department and before forwarding the petition to this Court, desired to look into the matter at his own level so that if there was any error, the same could be rectified and in this regard, also took legal opinion. After the legal opinion was received that the in default sentence cannot be said to have been undergone, the present petition was forwarded to this Court.

6. From the affidavit filed, it is evident that though there was no mala fide in not forwarding the petition to this Court immediately, however, there was certainly an error on the part of the Superintendent Jail who could not have kept the petition pending with him and ought to have filed the same as expeditiously as possible so that the petitioner's grievance could be redressed. As regards the nominal roll is concerned, the Jail Superintendents

are directed to be careful and will ensure that all petitions sent to this Court are duly accompanied by the copy of the nominal roll of the petitioner/applicant. Thus, the only issue which needs consideration in the present petition is whether the period spent by the petitioner on emergency parole outside can be counted not only towards the substantive sentence undergone but also towards the sentence undergone in default of payment of fine.

8. Learned counsel for the petitioner relies upon the decision in Santosh Manohar Deshmukh Vs. State of Maharashtra and Anr. CrI. Writ Petition Stamp No. 1690 of 2020 decided on 15th September, 2020, wherein, the Bombay High Court held that the imprisonment required to be undergone in default of payment of fine is a penalty incurred for non-payment of fine and cannot be said to be a sentence imposed under MCOCA. Considering the fact that the petitioner therein was unable to pay fine and his family was pushed to abject poverty during his incarceration; forcing his mother to do manual labour, the Court held that the petitioner has already undergone 14 years of substantive sentence and also almost 4 years 8 months' imprisonment in default of payment of fine and thus, in the interest of justice, deemed it appropriate to issue directions to the respondents therein to consider releasing of the petitioner therein on Covid parole on filing of a formal application initially for a period of 45 days in terms of the decision of the High Powered Committee.

9. Learned counsel for the respondent, however, relying upon the Proviso to Sub-Section 5 of Section 432 CrPC contends that no remission can be granted in case the prisoner is undergoing sentence in default of payment of fine and hence, the emergency parole granted to the petitioner

being akin to a remission, the petitioner could have utilized the said period only to undergo the substantive sentence and not against the sentence in default of payment of fine. Reliance is also placed on Chapter XVIII of the Delhi Prison Rules, 2018 which came into force on 1st January, 2019 dealing with the Remissions and also on Explanations to Rules 730, 756, 1176 and 1185 of the Delhi Prison Rules, 2018. It is stated that since the petitioner was not entitled to any remission while undergoing the sentence in default of payment of fine, the period on emergency parole cannot be counted as undergoing the in default sentence.

10. Before proceeding further, it would be appropriate to note the notification of the Home Department, Govt. of NCT of Delhi dated 27th March, 2020 in F.No.18/191/2015/HG/1428-1438 pursuant where to the petitioner was released on emergency parole as under:-

‘Whereas, Hon’ble Supreme Court of India, vide its order dated 16.03.2020 in SMWP(C) No. 1/2020, has observed that there is an imminent need to take steps on an urgent basis to prevent the contagion of COVID-19 in our prisons:

2. And Whereas, Government. of National Capital Territory of Delhi has initiated various measures including the notification of Delhi Epidemic Disease COVID-1 9 Regulations 2020 under the Epidemic Disease Act 1897 for prevention and containment of Corona Virus pandemic;

3. Now, therefore, the Government of National Capital Territory of Delhi, keeping in mind the emergent situation of threat of COVID-19 epidemic in Delhi Prisons and in exercise of powers conferred under Rule 1212 A (inserted in the main Rules ,Vide gazette Notification No F.18/191/2015/HG/ 1379-1392 dated 23.03.2020) of the Delhi Prisons Rules 1018. has decided to grant upto eight weeks emergency parole, which shall be counted towards the sentence of the prisoners.

4. The Government. has further decided to constitute a committee, to screen and recommend the cases of grant of emergency parole to the convicts. The committee consist of:-

- | | |
|-------------------------|----------|
| 1. DG(prisons) | Chairman |
| 2. Spl Secretary (Home) | Member |
| 3. DIG(prisons) | Member |
| 4. ADM (West) | Member |
| 5. Suptd Prison HQ | Member |

5. The following categories of convicts would be considered for grant of emergency parole by the above committee :-

(1) All convicts who are presently outside the prison either on furlough or on parole:-

Such convicts who are out of prison on furlough/parole would be granted eight weeks of emergency parole. The remaining portion of their on-going furlough/parole would be treated as suspended/lapsed on grant of emergency parole. The prisoners would now be required to report back to their respective jail on expiry of the emergency parole . Intimation to all such convicts in this regard would be ensured by the prison authorities.

(2) All convicts who have availed parole/furlough in the past :-

Such convicts who have availed parole/ furlough in the past and have overall satisfactory conduct would be granted eight weeks of emergency parole on furnishing of personal bond.

(3) All convicts not falling under S No 1 or 2 above but otherwise eligible.

Such cases will also be considered by the Committee for appropriate orders.

B. Terms & conditions

1. All the convicts released on emergency parole will surrender themselves on expiry of the parole period as granted or on recall or any other condition as deemed fit.

2. All pending applications for grant of regular parole would be deemed to have been withdrawn in view of grant of emergency parole to the eligible convicts.

3. DG(Prisons) will cause to maintain a proper record of convicts released on emergency parole.

C. Delegation of Power :-

1. The powers to consider the cases for grant of emergency parole except those falling under Rule 1211 of the Delhi prison rules, 2018, on the recommendation of the committee constituted under para 4 is delegated to DG(prison) till 30.04.2020

D. Cases falling under Rule 1211 of JDelhi Prisons Rule

1. The cases of grant of emergency parole to the eligible convicts falling under Rule 1211, will be submitted to the Home Department , either individually or as a class, for appropriate orders.

Note : For the purposes of this order, it is hereby clarified that a 'satisfactory conduct' would mean that the convict has not indulged in any major misconduct during his incarceration in the last three years or during parole/ furlough in the past. Minor incidents of misconduct, if any, on the part of the convict may be ignored. However in exceptional cases, where the Superintendent feels that despite a major conduct on the part of the convict earlier, he has shown good signs of improvement and reformation in his behavior and his going out on emergency parole will not be detrimental to the interest of the society, he may recommend the name of such convict for grant of 'Emergency Parole to the DG (Prison)'.

11. It is thus evident that the Govt. of NCT of Delhi vide order dated 27th March, 2020, considering the emergent situation caused due to Covid-19 and in exercise of the powers conferred under Rule 1212A of the Delhi Prison Rules decided to release certain categories of prisoners on emergency parole and that the period of emergency parole shall be counted towards the sentence of the prisoners. This period of emergency parole was extended from time to time and the order granting extensions, noted that the period of emergency parole shall be counted towards the sentence of the prisoners.

12. Supreme Court in the decision reported as 2017 (15) SCC 55 Ashfaq vs. State of Rajasthan brought out the distinction between 'parole' and 'furlough' as under:

“10. In the first instance, it would be necessary to understand the meaning and purpose of grant of parole. It would be better understood when considered in contrast with furlough. These terms have been legally defined and judicially explained by the Courts from time to time.

11. There is a subtle distinction between parole and furlough. A parole can be defined as conditional release of prisoners i.e. an early release of a prisoner, conditional on good behaviour and regular reporting to the authorities for a set period of time. It can also be defined as a form of conditional pardon by which the convict is released before the expiration of his term. Thus, the parole is granted for good behaviour on the condition that parolee regularly reports to a supervising officer for a specified period. Such a release of the prisoner on parole can also be temporarily on some basic grounds. In that eventuality, it is to be treated as mere suspension of the sentence for time being, keeping the quantum of sentence intact. Release on parole is designed to afford some relief to the prisoners in certain specified exigencies. Such paroles are normally granted in certain situations some of which may be as follows:

- (i) a member of the prisoner's family has died or is seriously ill or the prisoner himself is seriously ill; or*
- (ii) the marriage of the prisoner himself, his son, daughter, grandson, grand-daughter, brother, sister, sister's son or daughter is to be celebrated; or*
- (iii) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation of his land or his father's undivided land actually in possession of the prisoner; or*
- (iv) it is desirable to do so for any other sufficient cause;*
- (v) parole can be granted only after a portion of sentence is already served;*
- (vi) if conditions of parole are not abided by the parolee he may be returned to serve his sentence in prison, such conditions may be such as those of committing a new offence; and*

(vii) parole may also be granted on the basis of aspects related to health of convict himself.

12. Many State Governments have formulated guidelines on parole in order to bring out objectivity in the decision making and to decide as to whether parole needs to be granted in a particular case or not. Such a decision in those cases is taken in accordance with the guidelines framed. Guidelines of some of the States stipulate two kinds of paroles, namely, custody parole and regular parole. 'Custody parole' is generally granted in emergent circumstances like:

- (i) death of a family member;
- (ii) marriage of a family member;
- (iii) serious illness of a family member; or
- (iv) any other emergent circumstances.

13. As far as 'regular parole' is concerned, it may be given in the following cases:

- (i) serious illness of a family member;
- (ii) critical conditions in the family on account of accident or death of a family member;
- (iii) marriage of any member of the family of the convict;
- (iv) delivery of a child by the wife of the convict if there is no other family member to take care of the spouse at home;
- (v) serious damage to life or property of the family of the convict including damage caused by natural calamities;
- (vi) to maintain family and social ties;
- (vii) to pursue the filing of a special leave petition before this Court against a judgment delivered by the High Court convicting or upholding the conviction, as the case may be.

14. Furlough, on the other hand, is a brief release from the prison. It is conditional and is given in case of long term imprisonment. The period of sentence spent on furlough by the prisoners need not be undergone by him as is done in the case of parole. Furlough is granted as a good conduct remission.

15. A convict, literally speaking, must remain in jail for the period of sentence or for rest of his life in case he is a life convict. It is in this context that his release from jail for a short period has to be considered as an opportunity afforded to him

not only to solve his personal and family problems but also to maintain his links with society. Convicts too must breathe fresh air for at least some time provided they maintain good conduct consistently during incarceration and show a tendency to reform themselves and become good citizens. Thus, redemption and rehabilitation of such prisoners for good of societies must receive due weightage while they are undergoing sentence of imprisonment.

16. This Court, through various pronouncements, has laid down the differences between parole and furlough, few of which are as under:

- (i) Both parole and furlough are conditional release.*
- (ii) Parole can be granted in case of short term imprisonment whereas in furlough it is granted in case of long term imprisonment.*
- (iii) Duration of parole extends to one month whereas in the case of furlough it extends to fourteen days maximum.*
- (iv) Parole is granted by Divisional Commissioner and furlough is granted by the Deputy Inspector General of Prisons.*
- (v) For parole, specific reason is required, whereas furlough is meant for breaking the monotony of imprisonment.*
- (vi) The term of imprisonment is not included in the computation of the term of parole, whereas it is vice versa in furlough.*
- (vii) Parole can be granted number of times whereas there is limitation in the case of furlough.*
- (viii) Since furlough is not granted for any particular reason, it can be denied in the interest of the society.”*

(Emphasis supplied)

13. Section 432 sub-section 5 Cr.P.C. reads as under:

“432 (5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with: Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen

years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.”

14. Relevant Rules of Delhi Prison Rules, 2018 read as under:

Rule 730. *"The period of imprisonment to be undergone shall be reckoned from the date on which the sentence is passed, except in cases which fall under sections 31, 426 and 427 of the Code of Criminal Procedure, 1973, where the directions of the Court shall be followed.*

Explanation: In the case of a prisoner sentenced to imprisonment in default of fine, the period of imprisonment shall be reckoned from the day on which he was rearrested for failing to pay the fine imposed.”

Rule 756. *Sentences awarded in default of payment of fine shall be calculated as follows:*

(i) Sentences imposed in default of payment of fines cannot run concurrently.

x x x x x x

(ix) A prisoner will not be given benefit of section 428 Cr.P.C. for the sentence in-lieu of fine. The sentence of fine shall not run concurrently with other sentences of fine.”

CHAPTER-XVIII

REMISSION

Rule 1169. *Without prejudice to the provisions of Article 72 of the Constitution of India and the Section 432 of the Code, remission can be earned under the provisions of the Delhi Prisons Act, 2000, on the prisoner fulfilling the conditions required hereinafter. However, Remission is a privilege to a prisoner cannot be claimed as a right.*

Rule 1170. *Remission is a concession, which can be granted*

by the Authorities as provided in these rules. The appropriate Government reserves the right to debar/withdraw any prisoner, or category of prisoners from the concession of remission. The remissions may be withdrawn or forfeited if the prisoner commits specified Jail offences or conditions prescribed in the relevant order of remitting the sentence.

Purpose

Rule 1171. Remission should be granted on the basis of an inmate's overall good behavior during the stay in the Jail, willingness to take work while in custody, cooperation and help to the prison administration in prison management and general response to various institutional activities.

Note:- If any statute or the court in its order of sentence has denied the remission to the prisoner and thereby not specified the kind of remission to be denied then all kinds of remission will be denied.

Rule 1172. In the context of this chapter:

- I. 'Prisoner' means a convict and/ or includes a person committed to prison in default of furnishing security for maintaining peace or good behavior and also includes persons convicted by a Military Court.
- II. 'Sentence' means a sentence as finally fixed on appeal or revision or otherwise, and includes an aggregate of more sentences than one and an order of imprisonment in default of furnishing security for maintaining peace or good behavior.

Kinds of Remission

Rule 1173. Remission will be of the following types:

- A) Ordinary Remission
- B) Annual Good Conduct Remission
- C) Special Remission
- D) Remission by Government

Ordinary Remission

x x x x x x

Rule 1176. Non-Eligibility: The following types of prisoners

will not be eligible for ordinary remission:

I. x x x x x x

II. Prisoners sentenced in default of payment of fine only.

15. Thus from the notification issued by the Government granting emergency parole it is evident that release was in the nature of remission as the sentence was being undergone and not mere suspension of sentence as in the case of parole. The rules clearly prescribe that a convict is not entitled to remission while undergoing sentence in default of payment of fine. Thus the contention of learned counsel for the petitioner that the petitioner had undergone substantial sentence in default of payment of fine while on emergency parole cannot be accepted.

16. Petition is dismissed.

17. Order be uploaded on the website of this Court.

(MUKTA GUPTA)
JUDGE

JULY 06, 2021

akb/v