

**HIGH COURT OF MADHYA PRADESH : JABALPUR**

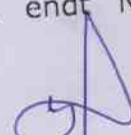
Endt No. C/2671/1  
III-2-51/2020

Jabalpur, dt 22/10/2020

The copy of Hon'ble Court order dated 12-10-2020 in W.P. 10678/2020 Manoj Yadav Vs. State of M.P. containing directions regarding sensitizing the Magistrates/Special Judges regarding purpose & procedure of remand & right of accused of getting Legal Aid flowing from constitution provisions & the Legal Services Authority Act 1987 is forwarded to :-

- (i) The District & Sessions Judge ....., with a request to bring the same into the knowledge of all the Judicial Officers under their kind control for information and necessary action.
- (ii) The District & Sessions Judge (Inspection & Vigilance), Jabalpur / Indore / Gwalior;
- (iii) The Director MPSJA with a request to take necessary steps to sensitize the Magistrates/Judges about their duty and obligations regarding purpose and procedure of remand & right of accused of getting Legal Aid flowing from constitution provisions and Legal Service Authority Act 1987.
- (iv) The Member Secretary, SALSA, 54, South Civil Lines, Jabalpur for needful as per order of Hon'ble the Court.
- (v) The Principal Registrar, Bench at Indore/Gwalior High Court of M.P., Jabalpur.
- (vi) P.S. to Hon'ble the Chief Justice, High Court of Madhya Pradesh Jabalpur for placing the matter before His Lordships,
- (vii) P.S. to Registrar General/ Principal Registrar(Judl)/ Principal Registrar (Inspection & Vigilance),/ Principal Registrar (Examination) / Principal Registrar (ILR) High court of Madhya Pradesh Jabalpur,
- (viii) Registrar(J.)/(D.E.)/(A)/ (Vig.)/ (VI.)/ Member Secretary SCMS, High Court of Madhya Pradesh, Jabalpur.
- (ix) Server Room (Computer) for making available in the official website of the High Court under the hyperlink circular/orders etc. in compliance of the orders of Registrar General dated 01-03-2018 & endt No. Reg(IT)/SA/2018/368 dated 01-03-2018.

for information & appropriate action.

  
(B.P. SHARMA)  
REGISTRAR(DE)

**HIGH COURT OF MADHYA PRADESH,**  
**PRINCIPAL SEAT AT JABALPUR**

|                                |   |
|--------------------------------|---|
| Case No.                       | W.P. No.10678/2020  |
| Parties Name                   | Manoj Yadav<br>Vs<br>State of M.P. and others.  |
| Date of Judgment               | 12.10.2020  |
| Bench Constituted              | <b>Division Bench:</b><br>Justice Sujoy Paul.<br>Justice Rajendra Kumar<br>Srivastava.  |
| Judgment delivered by          | Justice Sujoy Paul  |
| Whether approved for reporting | Yes.  |
| Name of counsels for parties   | <b>For the Petitioner:</b><br>Mr. Vishal Daniel, Advocate.<br><b>For the respondent:</b><br>Shri Pushendra Yadav, Addl.<br>Advocate General.  |
| Law laid down                  | <ul style="list-style-type: none"> <li>• <b><u>Section 167 of Cr.P.C</u></b> -- Admittedly there was no valid remand order covering the period between 17.04.2020 to 27.05.2020. W.e.f. 27.05.2020, a remand order was issued which is not subject matter of challenge before this Court.</li> <li>• Whether the petitioner is entitled to be released in this habeas corpus jurisdiction ? - No.</li> <li>• <b><u>Article 226 of the Constitution</u></b> - In habeas corpus jurisdiction, the petitioner cannot be directed to be released merely because for a period between 17.04.2020 and 27.05.2020, there was no remand order issued by the Special Judge. The remand order was indeed issued on 27.05.2020. Hence, on the date this petition is filed, response of State is received and the matter is heard, the petitioner cannot be said to be in illegal custody/wrongful confinement.</li> <li>• <b><u>Legal Services Authority Act,</u></b></li> </ul> |



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|-------------------------------|--|
|                               | <p><u>1987</u>– Section 12(g) : A person in custody is entitled to get legal aid if he is not capable to engage a private lawyer.</p> <ul style="list-style-type: none"> <li>• <b>Legal Services</b> – It is the duty and obligation of Magistrate/Judge before whom a person accused of committing cognizable offence is <i>first produced</i> to make him fully aware that it is his right to consult and be defended by a legal practitioner and in case he cannot afford a Lawyer of his choice, one would be provided to him from Legal Aid at the expense of the State.</li> <li>• <u>Article 21 &amp; 22(1) of the Constitution</u>: As per this constitutional mandate, all Magistrates/Special Judges are required to inform the accused persons regarding their right to engage a Lawyer. Failure to discharge this duty would amount to dereliction in duty and can be a reason to proceed against the Magistrate/Judge by instituting departmental proceedings.</li> <li>• The entitlement of legal aid is not dependent on the accused making an application to that effect, in fact, the Court is obliged to inform the accused of his right to obtain free legal aid and provide him the same.</li> </ul> |
| Significant paragraph numbers | 10, 12 & 13.   |

**ORDER**  
(12.10.2020)

*Per : Sujoy Paul J:-*

The interesting conundrum in this habeas corpus petition is whether the petitioner is entitled to be released if he remained in custody without therebeing any valid order of remand from 17.04.2020 to 27.05.2020 ? Despite



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the fact that on 27.05.2020, the learned Special Judge has issued a remand order.

2. The admitted facts between the parties are within narrow compass. An FIR was lodged against the petitioner on 27<sup>th</sup> of February, 2020 in Police Station, Niwadi, District Tikamgarh for committing offence punishable under Section 305 and 376 IPC and Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (for short '**POCSO Act**'). The petitioner was arrested on 01.03.2020. On 02.03.2020, the police produced the petitioner before the Special Court under the POCSO Act. Considering the fact that investigation is going on, the Court accepted judicial remand upto 14.03.2020. Shri Vishal Daniel, learned counsel for the petitioner by placing reliance on **1981 (1) SCC 627 (Khatri and others (II) vs. State of Bihar and others)** urged that at this stage itself, the learned Special Judge was under an obligation to inform the petitioner that he is entitled to engage a private lawyer or in the case of his incapacity, he is entitled to get an Advocate through legal aid.

3. The next date was 14.03.2020 before the learned special Judge. The petitioner was produced before the Court through Video Conferencing. On perusal of case diary, the Special Court authorised the judicial remand between 14.03.2020 to 30.03.2020. The matter was not taken up on 30.03.2020. Indeed, it was taken up on 04.04.2020. The petitioner was not produced before the Court. The Court extended/authorised the remand upto 17.04.2020. The matter was directed to be posted on



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17.04.2020 with a direction to produce the challan. On 17.04.2020, neither petitioner was produced nor government counsel appeared. Neither case diary was provided nor application seeking extension of remand was filed. The Special Court directed the Station House Officer, Niwadi to produce challan/file application seeking extension of remand. For this purpose, next date was fixed on 30.04.2020. On the said date, neither the government counsel nor the petitioner was produced before the Special Court. The said Court almost issued similar directions which were contained in the previous order dated 17.04.2020. Thereafter, the matter was taken up on 13.05.2020. The Government was represented by ADPO but petitioner was not produced. The learned special Judge noticed that neither charge-sheet nor application seeking extension of remand is filed and; therefore, directed issuance of notice to SHO as to why he failed to produce the challan and remand application. For obtaining his response, the matter was fixed on 27.05.2020.

4. Shri Vishal Daniel placed reliance on order-sheet dated 26.05.2020 and strenuously contended that petitioner engaged an Advocate and expressed his desire to get bail. Beyond 17.04.2020 and upto 27.05.2020 there was admittedly no valid authorization/judicial remand order passed by the Special Judge, the petitioner should have been given the benefit of bail. On 27.05.2020, the learned Special Judge opined that as per Section 167 of Criminal Procedure Code (Cr.P.C.), the maximum period for which an accused can be sent on remand is 90 days

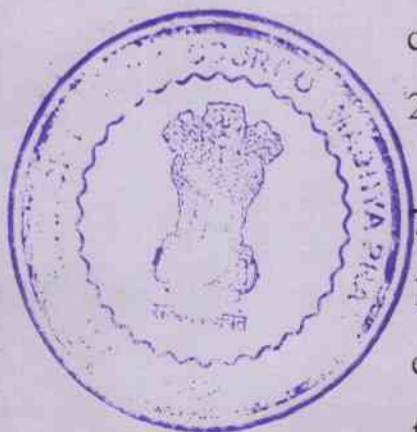


and said period is not over and hence judicial remand was granted/extended.

5. The argument of learned counsel for the petitioner is that as per Section 57 of Cr.P.C., the accused cannot be detained by police beyond 24 hours unless there exists a special order of Magistrate authorising the same. In the peculiar facts of this case, indisputably between 17.04.2020 and 27.05.2020 there existed no order of remand and; therefore, detention of petitioner was illegal hence he deserves to be released. Reliance is placed on a Constitution Bench judgment reported in AIR 1953 SC 277 (Ram Narayan Singh vs. The State of Delhi and others), (1970 (2) SCC 750 (Raj Narain vs. Superintendent, Central Jail, New Delhi) and 2017 (15) SCC 67 (Rakesh Kumar Paul vs. State of Assam).

6. Sounding a *contra* note, Shri Pushpendra Yadav, learned Additional Advocate General urged that no doubt, between 17.04.2020 and 27.05.2020, there was no valid order of remand by the learned Special Court, fact remains that such order of remand was admittedly issued on 27.05.2020. On the date this petition is filed i.e. 28.07.2020, as well as on the date reply and additional reply were filed on 21.08.2020 and 25.09.2020 respectively, the petitioner remained in valid judicial custody on the basis of a valid order of remand dated 27.05.2020.

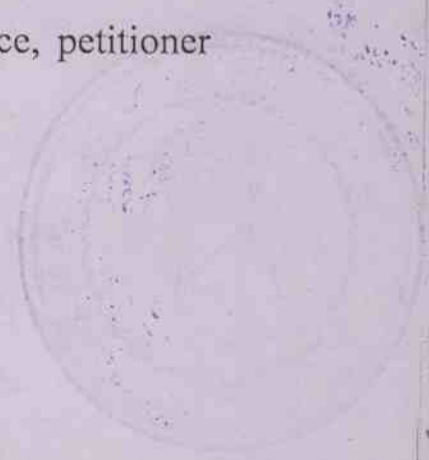
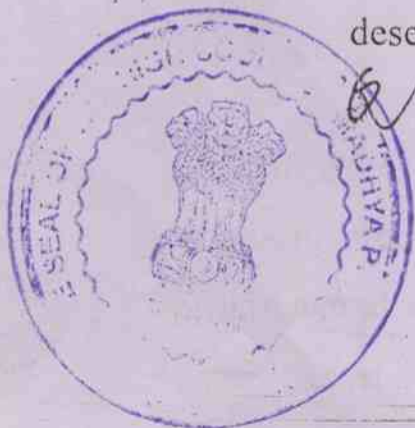
7. Even if there was no valid remand between 17.04.2020 and 27.05.2020, this cannot be a ground to exercise habeas corpus jurisdiction. What is material for this Court is to examine whether on the date of filing of



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this petition, reply and additional reply, petitioner remained in illegal custody/wrongful confinement. In support of aforesaid contentions, reliance is placed on AIR 1952 SC 106 [Naranjan Singh Nathawan and others vs. State of Punjab(I)], 1972 (3) SCC 256 (Col. Dr. B. Ramachandra Rao vs. The State of Orissa and others) and 2019 (5) SCC 266 (Serious Fraud Investigation Office vs. Rahul Modi and another). Learned Additional Advocate General urged that because of crisis arising out of Covid-19 situation, on certain dates, petitioner could not be produced before the Special Judge. However, this will not give him a right to be released in view of subsequent order of remand with effect from 27.05.2020.

8. In rejoinder submission, Shri Vishal Daniel urged that the judgments cited by learned Additional Advocate General cannot be pressed into service because those were cases of persons who have either undergone the entire sentence or relating to persons under preventive detention, etc. In view of judgment of **Rakesh Kumar Paul**(Supra) analogy can be drawn that in absence of authorised remand by Special Court, petitioner was entitled to be released. Lastly, it is argued that in M.Cr.C. No.16197/2020 (**Manoj Yadav vs. State**), the Court gave specific finding in para 10, 20 and 21 which leaves no room for any doubt that custody of petitioner during intervening period was totally illegal. Hence, petitioner deserves to be released.



9. The parties confined their arguments to the extent indicated above. We have bestowed our anxious consideration on rival contentions and perused the record.

10. We deem it proper to firstly deal with the objection of learned Additional Advocate General regarding maintainability of this petition. As noticed above, it is not in dispute between the parties that there was no valid and authorized remand order between 17.04.2020 and 27.05.2020 (intervening period). However, on 27.05.2020, a remand order was passed. Thus, conundrum is (i) whether a writ of habeas corpus can be issued when admittedly with effect from 27.05.2020 the petitioner is in judicial custody pursuant to a remand order (which is not subject matter of challenge) ? and (ii) whether for intervening period which was admittedly not covered by any remand order, petitioner deserves to be released in this habeas corpus petition ?

11. In **Basant Chand vs. Emperor, 1945 FCR**, it was held that (i) if order of detention is defective merely on technical or formal grounds, there is nothing to preclude a proper order of detention being based on the preexisting grounds themselves, especially in cases in which the sufficiency of grounds is not examinable by Court and (ii) if at any time, before the Court directs the release of detainee, a valid order directing his detention is produced, in that event, the Court cannot direct his release merely on the ground that *at some prior stage there was no valid cause for detention*. This principle is followed by a Constitution Bench of Supreme Court in the case of **Naranjan Singh (supra)**. No doubt, in **Naranjan Singh (Supra)**, the finding of the Court is in relation to a detainee. However, in our view, whether





petitioner is a detenu or remained in judicial custody for a particular period without authorized remand will not make much difference. In the case of **Talib Hussain vs. State of Jammu and Kashmir, 1971 (3) SCC 118**, the Supreme Court came to hold that it is sufficient to point out that in habeas corpus proceedings, the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing, it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, writ will not be issued. After following the judgment of **Talib Hussain(Supra)**, a Full Bench of Patna High Court in the case of **Babu Nandan Mallah vs. The State, 1971 Patna LJR 605** ruled that the detention of any such person may be illegal at the initial stage, but if this Court finds on the date fixed for the return of the rule, that such detention is legal and in accordance with law, then such application for writ of Habeas Corpus has to be dismissed.

12. In the recent judgment in **Rahul Modi(Supra)**, the Apex Court considered catena of previous judgments including the judgments on which heavy reliance is placed by Shri Vishal Denial and opined that if previous arrest order was having some defect but subsequently it is followed by another remand order, validity of which was not called in question, it was not open to the High Court to entertain challenge with regard to correctness of those orders. It was poignantly noticed that when High Court entertained the petition, there was already an order of extension passed by the Government on 14.12.2018 and; therefore, whether the previous arrest of respondent therein was legal or not, has lost its significance. It was held that High Court was not



justified in entertaining the petition and passing the order of release. Para 21 of this judgment reads thus:

*"21. The act of directing remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition. The first question posed by the High Court, thus, stands answered. In the present case, as on the date when the matter was considered by the High Court and the Order was passed by it, not only were there orders of remand passed by the Judicial Magistrate as well as the Special Court, Gurugram but there was also an order of extension passed by the Central Government on 14.12.2018. The legality, validity and correctness of the order or remand could have been challenged by the original Writ Petitioners by filing appropriate proceedings. However, they did not raise such challenge before the competent Appellate or Revisional Forum. The orders of remand passed by the Judicial Magistrate and the Special Court, Gurugram had dealt with merits of the matter and whether continued detention of the accused was justified or not. After going into the relevant issues on merits, the accused were remanded to further police custody. These orders were not put in challenge before the High Court. It was, therefore, not open to the High Court to entertain challenge with regard to correctness of those orders. The High Court, however, considered the matter from the standpoint whether the initial Order of arrest itself was valid or not and found that such legality could not be sanctified by subsequent Order of remand. Principally, the issue which was raised before the High Court was whether the arrest could be effected after period of investigation, as stipulated in said order dated 20.06.2018 had come to an end. The supplementary issue was the effect of extension of time as granted on 14.12.2018. It is true that the arrest was effected when the period had expired but by the time the High Court entertained the petition, there was an order of extension passed by the Central Government on 14.12.2018. Additionally, there were judicial orders passed by the Judicial Magistrate as well as the Special Court, Gurugram, remanding the accused to custody. If we go purely by the law laid down by this Court with regard to exercise of jurisdiction in respect of Habeas Corpus petition, the High Court was not justified in entertaining the petition and passing the Order."*

*(Emphasis supplied)*

In view of this legal position, we answer points (i) and (ii), by holding that a habeas corpus petition can be entertained if the petitioner claims that he is still in the wrongful

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confinement/custody. If at the time of entertaining the habeas corpus petition and particularly on the date reply has been filed, the petitioner was not in wrongful confinement, merely because prior to it for an "intervening period" he remained in judicial custody without any authorized remand order, writ of habeas corpus cannot be issued. The said writ cannot be issued when by a subsequent remand order dated 27.05.2020, the petitioner's judicial custody was extended. Pertinently, Rahul Modi's case does not pertain to a detinue or a convict who has undergone complete period of sentence. Indeed, it relates to an arrest and remand. Hence, argument of Shri Daniel in this regard pales into insignificance. In view of foregoing analysis, we are constrained to hold that this habeas corpus petition is not maintainable.

13. We will be failing in our duty if argument of Shri Denial based on the judgment of Supreme Court in the case of **Khatri and others(II)**(Supra) is not considered. In the said case, it was clearly held that free legal aid is an essential ingredient of reasonable, fair and just procedure for a citizen/accused of an offence and it must be held in implicit and guarantee by Article 21 of the Constitution. As per this constitutional obligation, the Magistrate and Sessions Judges in the country are under an obligation to inform every accused who appears before them and who are not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal aid at the cost of State. The concern shown by Supreme Court in the case of Khatri(Supra) was statutorily recognized by introducing Legal Services Authority Act, 1987. As per Section 12(g) of the said Act, the citizen in custody including the custody in a protection home are entitled to get legal aid. By following



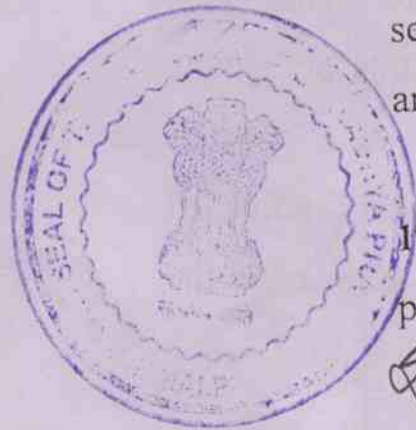
the *ratio decidendi* of *Khatri* in later judgments, the Apex Court emphasized the need of providing free legal aid to the citizen who are unable to afford/engage a lawyer. In 1986 (2) SCC 401 (**Suk Das vs. Union Territory of Arunachal Pradesh**), it was held that it would be a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal services. In that event, legal aid would become merely a paper promise and it would fail on its purpose. In 2012 (2) SCC 584 (**Mohd. Hussain vs. State (Govt. of NCT of Delhi)**), it was made clear that entitlement to free legal aid is not dependent on the accused making an application to that effect, infact, the Court is obliged to inform the accused of his right to obtain free legal aid and provide him with the same. Same was the view expressed in 2012 (8) SCC 553 (**Rajoo vs. State of MP**) by holding that free legal services must be provided to an eligible person at all stages of the proceedings, trial as well as appellate. In 2012 (9) SCC 1 (**Mohd. Ajmal Amir Kasab vs. State of Maharashtra**), it was poignantly held that it is the duty and obligation of the Judge before whom a person accused committing a cognizable offence *is first produced* to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, one would be provided to him from legal aid at the expense of the State. This right flows from Article 21 and 22(1) of the Constitution. The Apex Court clarified that any failure to discharge this obligation and duty on the part of Judge may amount to dereliction in duty and may make the Magistrate concerned liable to departmental proceedings. Same principle is followed in the case of **Rakesh Kumar Paul**(Supra).



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14. In this view of the matter, we find substance in the argument of Shri Daniel that the Court below has failed to inform the petitioner that he is entitled to get legal aid. We are disturbed in the manner petitioner was kept in judicial custody between 17.04.2020 and 27.05.2020 without there being any remand order. We are unable to persuade ourselves with aforesaid excuse and the argument of learned Additional Advocate General regarding non-production of petitioner for the purpose of obtaining remand order before the learned Special Judge. The difficulty arising out of Covid-19 situation cannot be treated as an excuse for not producing the petitioner before the Special Judge and not obtaining remand order in order to keep him in judicial custody when admittedly Video Conferencing facilities were available and petitioner was produced before the Special Judge through the said facility on 14.03.2020. In other words, we cannot treat Covid-19 situation such a necessary evil on the basis of which statutory requirement of Section 167 of Cr.P.C. can be compromised. If we assuage our judicial conscience and statutory requirement by treating something a "necessary evil", it may look more and more necessary and less and less evil. The Magistrates/Special Judges need to be sensitized regarding purpose and procedure of remand and right of accused of getting legal aid flowing from constitutional provisions and the Legal Services Authority Act, 1987. The Registry of this Court and M.P. State Judicial Academy may take necessary steps to sensitize the Magistrates/Judges about their aforesaid duty and obligations.

15. As analysed above, we find no reason to entertain this petition. However, this order will not come in the way of the



petitioner to avail the remedy of seeking bail under the Cr.P.C.

16. The petition is disposed of.

sd/-  
(Sujoy Paul)  
Judge

sd/-  
(Rajendra Kumar Srivastava)  
Judge

