

**(2009) 04 AHC CK 0787**

**In the Allahabad High Court**

**Case No :** Criminal Miscellaneous Parole Application No. 80925 of 2009

Kamlesh Pathak

APPELLANT

Vs

District Magistrate and Others

RESPONDENT

**Date of Decision :** 15-04-2009

**Acts Referred:**

Constitution of India, 1950 — Article 22, 226  
Criminal Law (Amendment) Act, 1932 — Section 7  
National Security Act, 1980 — Section 15, 3(2)  
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 332  
Prevention of Damage to Public Property Act, 1984 — Section 3, 6  
Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 — Section 2, 3

**Citation :** (2009) 2 ACR 1784

**Hon'ble Judges :** R.K. Rastogi, J; A.K. Roopanwal, J

**Bench :** Division Bench

**Advocate :** Viresh Misra, Nirvikar Gupta and Amit Mishra, for the Appellant;  
Poonam Singh, A.S.G.I. and A.G.A., for the Respondent

**Final Decision :** Disposed Of

## Judgement

R.K. Rastogi, J.—This parole application has been moved by the Petitioner Kamlesh Pathak on 26.3.2009 for grant of parole of three months to enable him to contest the election for Lok Sabha.

2. The facts relevant for disposal of this application are that the Petitioner has been a member of the Legislative Assembly from the Samajwadi Party in the State of U.P., on two occasions. He is an active worker of the Samajwadi Party and he has been declared as a candidate by the Samajwadi Party from Akbarpur Constituency in the ensuing Lok Sabha election. The Petitioner's case is that some highly placed persons of the ruling Bahujan Samaj Party are inimical towards him and they wanted to taint his image. Hence, two cases were registered against him. The first was Crime No. 487 of 2008 under Sections 147, 148, 149, 307, 436, 336, 332 and 353, I.P.C., Section 7 of Criminal Law

Amendment Act and Section 3/6 of Prevention of Damage to Public Property Act at Police Station Kotwali, District Auraiya. This case was registered against thirty five accused persons. Out of them twenty five persons were arrested on the spot and ten persons were shown to have run away from the spot after the incident. The name of the Petitioner finds place as accused No. 1 in the column of those accused persons who had allegedly run away from the spot. On the same day another F.I.R. was also registered at Police Station Kotwali, District Auraiya as Crime No. 487A of 2008 under Sections 147, 148, 149, 307, 436, 336, 332 and 353, I.P.C., Section 7 of Criminal Law Amendment Act and Section 3/6 of Prevention of Damage to Public Property Act. Twenty persons were named as accused persons in this F.I.R. and the name of the Petitioner finds place at Serial No. 1 in the column of the accused persons. It was further stated that 100 to 150 unknown persons had also participated in the incident. It may also be mentioned in connection with this F.I.R. that ten persons who had been listed as accused Nos. 11 to 20 were arrested on the spot and the remaining accused persons No. 1 to 10 including the Petitioner had allegedly run away from the spot. It was further alleged that due to these incidents public order was disturbed. Hence, on account of these two incidents as well as due to Petitioner's prior involvement in Case Crime No. 43 of 1991 of Police Station Kotwali, District Auraiya, in Case Crime No. 92 of 1985 Police Station Navagarh District Farrukhabad and in some other cases, a report was sent for his detention under the National Security Act by the S.H.O. of Police Station Kotwali Auraiya to the District Magistrate Auraiya through proper channel and the District Magistrate Auraiya after considering this report as well as recommendations of the concerned authorities passed an order on 28.1.2009 u/s 3(2) of the National Security Act for his detention. The Petitioner moved his representations against the above order but since he did not receive favorable decision from the concerned authorities, he filed Habeas Corpus Writ Petition No. 13411 of 2009 challenging the detention order as well as the grounds of detention. It was also pleaded that the Petitioner is a law abiding citizen and that he has not been convicted in any case so far, and he has been falsely implicated on account of political vengeance.

3. The Petitioner had also moved an application for parole alongwith the above petition. Objections on this application were invited and a date was fixed for its disposal. A counter-affidavit of Sri D. K. Rai, C.O. City, Auraiya on behalf of Respondent No. 2 the State of U.P., was filed in reply to the parole application. A counter-affidavit was also filed by Sri Rajiv Kumar Singh, Deputy Jailer, District Jail, Pilibhit on behalf of Respondent No. 3, but that is in reply to the petition and not the parole application. No counter-affidavit or objection has been filed by any other Respondent. However, at the time of arguments on this parole application, it was pointed out by the learned Government Advocate that u/s 15 of the National Security Act, the Petitioner has got right to move an application for parole before the appropriate Government and so he should first move the parole application before the Government and his parole application moved before this Court was premature and not maintainable.

4. The Court agreeing with the above contention of the Government Advocate, rejected the above parole application as premature with this option to the Petitioner to move his parole application before the Government and a direction was also issued to the Government to decide the parole application of the Petitioner at an early date preferably within a period of one week from the date of moving it before the Principal Secretary, Home, U.P. Government ; and a further direction was issued that this application should be decided by a speaking order. The above parole application moved before this Court stood decided in the aforesaid manner vide order dated 18.3.2009.

5. On 26.3.2009 the Petitioner moved a fresh parole application which was registered as Criminal Misc. Application No. 80925 of 2009 in which it was stated that he had moved the parole application before the Principal Secretary Home on 20.3.2009 and since no order had been passed on that application, he was moving this fresh parole application before this Court. Objections to this parole application were invited and the State filed a reply mentioning that the parole application had been rejected by the Government on 30.3.2009. Thereafter when this parole application was taken up for hearing, a preliminary objection was again raised by the learned Government Advocate that the Petitioner had not challenged the order passed by the Government on his parole application, and so no relief could be granted to the Petitioner in this parole application unless and until he challenges the order passed by the Government on the parole application. This plea was upheld by this Court vide order dated 31.3.2009 and the Petitioner was provided an opportunity to take suitable steps in the light of the order.

6. Then the Petitioner filed a supplementary-affidavit on 1.4.2009 with which the rejection order dated 30.3.2009 passed by the Government was endorsed as Annexure-SA-1 and it was challenged on the ground stated in para 3 that it had been passed without application of mind in an arbitrary manner with ulterior motives and mala fide intentions. Thereafter arguments of both the parties were heard on this parole application on 1.4.2009 and the order was reserved. Learned Counsel for the parties wanted time to file photo copies of the rulings relied upon by them, and they were provided time upto 2.4.2009 to file them.

7. There were holidays on 3.4.2009, 4.4.2009 and 5.4.2009 and 6.4.2009 Sri Nirvikar Gupta, learned Counsel for the Petitioner appeared before us and stated that the Petitioner had been granted bail in the case under the U.P. Gangster and Anti Social Activities (Prevention) Act, by this Court vide order dated 6.4.2009 in Criminal Misc. Bail Application No. 8114 of 2009. He further submitted that the Special Judge (Gangsters Act), Kanpur Nagar had vide his order dated 21.3.2009 in Case Crime No. 23 of 2009 under Sections 2/3 of the U.P. Gangsters Act of Police Station Kotwali, District Auraiya, State v. Kamlesh Pathak Case Crime No. 23 of 2009, permitted the Petitioner to be taken to Akbarpur in police custody for filing his nomination papers on 5.4.2009. He submitted that he may be granted time to file copies of these orders with a supplementary-affidavit and so orders

may not be passed on the parole application in the meantime. He was granted time for this purpose. Thereafter, he filed photo copies of these orders vide his supplementary-affidavit dated 8.4.2009. A copy of that supplementary-affidavit was ordered to be given to the learned Counsel for the Union of India as it had not been given to him by that time and the date 10.4.2009 was fixed for hearing of further arguments on the point. The arguments of both the parties were heard on that date. Now we are deciding this parole application on merits.

8. Learned Counsel for both the parties have also submitted their written arguments before us and filed photo copies of the rulings relied upon by them. It has also been argued by the learned Counsel for the Petitioner that the detention order had been passed out of political vendetta and no ground has been made out for detention of the Petitioner under the National Security Act. We are of the view that these aspects which pertain to merits of the habeas corpus petition cannot be considered at this stage of consideration of the parole application and the only question which is to be considered at this stage is whether parole should be granted to the Petitioner for the purpose of contesting the election of Lok Sabha as prayed by him. We are fortified in our view by the following observations of a Full Bench of this Court in *Jokhu Lal Vs. Central Jail and Others*, the relevant portion of which has been underlined by us to lay emphasis on it:

After considering various submissions made by learned Counsel for the parties and going through all the aspects of this case as also the relevant case law, our answer to question No. 1 is in the negative and it is held that a person detailed under a preventive detention law is not entitled as of right, to be set free only on the ground that un-expired period of his detention is less than a month. However, we also make it clear that under a given circumstance in a rare case, it may be possible for the High Court in exercise of its jurisdiction under Article 226 of the Constitution to direct release of a person detained under the preventive law without entering into the question of validity of the detention order, if the Court finds that exigency of the situation demands release of the Petitioner forthwith without considering the question of validity of the detention order.

9. It is thus clear that without entering into the question of validity of the detention order, we have to find out as to whether the exigency of the situation demands release of the Petitioner forthwith. In this connection it is to be seen that the Petitioner has already filed his nomination as a candidate from the Akbarpur Constituency of the Lok Sabha as permitted by the Special Judge (Gangsters Act) Kanpur Nagar. The election is going to take place in the above constituency on 30th April, 2009 as stated by the learned Counsel for the Petitioner. Now the question is whether the Petitioner should be released to enable him to do the election campaign as prayed by him.

10. It was contended by the learned Government Advocate that the Petitioner is detained under the National Security Act and he is not an independent candidate who may have to arrange for his election campaign himself, but he is a candidate of the Socialist Party and the members of that party can efficiently do the

election campaigning for him and there is no necessity of personal election campaign of the Petitioner. He also submitted that as laid down in the above ruling of this Court parole is to be granted in a rare case only. He contended that election campaign is not such a ground as to come within the term "rare case" for which parole should be granted. He also cited before us a Division Bench ruling of this Court in the case of *Atique Ahmad v. Election Commission of India and Ors.* 2001 (2) AWC 1610. In this case permission was refused to the Petitioner Atique Ahmad for being taken to the office of the Returning Officer from the Jail where he was detained at that time for filing the nomination, as their Lordships were of the view that there is no necessity of personal appearance of the candidate before the Returning Officer for filing nomination papers if he is in jail. The same view has been followed by this Court in its order dated 29.3.2009 in Crl. Misc. No. 7778 of 2009, *State of U.P. v. Atique Ahmad* Crl. Misc. No. 7778 of 2009.

Learned Counsel for the Petitioner has cited before us rulings of the Hon'ble Apex Court in the case of *Icchu Devi Choraria v. Union of India*, Writ Petition No. 2030 of 1980, decided on 9.9.1980 and in *Sunil Batra (II) v. Delhi Administration* 1980 SCC 777. Both these rulings are on the merits of the detention order and have got no application to grant of parole.

11. Learned Counsel for the Petitioner submitted before us that according to the detention order passed against the Petitioner his activities are detrimental to public order in the district of Auraiya. Learned Counsel for the Petitioner also submitted that the Petitioner is ready to give an undertaking that during the period of release on parole he shall not visit Auraiya. He further submitted that the Constituency of Akbarpur is situated at Kanpur Dehat at a distance from district Auraiya and during the period of release on parole, he shall remain busy in his election campaign at Akbarpur and so he will not get any opportunity or time to go to Auraiya and so there is no chance of detriment to public order if he is released on short term parole to enable him to do his election campaign at Akbarpur.

12. In reply the Government Advocate relied upon the following observations of the Hon'ble Apex Court in the case of *Pushpadevi M. Jatia v. Additional Secretary, Government of India and Ors.* AIR 1987 SC 1748:

Preventive detention is an extraordinary measure resorted to by the State on account of compulsive factors pertaining to maintenance of public order, safety of public life and the welfare of the economy of the country. The need for this extraordinary measure, i.e., detention without trial was realised by the founding fathers of the Constitution as an inevitable necessity for safeguarding the interests of the public and the country and hence a specific provision has been made in Clause (3) of Article 22 providing for preventive detention being imposed in appropriate cases notwithstanding the fundamental right of freedom and liberty guaranteed to the citizens by the Constitution. The entire scheme of preventive detention is based on the bounden duty of the State to safeguard the

interests of the country and the welfare of the people from the canker of anti-national activities by anti-social elements affecting the maintenance of public order or the economic welfare of the country. Placing the interests of the nation above the individual liberty of the anti-social and dangerous elements who constitute a grave menace to society by their unlawful acts, the preventive detention laws have been made for effectively keeping out of circulation the detenus during a prescribed period by means of preventive detention. The objective underlying preventive detention cannot be achieved or fulfilled if the detenu is granted parole and brought out of detention. Even if any conditions are imposed with a view to restrict the movements of the detenu while on parole, the observance of those conditions can never lead to an equation of the period of parole with the period of detention. One need not look far off to see the reason because the observance of the conditions of parole, wherever imposed, such as reporting daily or periodically before a designated authority, residing in a particular town or city, travelling within prescribed limits alone and not going beyond etc., will not prevent the detenu from moving and acting as a free agent during the rest of the time or within the circumscribed limits of travel and having full scope and opportunity to meet people of his choice and have dealings with them, to correspond with one and all, to have easy and effective communication with whomsoever he likes through telephone, telex etc. Due to the spectacular achievements in modern communication system, a detenu, while on parole, can sit in a room in a house or hotel and have contacts with all his relations, friends and confederates in any part of the country or even any part of the world and thereby pursue his unlawful activities if so inclined.

13. Learned Counsel for the Petitioner submitted that the above ruling of the Hon"ble Apex Court in Pushpadevi has been overruled in the case of Sunil Fulchand Shah Vs. Union of India and Others, and so no reliance should be placed upon it.

14. The learned Government Advocate submitted in reply that it had been held by the Hon"ble Apex Court in the case of Pushpadevi (supra), that the period of parole is not to be counted as a part of the period of detention and on that point the view taken by the Hon"ble Apex Court in Pushpadevi's case has been overruled in the case of Sunil Fulchand Shah but the entire ruling in the case of Pushpadevi has not been overruled and so the above observations which are on the point of effect and consequences of grant of parole still hold good. We have carefully gone through both these rulings of the Hon"ble Apex Court and we find sufficient force in the above contention of the learned Government Advocate. As such we are of the view that it is not possible to release the Petitioner on parole on this condition that after his release on parole he shall not visit Auraiya.

15. Learned Counsel for the Petitioner further submitted that the Petitioner is not a criminal, he has got no criminal history nor he has been convicted in any criminal case so far, and he has been falsely implicated in the cases under reference, only on account of political rivalry, and his activities are not

detrimental to the security of the State, and the detention order passed against him is totally illegal and so parole should be granted to him. It is, however, to be seen that, as laid down by the Full Bench of this Court in the case of *Jokhu Lal v. Superintendent, Central Jail, Naini, Allahabad and Ors.* (supra), the merits of the detention order are not to be considered at the stage of considering the matter of grant of parole to the detenu. The merits and demerits of the detention order will have to be considered at the appropriate stage while deciding the habeas corpus writ petition, but here at this stage while deciding the application for parole, the merits of the detention order are not to be considered as laid down in the aforesaid ruling of *Jokhu Lal's* case (supra), and so it is not possible to release the Petitioner on parole on this ground that the detention order passed against him is illegal as alleged by him.

16. It was further submitted by the learned Counsel for the Petitioner that the Petitioner has already been granted bail in case u/s 2/3 of the Gangster Act by this very Court and he has also been permitted by the Special Judge (Gangsters Act), Kanpur Nagar to go in police custody to the Returning Officer's office at Akbarpur for filing his nomination papers, and so he should also be permitted to do the election campaign. We do not find any force in this contention. It is to be seen that the criteria for grant of bail for an offence as well as for grant of parole under the preventive detention are quite different and a detenu cannot be granted release on parole on the ground that he has already been granted bail in any criminal case pending against him. So far as this fact is concerned that the Special Judge (Gangsters Act) had permitted the Petitioner to go to the office of the Returning Officer for filing his nomination papers, it is to be seen that the correct legal position is that personal appearance of a candidate who is detained in jail is not necessary before the Returning Officer for filing his nomination papers as laid down by this Court in the case of *Atique Ahmad v. Election Commission of India*(supra). However, if he has been permitted to go to the Returning Officer's Office at Akbarpur for filing nomination paper on the basis of permission granted by the Special Judge (Gangsters Act), he cannot claim on the basis of the above permission that he should now be granted release on parole for election campaign also. It is also to be seen that during the entire process of going to the aforesaid constituency from the District Jail Pilibhit, the Petitioner remained constantly in custody of the police, but if he is granted parole, he shall come out of the police as well as judicial custody ; and the permission to file nomination papers under police custody and the release on parole for short term for doing election campaign cannot be equated. Hence, we are of the view that the Petitioner cannot get any benefit on the question of grant of parole by these facts that he has been granted bail in the case under the Gangster Act and that he has been permitted to go to the office of the Returning Officer, Akbarpur for filing his nomination papers.

17. Learned Counsel for the Petitioner also cited before us a ruling of the Hon''ble Apex Court in the case of *Kamleshkumar Ishwardas Patel v. Union of India and Ors.* 1996 SCC 86. In this case the Petitioner who was detained under the

C.O.F.E.P.O.S.A. Act and whose period of detention was to expire shortly was ordered to be released on parole on certain conditions giving benefit of the decision of the Hon''ble Apex Court in Santosh Anand v. Union of India 1981 SCC 456. It is to be seen that in the above case the period of detention was to expire shortly while in the present case, the detention order was passed on 28.1.2009 and the period of 21/2 months only has expired as yet and so it cannot be said that the detention period is going to expire shortly and so the above ruling is not applicable to this case and it does not render any help to the Petitioner.

18. In view of the discussion attempted above, we are of the opinion that it is not such a rare case where parole should be granted to the Petitioner for doing his election campaign which can be efficiently done by his party-men and so we are rejecting the application for grant of parole.

19. Let the case be listed in the next cause list for orders on the writ petition.