

(2020) 12 DEL CK 0004

In the Delhi High Court

Case No : Criminal Writ Petition No. 1558 Of 2020, Criminal Miscellaneous
Application No. 14691 Of 2020

Mohd Shahabuddin

APPELLANT

Vs

State Govt Of Nct Delhi & Anr

RESPONDENT

Date of Decision : 02-12-2020

Acts Referred:

Constitution Of India, 1950 — Article 21, 32, 142
Delhi Prison Rules, 2018 — Rule 1203, 1205, 1206
Indian Penal Code, 1860 — Section 34, 120B, 201, 302, 307, 364, 364A
Arms Act, 1959 — Section 27

Citation : (2020) 12 DEL CK 0004

Hon'ble Judges : Anup Jairam Bhambhani, J

Bench : Single Bench

Advocate : Salman Khurshid, Aman Khullar, Kamna Singh, Aadil Singh Boparai,
Mohd. Yamin Alvi, Vishal Raj Sahejpal, Khalil A. Ansari, Sanjay Lao, Keshav
Mohan, Rishi K. Awasthi, Prashant Kumar, Piyush Vats, Ritu Arora

Final Decision : Disposed Of

Judgement

“

Anup Jairam Bhambhani, J”,,

1. The petitioner, who is a convict and an undertrial in custody in Tihar Jail in Delhi inter alia in case arising from FIR No. 362/2016 registered under”,,

sections 302/120-B/34 IPC and section 27 Arms Act at P.S.: Nagar Thana, Siwan, Bihar, seeks custody parole.”,,

2. Notice in this petition was issued on 28.09.2020; whereupon status report dated 29.10.2020 has been filed by the concerned Jail Superintendent”,,

Central Jail, Tihar and nominal roll dated 23.11.2020 has been received from the prison authorities. A separate status report dated 05.10.2020 has also”,,

been filed by the S.H.O. P.S.: Tilak Marg, Delhi, since the petitioner's case is being overseen by that police station in Delhi.",,

3. At the outset, it must be noticed that the petitioner had moved the Hon'ble Supreme Court vid' W.P. (CRL) No. 280/2020 seeking",,

effectively the same relief as is sought in the present petition; which writ petition was however dismissed as withdrawn vid' order dated 25.09.2020,,

made by the Hon'ble Supreme Court. In this regard, by its order dated 06.10.2020, this court had directed learned counsel who had appeared for",,

the petitioner before the Hon'ble Supreme Court to file an affidavit affirming that the writ petition before the Hon'ble Supreme Court was,,

simply withdrawn without any hearing having taken place in the matter. In compliance of that order, affidavit dated 21.10.2020 has been filed by",,

learned counsel who had appeared before the Hon'ble Supreme Court confirming the foregoing position. It thereby stands confirmed on,,

counsel's affidavit that the writ petition before the Hon'ble Supreme Court was withdrawn simpliciter without addressing any submissions,,

before the Hon'ble Supreme Court.,,

4. Since the petitioner is serving sentence in Delhi for a case in which he was convicted by a court in Bihar and there are also several other criminal,,

cases pending against the petitioner in that State, by order dated 06.10.2020, the State of Bihar was impleaded as party-respondent to the present",,

petition; and notice was issued to the State of Bihar. The Inspector General, Prison and Correctional Services, Home (Prison) Department,,

Government of Bihar has thereupon filed counter-affidavit dated 21.10.2020, setting-out in detail their position vis-a-vis the petitioner.",,

Petitioner's contentions:,,

5. Mr. Salman Khurshid, learned senior counsel appearing for the petitioner submits that the petitioner's father passed away on 19.09.2020; and in",,

view thereof, the petitioner wishes to spend time with his grieving mother, who is herself extremely unwell; and also to offer prayers at the grave of",,

his late father, to attend and perform religious rites and ceremonies for the departed soul; and to spend time with his family in this time of grief.",,

6. A copy of Death Certificate dated 24.09.2020 issued by the Department of Planning and Development, Gram Panchayat, Pakwaliya, Bihar has",,

been filed on record in evidence of the passing away of the petitioner's father.,,

7. Mr. Khurshid points-out that the petitioner was undertrial in case FIR No. 362/2016 registered at P.S.: Nagar Thana, Siwan, Bihar and has",,,

thereafter been transferred by the Honâ??ble Supreme Court vidÃ© judgment dated 15.02.2017 in Asha Ranjan vs. State of Bihar & Ors. (2017) 4,,

SCC 397 to be in custody at the Central Jail, Tihar, New Delhi.",,,

8. It is further submitted that though the petitioner has been implicated in multiple criminal cases, in case FIR No. 131/2004 and FIR No. 220/2014 he",,,

was granted bail/interim bail, which he availed from 10.09.2016 to 30.09.2016 and did not misuse the liberty granted.",,,

9. It is submitted that vidÃ© application dated 20.09.2020 the petitionerâ??s wife had sought parole from the Government of Bihar; and had also,,

simultaneously moved an application dated 20.09.2020 before the Director General (Prisons) Central Jail, Tihar seeking the same relief, to enable the",,,

petitioner to attend his fatherâ??s burial. However, the petitionerâ??s father was laid to rest on 20.09.2020 at his native place in Siwan, Bihar while",,,

the said applications were still pending. Thereafter, by e-mail communication dated 20.09.2020 the petitionerâ??s counsel sought custody parole for",,,

him; in response to which he received a reply dated 21.09.2020 from the Jail Superintendent stating that:-,,

â?? â??!,,

It is further informed that Custody Parole may be granted to the convict by an order in writing, issued by the Superintendent Prison and to",,,

the under trial prisoners by the Honâ??ble Court.,,,

Further the accused Md. Shahabuddin s/o S. M. Hasibullah has been informed about the sudden demise of his father.â??,,

(emphasis in original),,,

10. In the present petition, attention of this court is drawn to Rule 1203 of the Delhi Prison Rules 2018, which provides for grant of custody parole to a",,,

convict inter alia in case of death of a family member; and to Rule 1205 which postulates grant of custody parole to visit any place outside the NCT of,,

Delhi but within the territorial limits of India subject to fulfilling the other requirements contained in that rule.,,,

11. The petition also recites that apart from being shattered due to the demise of his father, the petitioner also wishes to be beside his mother, who is",,,

about 86 years of age and has been suffering from multiple age related ailments,

is bedridden and has been in deep shock due to the demise of her",,,
husband. It is further stated that the petitioner's elder brother passed away on 19.02.2020 and his sister-in-law had predeceased the brother.,,
Though initially, there was nothing on record to show for the medical condition of the petitioner's mother, vide Index dated 25.11.2020 the",,,
petitioner has filed medical records dated 15.08.2020 and 20.11.2020 from certain medical facilities in Siwan, Bihar alongwith a photograph of his",,,
mother, which appear to show the mother as being in a weak state of health; and in the last medical record dated 20.11.2020, the doctor appears to",,,
have advised "Absolute bed rest for 21 days",,,

12. Under cover of Index dated 28.11.2020 the petitioner has also placed on record two decisions relating to grant of interim bail/bail, one by a learned",,,
Single Judge of the High Court of Judicature at Patna and the other by a learned Single Judge of this court. Order dated 07.09.2016 by the Patna High",,,
Court relates to the petitioner himself, in which a learned Single Judge granted bail to the petitioner in case FIR No. 220/2014. It is noticed however",,,
that this bail was subsequently cancelled by the Hon'ble Supreme Court in Chandrakeshwar Prasad (infra). The second decision is order dated",,,
12.11.2020 made by a Co-ordinate Bench of this court in case titled Jaideep Singh Sengar @ Atul Singh vs. CBI, where a learned Single Judge has",,,
granted interim bail to the applicant, who is an undertrial in that case, on the basis of that applicant's own medical grounds. In the opinion of this",,,
court, neither of the said two decisions would have any bearing on the present case.",,

13. Upon being queried, Mr. Khurshid confirms on instructions, that the petitioner would be willing to bear all travel, lodging and boarding expenses",,,
towards the police detail that may be required to accompany the petitioner during the period of custody parole, if granted.",,

A., "What security arrangement shall be made by the state Government in case the petitioner is released on custody", "If petitioner is released on custody
parole then security escort of one
Dy Sp 03 inspector 06 sub
inspector and 30 armed police

force required

B., "How many police personals shall be deployed to facilitate custody parole to the Petitioner", "Inspector-4

Sub Inspector-8

Male Police-50

Female Police-15

C., "What additional conditions may be imposed on the petitioner if at all he is granted custody parole", "Custody parole granted should be

of minimum possible time no any

other person permitted to meet the

petitioner except family member

and close relatives no movement

outside from home

crystallised by a three-Judge Bench of this Court in Kehar Singh case [(1988) 3 SCC 609 : 1988 SCC (Cri) 711]. The High Court looking,,

to the exceptional and extraordinary circumstances can take such a decision and no personal hearing is warranted before taking such a,,

decision.,,

*****,,

â??138. The question arisesâ?"whether the present case would fall in the category of those extraordinary or exceptional cases where the,,

universal rule of open trial can be given a go-by.,,

â??139. It is alleged by the learned counsel appearing for the State that the appellant is involved in more than forty criminal cases. In the,,

counter-affidavit filed by the State it is mentioned that a reign of terror has been created by the appellant and his â??private armyâ? in the,,

last two decades is beyond imagination. Some of the notorious crimes committed by the appellant and his gang of criminals and the extent to,,

which he has been interfering with the administration of justice, has been enumerated in detail in the counter-affidavit.",,

â??140. During the raid conducted on 16-3-2001 in the house of the appellant, the appellant and his private army fired upon the raiding",,

party and burnt the vehicles of the Deputy Inspector General of Police, Saran Range; District Magistrate, Siwan and the Superintendent of",,,

Police, Siwan. These criminals fired more than 100 rounds of ammunition from arms including AK-47 and AK-56, etc. In that firing, one",,,

constable was killed and several constables were injured. There are innumerable cases of the same kind in which the appellant is directly",,,

involved.â??",,,

(emphasis supplied),,,

31. In Chandrakeshwar Prasad (supra) the Honâ??ble Supreme Court inter alia records this :,,

â??8. We have cautiously analysed the rival contentions and the materials available on record. For obvious reasons, more particularly having regard to",,,

the present stage of the case in which the impugned order has been passed, we consider it inexpedient to dwell on factual details. The crux of the",,,

charge against the respondent-accused in the case in hand is that he had entered into a conspiracy and in furtherance thereof, had eliminated a",,,

witness in an earlier case against him under Sections 302/364-A/201 and 120-B IPC, days before he was to finally testify in support of the charge.â??",,,

(emphasis supplied),,,

32. Most importantly, in its decision in Asha Ranjan (supra), whereby the petitioner was transferred from Bihar to Delhi to serve sentence and to face",,,

trial in the other cases pending against him, the Honâ??ble Supreme Court has made some very seminal observations in the following paras:",,,

â??9. At this juncture, we may advert to the facts in Writ Petition (Crl.) No. 147 of 2016. It is averred that Respondent 3 is a dreaded",,,

criminal-cum-politician who has already been declared history-sheeter Type A (who is beyond reform) and till date he has been booked in",,,

75 cases, out of which in 10 cases he has been convicted, and facing life imprisonment in two cases and 10 years' rigorous imprisonment in",,,

one and 45 cases are pending for trial. He has been acquitted in twenty cases. The first criminal case against Respondent 3 was initiated in",,,

1986. The criminal activities continued in some form or the other and on 3-5-1996, he along with his associates fired upon the then",,,

Superintendent of Police, Shri S.K. Singhal, IPS with sophisticated arms for which they were sentenced to undergo imprisonment for 10",,,

years. Thereafter, his name figured in the murder of former JNU President, Mr Chandrashekhar, who was shot dead in Siwan on 31-3-",,,

1997. It is alleged that he and his private army fired upon the raiding party on 16-3-2002 when his house was raided and in that incident,",,

the vehicles of Deputy Inspector General of Police, Saran Range, District Magistrate, Siwan and Superintendent of Police, Siwan were",,,

burnt. From his house, huge quantities of ammunition were recovered and FIR No. 32 of 2001 was registered. In another raid conducted in",,,

2005, large number of arms and ammunition were recovered from the house of the third respondent and FIRs Nos. 41 to 44 of 2005 were",,,

registered. In November 2005 he was arrested by the joint team of Bihar and Delhi Police in connection with various cases. It is put forth,,

that he ran a parallel administration in Siwan from 1990 till 2005 and in March 2007 he was sentenced to two years' imprisonment for,,

assault on CPI-ML offices in Siwan on 19-9-1998. Further, he was sentenced to life imprisonment on 8-5-2007 under Sections 364/34 IPC",,,

for abduction with an intention to commit murder of CPI (ML) worker in February 1999, whose dead body was never traced.",,

*****,,

â??15. The seminal issue that we are required to address is whether this Court, in exercise of power under Article 32 and Article 142 of the",,,

Constitution can direct transfer of an accused from one State to another and direct conducting of pending trials by way of,,

videoconferencing. Needless to emphasise, the said advertence in law will also depend upon the factual scenario and satisfaction of the",,,

judicial conscience of this Court to take recourse to such a mode. The petitioners have asserted with regard to the criminal activities of the,,

third respondent, the cases in which he has been roped in, the convictions he has faced, the sentences imposed upon him, the snail's speed",,,

at which the trials are in progress because of the terror that reigns in Siwan, the declaration of the third respondent as a history-sheeter",,,

Type A (who is beyond reform), the nonchalant attitude unabashedly and brazenly demonstrated by him that has unnerved and shaken the",,,

victims and the society at large, the impunity with which the collusion with the jail administration has taken place, the blatant intimidation of",,,

witnesses that weakens their sense of truth and justice; and mortal terror unleashed when they come to court, the audacious violation of the",,

rules and regulations that are supposed to govern the convicts or undertrial prisoners inside the jail as if they have been made elegantly,,

unperceivable and the confinement inside jail remains a word on paper, for the third respondent, still is able to issue his command and writes",,

from the jail, run a parallel administration and get involved with the crimes, at his own whim and fancy.",,

*****,,

18. On a perusal of the aforesaid chart, it is clear as noon day that Respondent 3 has been involved in numerous cases; that he has",,

been booked in at least 75 cases, out of which he stands convicted in 10 cases; that he is facing life imprisonment in two, which include",,

murder case of the petitioner's two sons, and 10 years' rigorous imprisonment in one; that out of 45 pending cases, at least 21 are those",,

where maximum sentence is 7 years and more, including 9 for murder and 4 for attempt to murder; that apart from the murder of the",,

petitioner's two sons, there are at least 15 out of total 45 pending cases which have been registered against him while he was in jail and out",,

of these 15 pending cases, one is for the murder of the petitioner's third son and two are for attempt to murder. He has been declared a",,

history-sheeter Type A (who is beyond reform).,,

*****,,

37. When there is threat to life, liberty and fear pervades, it sends shivers in the spine and corrodes the basic marrows of holding",,

of the trial at Siwan. This is quite farther from the idea of fair trial. The grievance of the victims, who have enormously and apparently",,

suffered deserves to be dealt with as per the law of the land and should not remain a mirage and a distant dream. As we find, both sides",,

have propounded the propositions in extreme terms. And we have a duty to balance.,,

*****,,

53. It is settled in law that the right under Article 21 is not absolute. It can be curtailed in accordance with law. The curtailment of the",,

right is permissible by following due procedure which can withstand the test of

reasonableness. The interest of the victim is relevant,,
and has to be taken into consideration. The contention that if the accused is not shifted out of Siwan Jail, the pending trials would result in",,,
complete farce, for no witness would be in a position to depose against him and they, in total haplessness, shall be bound to succumb to the",,,
feeling of accentuated fear that is created by his unseen tentacles, is not an artifice and cannot be ignored. In such a situation, this Court",,,
should balance the rights between the accused and the victims and thereafter weigh on the scale of fair trial whether shifting is necessary or,,
not. It would be travesty if we ignore the assertion that if Respondent 3 is not shifted from Siwan Jail and the trial is held at Siwan, justice",,,
which is necessitous to be done in accordance with law, will suffer an unprecedented set-back and the petitioners would remain in a",,,
constant state of fear that shall melt their bones. This would imply balancing of rights.,,

*****,,

61. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. However, when",,,
there is intra-conflict of the right conferred under the same article, like fair trial in this case, the test that is required to be applied, we are",,,
disposed to think, it would be paramount collective interest or sustenance of public confidence in the justice dispensation",,,
system. Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim",,,
or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the",,,
rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as,,
well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances",,,
has to be given primacy, for it furthers and promotes Rule of Law. It may be clarified at once that the test of primacy which is based",,,
on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require,,
studied scanning of facts, the competing interests and the ultimate perception of

the balancing that would subserve the larger public interest",,
and serve the majesty of rule of law.,,

*****,,

80. Presently, we shall advert to the facts which we have stated in the beginning. He is an influential person of the locality, for he",,

has been a representative to the Legislative Assembly on two occasions and elected as a Member of Parliament four times. This is not a,,

normal and usual case. It has to be dealt with in the aforesaid factual matrix. A history-sheeter has criminal antecedents and sometimes,,

becomes a terror in society.â?,,

(emphasis supplied),,

33. It is accordingly seen that the petitioner's matter has travelled to the Hon'ble Supreme Court multiple times; and the perspective of the,,

Hon'ble Supreme Court on the petitioner has been very lucidly expressed. One cannot but notice the supervening and overarching fact that the,,

petitioner is a Category 'A' history-sheeter, meaning thereby that as per the State he is 'beyond reformation'; that he has scores of",,

extremely heinous criminal cases against him, in some of which he already stands convicted and in others he is undergoing trial. The Hon'ble",,

Supreme Court has recorded in its orders that the State of Bihar says in a counter affidavit that the petitioner controls a 'private army'; and that,,

the petitioner has been accused of being involved in murder cases even while he was in judicial custody.,,

34. Though the grant of 'custody parole' would in ordinary circumstances be unexceptionable, even custody parole is not a matter of right. In",,

the opinion of this court, the relevant considerations for grant or denial of custody parole are:",,

(a) The verified existence of exceptional personal circumstances, which warrant the grant of the guarded liberty of 'custody parole';",,

(b) The assurance that the grant of 'custody parole' will not (i) compromise the prisoner's judicial custody; (ii) the prisoner's own,,

safety or the safety of others; and/or (iii) subvert or prejudice the legal process in some other way ; and,,

(c) The court must also never lose sight of the fact that the length of time for which 'custody parole' is granted is ultimately of no consequence",,

whether it be for short duration or long, if there is palpable and significant risk on any of the counts referred to in",,,

(b) above.,,,

35. Another question that arises in the present case is that since the petitioner is admittedly in judicial custody in multiple cases, in some of which he is",,,

serving sentence as a convict while in others he is still an undertrial, is it necessary for the petitioner to obtain custody parole in each and every case",,,

from the concerned trial court, before he can avail custody parole in a given case. This question has been answered by a Division Bench of this court",,,

in CrI. Ref. 5/2019 titled Court on its own motion vs. State, in which, vidÃ© order dated 20.01.2020, the Division Bench has answered the reference",,,

as under:,,

â??9. From the conjoint reading of the aforementioned Rules, it can be safely inferred that if one Court has issued an order of custody",,,

parole for the eventualities as mentioned in the Rule 1203 and the accused is in custody in more than one case, it is incumbent on the",,,

Director General Prison / Jail Superintendent to inform the other trial courts about the absence of the accused, and obtain the next date for",,,

production of the accused. Further, since the custody parole is for a limited period, it is not required, that the accused has to obtain custody",,,

parole from each and every concerned trial court and as such no permission is required from other concerned courts before sending the",,,

under-trial on custody parole.â??,,

(emphasis supplied),,,

36. To further elaborate on this issue, this court may add, that conceptually, when a prisoner is granted â??custody paroleâ??, the prisoner is not",,,

freed from judicial custody, in that he is not allowed to leave prison on his own or to come and go where he pleases. During 'custody paroleâ?? the",,,

prisoner continues to remain in the custody of the court. It is for this reason that the period spent on custody parole is counted towards period spent in",,,

prison. Custody parole therefore contemplates a situation whereby, for special exigencies mentioned in the jail rules, the prisoner is granted guarded",,,

liberty and the jail travels with the prisoner to wherever the prisoner is allowed to go under orders of the court. Since the prisoner continues to remain",,,

in judicial custody, the need for taking custody parole or other permission from

each and every court in which the prisoner is pending trial or has been",,,
convicted does not arise. Accordingly, once a prisoner obtains custody parole in a given case, he does not need to obtain separate custody parole",,,
orders from every other court which has convicted him or in which he is pending trial, except that if during the period of custody parole the prisoner is",,,
required to be produced by the Jail Superintendent before any court, as per the mandate of the Division Bench in Crl. Ref. 5/2019 (supra), information",,,
of the fact that he is on custody parole must of course be given to such court.,,,

37. In the present case there is no doubt that the petitioner's personal circumstances at this time, namely the passing-on of his father and his need",,,
to be with his family and perform rites and rituals, stands verified and requires humane consideration, yet the other considerations referred to above",,,
require closer scrutiny.,,,

38. The police departments of the States of Bihar and Delhi are both saying in unison that they cannot assure the petitioner's custody and safety.,,,

Alternatively, they are saying that they would need to deploy inordinately vast resources, if the petitioner's custody and safety is to be ensured.",,,

Rare is it to come-upon a case where State Governments are unsure and dithering to make a commitment that they can ensure the custody of a,,
prisoner. This however, is definitely such a case.",,,

39. In view of the above, this court has given its painful consideration to the prayers made in the petition and is of the opinion that a very strict",,,

balancing is required between the humane considerations for grant of custody parole and the overarching considerations of ensuring judicial custody of,,

the prisoner; his own safety and the safety of others; and ensuring that there is no subversion of, or prejudice to, the legal process. After all, the",,,

Hon'ble Supreme Court has in exercise of its extraordinary judicial powers, transferred the petitioner to Delhi to undergo sentence as well as trials",,,

outside the State of Bihar for compelling considerations. It is evident that the very presence of the petitioner within the State of Bihar was perceived,,

by the Hon'ble Supreme Court as a grave threat and interference in the course of justice.,,,

40. Yet, in an effort to balance competing interests and rights, as propounded by the Hon'ble Supreme Court, this court would not completely",,,

negate the petitioner's plea for custody parole in the backdrop of the recent

bereavement he has suffered.,,

41. In the opinion of this court, the foregoing considerations are adequately and justly balanced, by issuing the following directions:",,

a. The petitioner is granted â??custody paroleâ?? for a period of 06 (six) hours at a time on any 03 (three) days of his choice, whether consecutive",,

days or otherwise, within a period of 30 (thirty) days from the date of this order;",,

b. On each of these 03 days, the petitioner would be taken â??in custodyâ?? with adequate police security and protection, to a single address of his",,

choice to be indicated by him in writing to the Jail Superintendent in advance, but only within the State of Delhi; which address and location would be",,

verified and secured appropriately by the State;,,

c. On each of these 03 days of his choosing, the petitioner shall be taken â??in custodyâ?? to the verified address for a maximum of 06 hours,",,

excluding the time of travel to and from that address, between 6.00 a.m. and 4.00 p.m. on each such day;",,

d. During the period of custody parole, the petitioner shall be free to meet only his mother, wife and any other blood relatives but no one else; and the",,

petitioner shall be afforded sufficient privacy to interact with such persons as he pleases;,,

e. It is made clear that in the course of custody parole, the petitioner shall not be entitled to the presence of his personal guards or other such persons;",,

f. In order to execute the aforesaid directions, the petitioner is directed to furnish to the Jail Superintendent the address which he would like to visit",,

during custody parole within 03 days of this order, which address may accordingly be verified in advance.",,

42. The writ petition stands disposed of in the above terms.,,

43. Other pending applications, if any, also stand disposed of.",,

44. A copy of this order be sent to the concerned Jail Superintendent.,,