

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

WPA 15893 of 2023
Afjal Ali Sha @ Abjal Shaukat Sha
Versus
State of West Bengal & Ors.

For the petitioner	: Mr. Sourav Chatterjee Mr. Rajdeep Majumder Mr. Moyukh Mukherjee Mr. Soumya Nag Ms. Aditya Tiwari Ms. Namrata Chatterjee Advocates
For the State	: Mr. Amitesh Banerjee Mr. Saswata Gopal Mukherjee Mr. Rudradipta Nandi Ms. Ipsita Banerjee Mr. Suddhadev Adak Advocates
For the respondent no. 9	: Mr. Phiroze Edulji Mr. Goutam Dey Mr. Dipendu Sarkar Ms. Ankita Ghosh Ms. Roshni Mukherjee Advocates

For the respondent no. 10 : Mr. Sukanta Chakraborty

....Advocate

Heard on : 05.07.2023, 06.07.2023 and 07.07.2023

Judgment on : 07.07.2023

Jay Sengupta, J.:

1. This is an application under Article 226 of the Constitution of India, inter alia, praying for direction upon the respondent authorities, especially the respondent nos. 2 and 5 to cancel the parole of the respondent no. 9, for a direction upon the respondents, especially the respondent nos. 2, 5 and 8 to show cause as to why the disciplinary proceeding shall not be initiated for releasing the respondent no. 9, direction upon the respondent police authorities, especially the respondent nos. 3, 7 and 8, to provide adequate security to the petitioner, his family members and witnesses of the case in terms of the order dated 17.03.2023 passed by the Hon'ble Apex Court in Transfer Petition (Criminal) 409 of 2021 and a direction upon the respondent no. 10 to deploy Para Military Forces in Panshkura for adequate protection of the petitioner, his family members and the witnesses of the case.

2. Mr. Sourav Chatterjee, learned counsel appearing on behalf of the petitioner submitted as follows. The petitioner is the brother of one Kurban Sha (since deceased) who was brutally murdered on 07.10.2019. At the behest of one Jawar Sha, a co-villager, Panshkura Police Station Case No. 495 dated 08.10.2019 was started under Section 302 read with Section 120B of the Penal Code and under Sections 25 and 27 of the Arms Act in

this regard. The respondent no. 9 is a prime accused in this case. He is a dreaded criminal. According to a chart appended with the writ petition the said respondent is an accused in at least 34 criminal cases of which some are for murder, some for kidnapping and rape. His applications for bail in connection with the present case was rejected by this Court at least on four occasions. Two other applications were not pressed. After the petitioner changed political colour, he has been treated with special favours by the State. He could even celebrate birthday parties inside jail. The State applied for withdrawal of prosecution against him under Section 321 of the Code. On the very day that the matter was being heard before this Court in a writ application, the learned Trial Court acquitted the respondent. A Single Bench of this Court finally set aside the acquittal with caustic remarks. This Court had termed the respondent no. 9 a history sheeter and the same was not challenged. The Hon'ble Supreme Court, while transferring the trial of the case to Calcutta, categorically recorded that the accused should not be released on bail till conclusion of the trial. Yet, apparently for availing of his services during the elections, an application was made seeking parole on the ground of his mother's illness and on the very same day he was released on parole. The respondent no. 9 has a brother living with his mother who can very well take care of her. In fact, he is the owner of a medical shop. Immediately after his release, the anti-socials owing allegiance to the respondent no. 9 threatened one of the key witnesses who was supposed to depose at the trial on 05.07.2023. He did not come on that day and would possibly be able to depose on a subsequent date. Because of such threat,

the said witness lodged a complaint before the police. It is pertinent to state that earlier a witness Imran Ali was abducted by the men of the said respondent. As recorded by this Court the State was allowing witnesses to turn hostile during trial without being declared to be so. The presence of the said accused outside custody is a menace for all connected with the instant case and would adversely affect a fair trial.

3. Mr. Amitesh Banerjee, learned senior standing counsel representing the State, submitted as follows. The consideration for grant of parole is distinctly different from the ones for grant of bail or for withdrawal of prosecution under Section 321 of the Code. Parole has not been referred to anywhere in the judgments and orders relied upon by the petitioner. In any event, the petitioner is released on parole on being escorted by five armed police personnel. The State has also complied with the direction of videography of the activities of the respondent no.9 while outside his residence as directed by this Court on 05.07.2023. The respondent no. 9 prayed for parole for five days on the ground of his mother's illness. She was bedridden. Immediately after such he made an application, an enquiry was made on the same date and parole was also granted on the same day. This is in conformity with Section 62 of the West Bengal Correctional Services Act, 1992. However, there is not a single ground on which the parole has been challenged on merits. There is also no pleading in the writ petition as to the documents annexed at page 140 purporting to be a complaint made about threats received by a witness. The document referred to was sent by email to the SP and the Police Station on 05.07.2023 itself the date on

which leave was sought to move the matter. There is no ground on which such parole granted to the respondent no. 9 could be cancelled. The State has provided two armed escorts for the security of the present petitioner.

4. Mr. Phiroje Edulji, learned counsel appearing on behalf of the respondent no. 9 submitted as follows. Police and correctional service are two different items in the State list appended to the Constitution of India. This Court, dealing with group IX writ matters concerning the police, does not have determination to take up matters regarding the West Bengal Correctional Services Act, 1992. So far as the purported complaint of threats alleged on 02.05.2023 is concerned, there was a delay of five days from the last alleged occurrence of threats on 28.04.2023. The stories of threats started coming only after the proceeding under Section 321 was initiated by the State. It is also significant that the Hon'ble Supreme Court turned down the petitioner's prayer for transferring the trial from West Bengal to Guwahati. Quite significantly, no complaint was ever made about threats before the Zonal Judge of this Court although there was a direction passed by the Hon'ble Apex Court that the said Zonal Judge may monitor the trial. There was a clear application of mind by the authority under the Act to grant parole. The Hon'ble Supreme Court never said anything about parole. Only the Trial Court was debarred from granting bail during trial. In fact, there is no pleading about non-application of mind nor about the verbal allegation that the respondent no. 9 was released on parole because of the Panchayat elections. The petitioner may be continued to complete the parole even on stringent conditions.

5. Mr. Sukanta Chakraborty, learned counsel representing the respondent no. 10 relates about the difficulty of the Union of India in providing further police personnel for protection as a number of them had been deployed for the conduct of the elections in West Bengal. However, it is left for the Court to decide finally on this.

6. In reply, Mr. Chatterjee, learned counsel for the petitioner submitted as follows. The Chief of the Correctional Services and most of the senior Officers of the service are officers of the Indian Police Service. This Bench has the determination to deal with all police matters in group IX writ. It is not that the petitioners and others started all allegations of threats against the respondent no. 9 only after the State initiated a proceeding under Section 321 of the Code. Even earlier on 03.02.2020 the Investigating Officer of the case had lodged an FIR against the accused, inter alia, under Section 195A of the Penal Code for giving him threats. Since the writ petition had to be filed in haste no proper pleading could be made regarding the document annexed at page 140. But, earlier reference about threats have been pleaded. The security provided to the petitioner is not regular.

7. I heard the learned counsels for the parties and perused the writ petition and the documents filed on behalf of the State.

8. First, it appears from prayer (d) of the writ petition that the petitioner has also prayed for protection of their and other witnesses' lives and property from the respondent police authorities. The prayers are quite inextricably intertwined. In fact, the issue of parole assumes significance

mainly on the question of security of the witnesses including the petitioner. Therefore, this Bench has the required determination to take up the matter.

9. At the outset, I find it expedient to refer to the relevant observations of this Court and of the Hon'ble Supreme Court while dealing with the connected matters in respect of the instant case involving the respondent no. 9. On 10.06.2022 a Division Bench of this Court while dismissing the petitioner's bail application in CRM (DB) 1472 of 2022, held as under –

“.....Manner in which the prosecution is sought to be jettisoned gives rise to grave doubt with regard to the bona fides of the State in effectively prosecuting the petitioner and the other accused persons. As noted above, while on one hand the State chooses to support its stance of withdrawal of prosecution, on other hand it appears to be conducting a 'lip-service' trial wherein most witnesses have turned hostile.

An aura of fear and apprehension seems to pervade the minds of the witnesses and the relations of the victim. In fact, Jahar Sha (informant in the case) was constrained to withdraw himself from the writ proceeding challenging the withdrawal of prosecution. This calls for a balancing act between rights of victim i.e., access to justice and witness protection and the right of the petitioner-accused under Article 21 of the Constitution of India.

In view of the painful state of affairs where the bias of the State is heavily loaded in favour of the petitioner-accused, it would be prudent for us to tilt in favour of protection of the witnesses and family members of the deceased and ensure a fair and just prosecution. Hence, we are not inclined to release the petitioner on bail.....”

10. While considering the transfer petition of the present petitioner in Transfer Petition (Criminal) No. 409 of 2021, the Hon'ble Apex Court observed as follows –

“.....33. Adverting to the facts of the case in hand in light of the principles enunciated by this Court from time to time, it is true that the State of West Bengal has taken a complete u-turn with a view to help the main accused, namely, respondent no. 2 and it went to the extent of resorting to its powers under Section 321 of Cr.PC to withdraw the prosecution itself. A plain reading of Section 321, Cr.PC leaves no room to doubt that it is the Public Prosecutor in-charge of the case who has to apply his mind independently and impartially to form a view for withdrawal from the prosecution with the consent of the Court. The procedure followed in the case in hand was completely alien to the scheme of Section 321, Cr.PC as the decision to withdraw prosecution was taken at the level of the State Government and the Public Prosecutor was merely asked to act upon the said Government notification. The Link Judge also showed tearing hurry in accepting the application of the Public Prosecutor and permitting withdrawal from prosecution even before the date when the case was listed for prosecution evidence.....”

Thereafter, the Hon'ble Supreme Court went on to hold that the present respondent no. 9, having regard to the criminal antecedents, as well as the other accused who were in custody, shall not be enlarged on bail till the conclusion of trial save except by High Court.

11. From the above, it is evident that the reason behind keeping the respondent no. 9 in custody was that then a fair trial could take place. Therefore, the same principle should have been taken into consideration while granting parole. It would be rather naive to contend that merely the difference between considerations for grant of bail and for grant of parole is going to determine the present lis. The spirit of the above referred directions were given a complete go-by while granting parole.

12. Now, let us see what is the requirement for granting parole to such an undertrial for this. The relevant portion of Section 62 of the West Bengal Correctional Act is quoted as under –

*“.....**Section 62.** (3) Notwithstanding anything contained in sub-section (1) or sub-section (2), the Inspector General of Correctional Services may grant release of any prisoner for a period not exceeding five days in case of any emergency, such as serious illness of his near relative or friend or marriage of his son, daughter, brother or sister or funeral of his near relative or friend or son or daughter or brother or sister or any ceremony in which his participation according to the prevalent custom is essential:*

Provided that if the release of a prisoner is immediately necessary on parole in case of any emergency as aforesaid, the Superintendent may subject to ratification by the Inspector General of Correctional Services, release such prisoner for a period not exceeding five days as may be considered necessary, and may requisition police escort for the prisoner during the period of such release and, in such case, the execution of any bond or the furnishing of any surety shall not be necessary.....”

13. Here, the instant case 'serious illness' of a near relative was invoked for grant of parole to the respondent no. 9. However, there was hardly any effort made for establishing or ascertaining the seriousness of the ailment. There is nothing on record to indicate either what illness the respondent's mother was suffering from or any medical prescription or opinion being taken into consideration for this.

14. An application for parole was made on 03.07.2023, a purported enquiry took place on the same day and on the very same day an order was passed directing release of the petitioner on parole.

15. This is very exceptional indeed.

16. It is true that in case of demise of relatives, even a lethargic bureaucracy often pulls up its sleeves and manages to grant parole on the same day as when an application is made. But, the same being done in case of a purported illness of a relative is indeed very rare.

17. It is also quite surprising that the petitioner is released on parole few days before the ensuing Panchayat elections. A prisoner like him who has at least 34 serious cases pending against him is ideally not to be released at such vulnerable time. After assessing the situation and the criticality of illness of the relative, the parole could have been postponed till after the election. In fact, it is a practice to detain history sheeters and trouble makers before such events if required. One fails to understand as to what could be the very very special reason for the Administration to release the present petitioner on parole immediately before the Panchayat elections.

18. Thus, the process of decision making in this regard and resultant decision are suspicious, inchoate and bad in law.

19. It is another thing that with the turn of events, the respondent no. 9 has already been able to utilise nearly three days of parole out of five days granted.

20. Be that as it may, in view of the above discussions, I am inclined to set aside the order granting parole.

21. It is further evident from the above facts that the respondents need to take prompt action to comply with the order passed by the Hon'ble Supreme Court in the transfer petition, especially in respect of protection of witnesses.

22. In view of the above and in the interest of justice, I dispose of the writ application by passing the following directions –

(i) the order granting parole to the respondent no. 9 is set aside. The respondents shall immediately transfer him to the correctional home.

(ii) during the respondent authorities shall continue to provide security to the petitioner of two armed police personnel, henceforth with utmost regularity.

(iii) the respondent authorities shall take immediate steps to comply with the directions of the Hon'ble Apex Court regarding security of the other witnesses and in the event a breach or violation is caused by any of the accused or their associates, take immediate steps in accordance with law.

23. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

24. Let the order be communicated to the ADG & IG of the Correctional Services forthwith.

(Jay Sengupta, J.)

Later

25. At this stage, learned counsel for the State prays for a stay of the order passed.

26. The prayer is considered and is rejected.

27. Let this be treated as a part of the judgment passed earlier.

(Jay Sengupta, J.)