

**IN THE HIGH COURT OF JAMMU AND KASHMIR  
AT SRINAGAR**

Reserved on:09.07.2021  
Pronounced on: 15.07.2021

**CRM(M) No.210/2019**

**CrIM No.660/2019**

**Bashir Ahmad Mir and another**

**...PETITIONER(S)**

Through: Mr. S.T.Hussain, Sr. Advocate with  
Ms. Nida Nazir, Advocate

Vs.

**State and others**

**....RESPONDENT(S)**

Through: Mr. B.A.Dar, Sr. AAG

**CORAM:HON'BLE MR. JUSTICE SANJEEV KUMAR,JUDGE**

**JUDGMENT**

1) The petitioners, who are facing trial in FIR No.51/2013 under Sections 302/307/120-B, 419, 467, 468, 447-A, 326, 323 RPC, Section 14 of Forest Act, Sections 7/25, 7/27 Arms Act, Sections 3, 4 and 5 of Explosive Act and Sections 16, 17, 19, 20 and 40 of Unlawful Activities Prevention Act before Special Judge Designated under National Investigation Agency Act, Srinagar [“the Special Court”] are before this Court by way of instant petition filed under Section 561-A of the Code of Criminal Procedure (“the Code”) seeking a direction to the respondents not to transfer them from

Kupwara sub-jail to any other jail outside the Kashmir valley and adhere to the order of the trial Court dated 03.05.2019 in letter and spirit.

2) It is submitted that a challan in FIR No.51/2013 against the petitioners along with eight others was presented before the Special Judge on 31.03.2013 and more than eight years have elapsed but the trial is still proceeding at a snail's pace. The major reason for the delayed trial attributed by the petitioners is the transfer of the petitioners outside Kashmir valley and failure of the prosecution/State to produce them in the Court on each and every date of hearing. It is submitted that the Special Court vide its order dated 03.05.2019 had directed that in case the Incharge Central Jail, Srinagar intends to shift the petitioners and other accused from Central Jail, Srinagar to another jail in Jammu, in that eventuality, he shall shift the petitioners in jails situate either at Baramulla or Kupwara. This order, it is complained, has not been adhered to by the respondents and they have instead shifted the petitioners to some jail in Jammu.

3) This petition is resisted by the respondents and in the objections filed by the respondents duly supported by an affidavit of the S.H.O., Police Station, Parimpora, Inspector Jaffar Iqbal, it is stated that a case FIR No.51/2013 was registered in the Police Station, Parimpora against seven persons including the petitioners in the instant petition. Subsequently, Final Report/Challan was

presented before the Special Court in the year 2013 against all the accused. So far as change in custody is concerned, it is pleaded by the respondents that the same falls under the domain of the jail authorities and the police, which has registered the case has no say in the matter.

4) Having heard learned counsel for the parties and perused the record, it is necessary to first set out the prayer of the petitioners made in the petition, which reads thus:-

“1. That a direction may be issued to the respondents to act according to law and take into consideration ANNEXURE-I a Judicial order passed in this case for securing the ends of justice u/s 561-A of the CRPC because under established law the executive is bound to consider the Judicial order which attains finality. Either bail or time limit be fixed.

2. That a direction may be issued to Additional Director General of Prisons to consider this Application as a representation and decide the same in accordance with law.

3. Any other writ, order or direction which this Hon’ble Court may deem fit or proper in the facts and circumstances of the case.”

5) From perusal of the contents of this petition, it transpires that the petitioners, who along with others are facing trial in FIR No.51/2013 in the Court of Special Judge, apprehend that their custody may be changed and they could be lodged in a jail outside the Kashmir valley. They, therefore, place strong reliance on order dated 03.05.2019 passed by the Special Judge, wherein it is held that transfer of prisoners from one place of detention to another is permissible only with the permission of the Court under whose warrant an undertrial has been remanded to custody. The Special Judge in the same order has also directed that in case the petitioners are required to be shifted from Central Jail, Srinagar to any other jail in Jammu, the Incharge Central Jail, Srinagar shall shift them to a jail situated either at Baramulla or Kupwara.

6) Mr. B.A.Dar, learned Sr. AAG, has vehemently resisted the petition and submitted that this petition is rendered infructuous, as the petitioners have already been shifted to jails in Jammu and the order of shifting them from Central Jail, Srinagar to a jail in Jammu is not assailed by the petitioner. I cannot agree more with the learned counsel for the respondents.

7) The application is totally cryptic and very poorly drafted, though, two important questions of law were raised by Mr. S.T.Hussain, learned Senior Counsel, during arguments for consideration:-

- 1) Whether an undertrial, who is remanded to judicial custody by the trial Court can be shifted from one prison to another without permission of the trial Court?
- 2) Whether before shifting an undertrial from one prison to another requires compliance of principles of natural justice, in that, undertrial sought to be shifted is required to be provided an opportunity of being heard?

**Question No.1**

8) The custody of an accused, during the course of investigation and before the competent Court takes cognizance, is regulated by Section 167 of the Code of Criminal Procedure. Section 57 of the Code provides that no police officer shall detain in custody a person arrested without warrant for a longer period than under all circumstances of the case is reasonable and such period shall not, in the absence of special order of Magistrate under Section 167 of the Code, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court. It is, thus, evident that if a person is arrested in connection with a cognizable offence, he cannot be detained by the police officer for a period more than 24 hours and if during such period investigation is not completed or it appears that it cannot be completed then the police officer not below the rank of Sub-Inspector shall forthwith transmit the accused to the nearest Judicial Magistrate. It is the

Judicial Magistrate, to whom the accused is forwarded, who can authorize further detention in police custody for a term not exceeding 15 days in the whole. There is, however, a proviso added to Sub Section (2) of Section 167 of the Code, which lays down that the Magistrate may authorize the detention of the accused person, otherwise than in police custody, beyond the period of fifteen days provided he is satisfied that adequate ground exists for doing so but no Magistrate shall authorize such detention for total period exceeding ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years; and sixty days where the investigation relates to any other offence. The provisions of Section 167 of the Code, as is evident from its bare reading, relate to regulation of custody of accused person during investigation.

9) So far as custody of an undertrial is concerned, it is dealt with in Section 309 of the Code. What is provided in Section 309, in nutshell, is that if the Court after taking cognizance of offence and commencement of trial finds it necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, it may from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may by a warrant remand the accused if in custody. The plain language of Section 309 does not suggest that Magistrate has to remand accused produced before him during the course of

inquiry or trial for his lodgement in a particular prison/jail nor from a reading of Sections 167, 309 or other provision in the Code, one would find that accused person/undertrial is conferred any right to choose a prison/jail of his choice.

**10)** In terms of Section 417 of the Code, it is the State Government, which is enjoined to direct in what place any person liable to be imprisoned or committed to custody under the Code shall be confined. It shall, however, be subject to any provision in this regard made by any law for the time being in force. A conjoint reading of Sections 167, 309 and 417 of the Code, makes it abundantly clear that neither an undertrial or for that matter a convict has a right to dictate his choice of prison nor the Court under any provision of the Code is obligated to nominate a jail or prison for the lodgement of an undertrial while issuing remand/warrant for lodgement during the course of trial. For facility of reference relevant extract of Section 417(1) of the Code of Criminal Procedure is reproduced hereunder:-

**“417. Power to appoint place of imprisonment.—(1)**  
 Except when otherwise provided by any law for the time being in force, the State Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.  
 .....

**11)** As a matter of fact, under Section 29 of the Prisons Act, 1990, it is left to the State Government concerned to provide by general or special order the removal of any prisoner confined in a jail when he is under sentence of death, or, or in lieu of a sentence of imprisonment, or in default of payment of fine, or in default of giving security for keeping the peace or for maintaining good behaviour, to any other prison in the State. Subject to such orders and under the control of the State Government such powers can also be exercised by the Inspector General of Prisons.

**12)** Admittedly, Section 29 pertains to regulating of custody of convicts and does not deal in any manner with the undertrials. The reliance placed by Mr. B.A.Dar, learned Sr. AAG on Section 29 of the Code is, thus, misplaced.

**13)** In exercise of powers conferred by Sections 59 and 60 of the Prisons Act, Svt. 1977 read with Section 51 of the Prisons Act, Svt. 1977, the Government has promulgated “Manual for Superintendence and Management of jails in the State of J&K”. Rule 18.(59), which deals with transfer of undertrial is reproduced hereunder:-

“18.(59) During an emergency or on administrative grounds, the Inspector-General Prisons is authorised to transfer undertrial prisoners from one prison to another, within the State: Provided that if a prisoner is transferred to a place outside the jurisdiction of the Court



concerned, prompt intimation shall be sent to the concerned Court. The prisoner shall be produced before Court on the due date.”

**14)** From a reading of Rule 18.(59) of the Jail Manual, it becomes abundantly clear that Inspector General Prisons is conferred the power to transfer undertrial prisoners from one prison in the State to another during an emergency or on administrative grounds. The only caveat is that if a prisoner is to be transferred to a place outside the jurisdiction of the Court concerned, prompt intimation is required to be sent to the Court and it shall be ensured that the prisoner is produced before the Court on the due date. This power conferred upon the Inspector General Prisons is statutory in nature. Admittedly, in the instant case this statutory provision of the manual enacted by the State in exercise of powers conferred by Section 59 of the Prisons Act has not been called in question in this petition.

**15)** As a matter of fact, this petition, when filed was premature and the petitioners were only apprehending their shifting to a jail in Jammu and no formal order of transfer of the petitioners from a jail in Srinagar to a jail in Jammu/Kathua had been passed. Even when the case was heard, it was not brought on record as to whether the petitioners have been transferred from a jail in Kashmir to a jail in Jammu. Though, report of medical examination of petitioner No.1 by the Medical Officer, District Jail Kathua, which is placed on record by Mr. B.A.Dar, learned Sr. AAG, suggests that petitioner No.1 has

been shifted from a jail in Kashmir to District Jail, Kathua. There is, however, no whisper with regard to transfer of petitioner No.2 from one jail of the State to another.

**16)** Be that as it may, looking to the importance of the questions raised and its ramifications, I have, with the assistance of learned counsel appearing for the parties, attempted to put the legal position in proper perspective.

**17)** It is, thus, concluded that that when the Code of Criminal Procedure does not authorise the trial Court to remand an undertrial to a particular jail, it is not correct and logical to assume that the jail where an undertrial on remand by the trial Court is lodged is the one identified or nominated by the trial Court and for removal of an undertrial from such jail, it is incumbent upon the respondents to seek prior permission of the trial Court. This conclusion arrived at by me finds support from the provisions of Section 417 of the Code of Criminal Procedure, which leaves it to the Government to determine as to where a convict or undertrial is required to be lodged. Aside, Rule 18.(59) of the Manual for Superintendence and Management of Jails in the State of J&K gives such power to the Inspector General Prisons. In an emergency or for administrative reasons, Inspector General Prisons is authorized to shift the custody of an undertrial from one prison to another within the State. In the absence of any contrary or overriding provision in the Code of Criminal Procedure, statutory provision i.e. Rule 18.(59) of the Manual framed by the

Government in exercise of powers conferred by Section 59 of the Prisons Act deserves to be given effect to.

18) Judgment of the Supreme Court in the case of **State of Maharashtra v. Mohd. Saeed Sohail Sheikh, AIR 2013 SC 168** strongly relied upon by Mr. S.T.Hussain, learned Senior Counsel, may not be applicable to the facts and circumstances of this case. In the aforesaid case Hon'ble Supreme Court was confronted with the Jail Manual of State of Maharashtra in which there was no specific provision regarding transfer of undertrials from one prison to another within the State. Hon'ble the Supreme Court repelled the argument of the State of Maharashtra that it had such powers conferred on them under Section 29 of the Prisons Act. The Supreme Court, after analysing Section 29 of the Prisons Act, concluded that power under Section 29 of the Prisons Act conferred on the Government was only in relation to change of custody of convicts or those, who are undergoing imprisonment of the descriptions given in Clause 1 of Section 29 of the Prisons Act and further held that Section 29 did not deal with the undertail prisoners who did not answer the description given in Section 29. It may be noted that there was no statutory provision like 18.(59) of the Jail Manual adopted by the State of J&K, in the Jail Manual or the rules framed by Maharashtra Government under the Prisoners Act or the Prisons Act. The provisions of Section 417 of the Code of Criminal Procedure also did not fall for consideration of the Hon'ble Supreme Court where it is

unequivocally mentioned that it is for the State Government to determine as to where a convict or even undertrial is to be lodged.

**19)** In view of the aforesaid analysis, I have no doubt in my mind that under the Code of Criminal Procedure neither undertrial is conferred any right to dictate choice of his prison for his lodgement during trial nor the trial Court while giving remand of an undertrial during the course of trial is authorized to indicate or specify a particular prison/jail for keeping the undertrial in judicial custody. In view of the clear and unequivocal provisions in Sections 167 and 309 of the Code of Criminal Procedure, it is not permissible to resort to the doctrine of “reading into” and insert something, which the legislature never intended.

**20)** That apart, reading into Section 167 or Section 309 of the Code of Criminal Procedure, the power of the Court to specify or identify prison or jail for lodgement of an undertrial on remand would run counter to the provisions of Section 417, which gives such power of regulating the lodgement of convicts and undertrials to the State. Saeed Sohail Sheikh’s case (supra) has been decided by the Supreme Court in different context and under different set of circumstances. Undoubtedly, an undertrial has a fundamental right to speedy trial and any attempt by the State to scuttle such right by resorting to arbitrary transfer of an undertrial from a prison located nearer the trial Court to a prison located at far off place in certain circumstances may amount to violation of right to fair and speedy

trial of the undertrial. In such eventuality, Constitutional Court may intervene, but for that undertrial has to demonstrate and make out a case of violation of his right to speedy trial conferred upon every undertrial under Article 21 of the Constitution. In the absence of any such foundational facts pleaded and demonstrated in the petition, embarking upon by the Court on such aspects would be an exercise in futility.

### **Question No.2**

21. Having answered question No.1 in negative and as a necessary corollary, it is held that the functions or the authority exercised by the Inspector General Prisons for transfer of undertrial from one prison to another in the State is administrative in nature and does not call for providing an opportunity of being heard to the undertrial concerned. As held above, neither Constitution nor the Code of Criminal Procedure gives any right to the undertrial to claim his lodgement in a particular prison, for, shifting of prisoner/undertrial from one prison to another in an emergency or on administrative reasons cannot said to have any civil or evil consequences necessitating compliance of principle of *audi alteram partem*.

22) Judgment of the Supreme Court in **A.K.Roy v. Union of India, AIR 1982 SC 71**, in which their lordships while dealing with change of custody of the person in preventive detention observed that the requirements of administrative convenience, safety and

security may justify in a given case the transfer of a detenu to a place other than that where he ordinarily resides, but that can only be by way of an exception and not as a matter of general rule. It was further observed that even when a detenu was required to be transferred to a place, which is other than his usual place of residence, he ought not to be sent to any far-off place which, by the very reason of its distance, is likely to deprive him of the facilities to which he is entitled. The judgment aforesaid was rendered in the context of rights of persons detained under preventive detention and who have the protection of Article 22 of the Constitution of India.

**23)** The instant case is a case of undertrials, who have filed the instant petition apprehending their transfer from a jail in Kashmir to a jail in Jammu. The undertrial is not placed at a superior pedestal than a person under preventive detention and cannot claim rights higher than those available to a person under preventive detention.

**24)** Be that as it may, the fact remains that as per the observations of the Supreme Court in A.K.Roy's case (supra), even person under preventive detention can also be shifted from one place to another, of course, keeping in view certain factors as described in the judgment.

**25)** In the conclusion, it is held that the function performed by the Inspector General prisons in relation to shifting of undertrials from one prison to another in case of an emergency or on administrative reasons is administrative in nature and, therefore, there is no place

for providing an opportunity of opportunity of being heard to the undertrial, which does not have any right to choose a prison of his choice for lodgement during trial. Since permission of the Court before shifting of the undertrial from one prison to another within the State is not mandatory and trial Court is only required to be intimated, as such, the Court in such situation also does not perform any judicial or quasi-judicial function, which may necessitate hearing of the undertrial before granting permission.

The discussion made herein above, thus, answers question No.2.

**26)** The order of Special Court dated 03.05.2019 does not deal with issues considered by this Court hereinabove. That apart, vide order dated 03.05.2019, Incharge Central Jail alone was directed not to shift the petitioner to jails other than Kupwara or Baramulla jails. The order dated 03.05.2019 passed by the Special Court cannot be construed to have taken away the power of Inspector-General Prisons vested in him under Para 18.(59) of Jail manual.

**27)** For the foregoing reasons and the discussion made herein above, I find no merit in this petition and the same is, accordingly, dismissed. It is, however, provided that Inspector General Prisons shall ensure that the trial of the petitioners and others in FIR No.51/2013 is not delayed due to absence of the petitioners and other accused during trial. It shall be the duty of the Inspector General

Prisons to ensure that the petitioners are produced in the trial Court on due date/dates, either physically or through video conferencing. Any delay in conducting of trial by the trial Court for the reasons aforesaid would be taken as violation of the right of speedy trial of the petitioners giving them a fresh cause of action to approach this Court again for enforcement of their fundamental right of speedy and fair trial.

**(Sanjeev Kumar)**  
**Judge**

**Srinagar**  
**15.07.2021**  
***"Vinod, PS"***

Whether the order is speaking: **Yes**  
Whether the order is reportable: **Yes**

