

via Video-conferencing

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 02nd December 2020

+ W.P. (CRL) 1558/2020 & CrI. M.A. No.14691/2020

MOHD SHAHABUDDIN

..... Petitioner

Through: Mr. Salman Khurshid, Sr. Adv. with
Mr. Aman Khullar, Ms. Kamna Singh,
Mr. Aadil Singh Boparai, Mr. Mohd.
Yamin Alvi, Mr. Vishal Raj Sahejpal
and Mr. Khalil A. Ansari, Advs.

versus

STATE GOVT OF NCT DELHI & ANR.

..... Respondent

Through: Mr. Sanjay Lao, ASC (Criminal) for
R-1/State NCT of Delhi.
Mr. Keshav Mohan, Standing Counsel
with Mr. Rishi K. Awasthi, Advocate,
Mr. Prashant Kumar, Advocate,
Mr. Piyush Vats, Advocate and
Ms. Ritu Arora, Advocate for R-2/
State of Bihar.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J.

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 *vidé* 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seeking effectively the same relief as is sought in the present petition; which writ petition was however dismissed as withdrawn *vidé* order dated 25.09.2020 made by the Hon'ble Supreme Court.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Hon'ble Supreme Court to file an affidavit affirming that the writ petition before the Hon'ble Supreme Court was simply withdrawn without any hearing having taken place in the matter.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 It thereby stands confirmed on counsel's affidavit that the writ petition before the Hon'ble Supreme Court was withdrawn *simpliciter* without addressing any submissions before the Hon'ble Supreme Court.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 Hon'ble Supreme Court *vide* judgment dated 15.02.2017 in *Asha Ranjan vs. State of Bihar & Ors.*¹ to be in custody at the Central Jail, Tihar, New Delhi.

¹ (2017) 4 SCC 397

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 *vidé* application dated 20.09.2020 the petitioner'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 father's burial. However, the petitioner'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 petitioner'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:-

“
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 Hon'ble Court.

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

(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, *vidé* 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.

Stand of the State of NCT of Delhi:

14. As recorded above, the State (NCT of Delhi) has filed two status reports, through the concerned Jail Superintendent and the S.H.O. P.S.: Tilak Marg, Delhi, placing on record its contentions in relation to the petition.
15. Mr. Sanjay Lao, learned ASC appearing for the State (NCT of Delhi) opposes grant of custody parole, submitting that the petitioner is implicated in some 41 criminal cases of very serious nature; that he is a habitual offender; and that his petition may therefore be assessed accordingly. Besides, Mr. Lao contends that since all cases in which the petitioner is implicated, and in which he is either under trial or has been convicted, are registered in the State of Bihar; and the petitioner is only in custody at the Central Jail, Tihar, Delhi under directions of the Hon'ble Supreme Court, it is mainly for the State of Bihar to take a stand in relation to the petitioner's prayer for custody parole.
16. Mr. Lao points-out that the petitioner is a very high-risk prisoner, which is evident from the judgment of the Hon'ble Supreme Court in

Asha Ranjan (supra), in which the Hon'ble Supreme Court has observed that even to allow the petitioner to undergo sentence or be in custody as an undertrial within the State of Bihar would be a risk, which is what impelled the Hon'ble Supreme Court to transfer the petitioner from Bihar to Delhi.

17. Mr. Lao further points-out that Rule 1203 of the Delhi Prison Rules provides for grant of custody parole to a convict *inter alia* in the eventuality of death of a family member but only for a period not exceeding six hours, excluding the time taken to reach the destination and return to prison. Counsel contends that insofar as undertrials are concerned, custody parole may only be granted by the concerned trial court.
18. Insofar as custody parole to visit any place outside Delhi is concerned, Mr. Lao submits that Rule 1205 of the Delhi Prison Rules permits this, so long as the place to be visited is within the territorial limits of India and subject to reasonable logistical and security constraints, with the cost of transportation to be borne by the prisoner unless waived by the Director General of Prisons in exceptional circumstances; and that Rule 1206 provides that in the course of custody parole, the prisoner is deemed to be in prison and the period on custody parole is treated as time spent in prison.
19. Mr. Lao in fact categorically submits that since the petitioner is an extremely high-risk prisoner in the custody of the State of Bihar while only being physically held by the Delhi Prisons Department, if this court is at all inclined to grant custody parole to the petitioner for visiting Bihar, the Bihar Police must take the petitioner from prison in

Delhi; must ensure his safe passage and custody; and must bring him back to prison in Delhi. Alternatively, Mr. Lao submits that a video-conference meeting can be arranged between the petitioner, his mother and other family members so that they may conduct the last rites and rituals 'on-line', as has now become the norm for such ceremonies in these unprecedented times of the coronavirus pandemic, insofar as may be possible.

20. On point of fact it is pointed-out that the bail order granted to the petitioner in case FIR No. 220/2014 was subsequently cancelled by the Hon'ble Supreme Court in *Chandrakeshwar Prasad vs. State of Bihar*².

Stand of the State of Bihar:

21. Relying on counter-affidavit dated 21.10.2020 filed by the State of Bihar, Mr. Keshav Mohan, learned Standing Counsel has also opposed grant of custody parole to the petitioner. While admitting that since the petitioner is in custody and serving sentence in Delhi, the Delhi Prison Rules, 2018 would be applicable to the petitioner, it is argued that the prayer made is not tenable since there is no provision in the Delhi Prison Rules or even in the Bihar Prison Rules for grant of custody parole to a prisoner *for a period of seven days* as has been prayed for.
22. It is further submitted that though Memo No. 775/Law dated 19.05.2004 issued by the Home (Special) Department, Government of Bihar provides for grant of *maximum three days* of custody parole by

² (2016) 9 SCC 443

the District Magistrate within whose jurisdiction the prisoner is confined on very limited grounds; Rule 1203 of the Delhi Prison Rules limits custody parole to *not more than 6 hours*.

23. In the counter affidavit attention is drawn to the report of the District Magistrate, Siwan, which said, that though the *chaliswaan* of the petitioner's father was to fall on 27.10.2020, since assembly elections in all eight seats in Siwan District were scheduled for 03.11.2020 and counting of votes was to happen on 10.11.2020, considering that the petitioner is a former Member of Parliament and if the petitioner is (was) allowed to attend any religious programs within the district while the electoral process is underway, there is possibility of adverse impact on the election process also, including serious apprehension of law and order problems. In this view of the matter, it was submitted that the petitioner's plea for grant of custody parole may be considered only after the election process is over *i.e.* after 10.11.2020.
24. It is further stated in the counter-affidavit that the petitioner is a hardcore criminal, implicated in about 45 criminal cases, which are either pending against him or in which he stands convicted, some particulars of which are listed-out in the counter-affidavit. It is pointed-out that the petitioner was transferred to Tihar Jail on 19.02.2017 in compliance of order dated 15.02.2017 made by the Hon'ble Supreme Court in *Asha Ranjan* (supra) since the Supreme Court considered the petitioner to be an extremely dangerous criminal, *who would be a risk even if in custody in Bihar*. It is pointed-out that from the list of cases set-out in *Asha Ranjan* (supra), it will be noticed that 09 cases are under section 302 IPC, 10 are

under section 307 IPC and others relate to equally serious offences. The affidavit further recites that even the petitioner's pending trial in various cases in Bihar is being facilitated only *via* video-conferencing, without physically producing him in court there, to ensure fair trial while averting the risk of his presence in that State.

25. In a subsequent affidavit dated 05.11.2020 filed by the State of Bihar, it is stated that if the custody, safety and security of the petitioner is to be ensured within Bihar, it would require the following police arrangements :

A.	<i>What security arrangement shall be made by the state Government in case the petitioner is released on custody</i>	<i>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</i>
B.	<i>How many police personals shall be deployed to facilitate custody parole to the Petitioner.</i>	<i>Inspector-4 Sub Inspector-8 Male Police-50 Female Police-15</i>
C.	<i>What additional conditions may be imposed on the petitioner if at all he is granted custody parole</i>	<i>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</i>

This would of course be in addition to the security personnel that would be required to ensure the petitioner's custody, safety and security during transportation within Delhi.

Discussion & conclusions:

26. Though *ordinarily* custody parole would be granted to a prisoner without much reservation, once the existence of exceptional situations and exigencies contemplated in the prison rules is verified, however the backdrop and history of the present case is not run-of-the-mill or usual by any standards. This court is accordingly compelled to take an extremely close and critical look at the present case.
27. At the cost of repetition, *this is no ordinary case*.
28. There is no contest on either side that since the petitioner has been transferred by the Hon'ble Supreme Court to serve sentence and remain in custody as an undertrial in prison in Delhi and has been subject to the prison regime in force under the Delhi Prison Rules 2018, the said rules would also govern the grant or denial of custody parole to him. It is inconceivable that the petitioner, who is in long-term custody in Delhi, would be dealt-with under the Bihar Prison Rules since such a situation would be rife with anomalies, impracticalities and day-to-day problems of implementation. It would neither be feasible nor fair nor just that one prisoner in a Delhi prison should be treated differently than others, for any reason. Also, the petitioner has been transferred by the Hon'ble Supreme Court out of Bihar to suffer sentence and remain as an undertrial in Delhi for security considerations *but without any direction* that he is to be dealt-with under the Bihar Prison Rules. Accordingly, it is the Delhi Prison Rules that would apply to the petitioner's plea for custody parole.
29. The relevant Delhi Prison Rules relating to custody parole are extracted below for ease of reference :

“CUSTODY PAROLE

1203. *“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 trial court concerned, for a period of not more than six hours, excluding the time taken to reach the destination and return to Prison, in the following eventualities:*

- i. Death of a family member;*
- ii. Marriage of a family member;*
- iii. Serious illness of a family member or*
- iv. Any other emergency circumstances with the approval of DIG (Range) of prisons.*

Note: The prisoners who have been convicted by the trial court may avail custody parole from prison authorities though their appeals are pending before the higher courts.

1204. *The Superintendent of Jail will verify the existence of the circumstances mentioned in Rule 1203 above from the concerned police station immediately on receipt of the application/request to that effect.*

1205. *The custody parole may be granted to visit any place outside Government of NCT of Delhi of Delhi but within the territorial limits of India, subject to reasonable logistic and security constraints by Inspector General of Prisons. The cost of transportation of the Prisoner and the Police shall be borne by Prisoner; however, Inspector General of Prisons may waive the cost of transportation of the Prisoners, who cannot afford the same in exceptional circumstances.*

1206. *The prisoner would be escorted to the place of visit until his return there from, ensuring the safe custody of the prisoner. Such prisoner would be deemed to be in prison for the said period which would also be treated as period spent in prison.”*

(emphasis supplied)

30. Though the proceedings in which the Hon'ble Supreme Court transferred the petitioner to serve life sentence and to be in custody as an undertrial in Delhi after being convicted by a court in Bihar, were not proceedings for custody parole, the considerations that weighed with the Hon'ble Supreme Court and the observations made in that case are not only *per se* binding on this court but also impinge squarely upon the issue of grant of custody parole to the petitioner. The exceptional nature of the present case is highlighted *inter alia* in the decision of the Hon'ble Supreme Court in ***Mohd. Shahabuddin vs. State of Bihar***³, in which case, while upholding the direction of the Patna High Court to conduct the petitioner's trials in Siwan Jail instead of the Siwan Court, the following observations have been recorded :

"136. The importance of public trial in a democratic country governed by rule of law can hardly be overemphasised, but at the same time I cannot overlook the fact that primary function of the judiciary is to do justice between the parties which bring their causes before it. Therefore, it is difficult to accede to the proposition that there cannot be any exception to the universal rule that all cases must be tried in open court. In a case of extraordinary nature, the universal rule of open trial may not be adhered to. This is the settled legal position 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."

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³ (2010) 4 SCC 653

“138. The question arises—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.

“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 “private army” 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.**

“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.**”

(emphasis supplied)

31. In *Chandrakeshwar Prasad* (supra) the Hon'ble Supreme Court inter alia records this :

“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.**”

(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 Hon'ble Supreme Court has made some very seminal observations in the following paras:

*“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.

* * * * *

“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 writs 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

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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.”

(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, *vidé* order dated 20.01.2020, the Division Bench has answered the reference as under:

"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.”

(emphasis supplied)

36. To further elaborate on this issue, this court may add, that conceptually, when a prisoner is granted ‘custody parole’, 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 parole’ 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 'custody parole' 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 'in custody' 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 'in custody' 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

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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.

ANUP JAIRAM BHAMBHANI, J.

December 02, 2020

uj/Ne