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**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

D.B. CrI. Ref. No. 1/2021

Gajja Ram @ Gajendra S/o Lumba Ram, Aged About 39 Years, At Present Lodged In Central Jail, Jodhpur Through His Wife Smt. Neelam Chaudhary Aged About 35 Years, R/o Labrau, P.s. Ramsar, Dist. Barmer.

----Petitioner

Versus

1. State, Through Secretary, Department Of Home, Secretariat, Rajasthan, Jaipur.
2. The Director General Jail, Jaipur.
3. The Superintendent, Central Jail, Jodhpur.

----Respondents

For Petitioner(s)	:	Mr Ashok Chhangani, Mr K.R.Bhati, Dr.RDSS Kharlia, Mr Nikhil Dungawat, Mr Gajendra Singh Butati, Mr Deepender Rajpurohit
For Respondent(s)	:	Mr Farzand Ali, GA-cum-AAG assisted by Mr Abhishek Purohit, Mr S.S.Rajpurohit

**HON'BLE MR. JUSTICE VIJAY BISHNOI
HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI
HON'BLE MR. JUSTICE VINIT KUMAR MATHUR**

Judgment

[PER HON'BLE VIJAY BISHNOI, J.]

26/08/2021

This Larger Bench has been constituted under the orders of Hon'ble The Chief Justice for answering the following question:-

“Whether non surrendering of a prisoner to the prison authorities after expiry of the period of parole would amount to escape from lawful custody and therefore, ordinarily, such prisoner would not be entitled to be transferred to



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Open Air Camp, on account of inhibition contained in Rule

3(c) of the Rules of 1972 ?”

A Division Bench of this Court in ***Yogesh Kumar Devangan vs. State and Ors. (DBCr.WP No.541/2019)***

decided on 06.10.2020, while dealing with the provisions of Rule 3(c) of the Rajasthan Prisoners Open Air Camp Rules, 1972 (for short ‘the Rules of 1972’), has considered the case of a prisoner, whose request for sending him to Open Air Camp has been rejected by the Prisoners Open Air Camp Advisory Committee (for short ‘the Advisory Committee’) on the ground that after completion of regular parole of 20 days, the prisoner did not report to the concerned Jail Superintendent and absconded and as such by the mandate of Rule 3(c) of the Rules of 1972, he is not entitled to be shifted to Open Air Camp. The Division Bench, in the above referred case, has taken a view that such act of the prisoner of not reporting to the Jail Authorities on completion of his parole cannot be equated with the case of the prisoners, who have escaped from the jails or have attempted to do so and also held that the Rule 3(c) of the Rules of 1972 cannot be taken up as an absolute bar and it is upon the Advisory Committee to consider the application after due application of mind on merits.

Another Division Bench of this Court in the present case is not agreeable to the view taken by the Division Bench of this Court in *Yogesh Kumar Devangan vs. State and Ors.* (supra) and opined that if a prisoner, released on parole, does not surrender before the Jail Authorities on completion of parole period, it would amount to escaping from the lawful custody and thus, ordinarily be not eligible to be transferred to Open Air Camp on account of inhibition contained in Rule 3(c) of the Rules of 1972. The Division



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Bench in this case, therefore, requested Hon'ble The Chief Justice to refer the above question for consideration by a Larger Bench.

Learned counsel Mr Kalu Ram Bhati has argued that the law laid down in *Yogesh Kumar Devangan vs. State and Ors.* (supra) is correct law. It is submitted that a prisoner, who fails to report to the Jail Authorities on completion of his parole, cannot be equated with the prisoners, who have escaped from the jails or attempted to do so. It is further argued that the object of Open Air Camp is to bring the convict-prisoner into main stream of society and while considering the matter under adjudication, the aim and object of Open Air Camp must be taken into consideration.

Learned counsel Mr Ramandeep Singh Siddhu Kharlia has argued that prisoners, who have failed to report back to the Jail Authorities on completion of their parole period are different from those prisoners, who absconded or escaped from the jail or attempted to do so and cases of such prisoners are not liable to be considered as per Rule 3(c) of the Rules of 1972 but can only be considered as per Rule 3(g) of the Rules of 1972. Mr Kharlia further argued that provisions of Parole Rules prescribe punishment for such overstaying prisoners and it applies to them under the jail punishment category, therefore, denying admission to Open Air Camp in addition to such punishment would amount to double jeopardy, which is violative of Articles 14, 20 and 21 of the Constitution of India.

Learned counsel Mr Nikhil Dungawat has argued that Rules of 1972 is a welfare legislation and is directory in nature. While referring to Parole Rules, it is argued that in the said Rules, the expression used is "overstays" and not "escaped" or "absconded" for the prisoners, who fail to return to the prison and



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deal with their penalty separately under the rules and other laws, therefore, these two terms cannot be equated. It is further argued that punishing the prisoner for overstaying and simultaneously denying admission to Open Air Camp would amount to double jeopardy and is violative of Article 20(2) of the Constitution of India.

Learned counsel Mr Gajendra Singh Butati has contended that reformatory approach should be taken for transfer of a prisoner to Open Air Camp and denial for the same would amount to violation of fundamental rights therefore, any rule, order or provision of law cannot debar a prisoner from his right to be reformed. He has further argued that there is difference between "custody parole" and "regular parole" and that the expression "lawful custody" cannot be replaced by "legal custody". He went on to explain that, when the prisoner is on regular parole, he is not in the custody of the State in any manner. It is also submitted that Rule 3(c) of the Rules of 1972 is only about the 'substance' of custody (lawful or unlawful) but not about the 'form' of custody (physical or constructive).

The sum and substance of the arguments of learned counsel Mr Kalu Ram Bhati, Mr Raman Deep Singh Siddhu Kharlia, Mr Nikhil Dungawat and Mr Gajendra Singh Butati is that the view expressed by the Division Bench of this Court in *Yogesh Kumar Devangan vs. State and Ors.* (supra) is the correct law and the question referred to the Larger Bench should be answered in negative.

Learned counsel Mr Ashok Chhangani though argued that a prisoner on parole is well within the 'legal custody' of the State Authorities but it should be held that the action of a prisoner



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of not reporting to Jail Authorities after expiry of the parole period should not be treated as an absolute bar to send him to the Open Air Camp and Advisory Committee should apply its mind and should take into consideration the circumstances under which, a prisoner fails to report to the Jail Authorities after expiry of parole period.

Per contra, Mr Farzand Ali, learned GA-cum-Additional Advocate General has argued that there is no specific provision in CrPC with regard to parole and all the laws and rules promulgated in this regard are for the welfare of prisoners and, therefore, a prisoner cannot ask for sending him/her in the Open Air Camp as a matter of right. It is further argued that the period for which a prisoner stays on parole is treated as imprisonment served and is not considered as suspension of sentence and as such the parole only changes the mode of undergoing the sentence. He further argued that lawful custody has a wider connotation and includes legal custody, judicial custody and police custody while referring to the provisions of sections 417-419 CrPC. He has submitted that since the day, a prisoner is sentenced and warrant is issued, he/she remains in the lawful custody of the State till he/she serves the entire punishment and failure to surrender to the prison authorities after expiry of parole period amounts to escape from the lawful custody. Lastly, it is argued that the principle laid down by the Division Bench of this Court in *Yogesh Kumar Devangan vs. State and Ors.* (supra) is not a correct law and the question referred through this reference should be answered in affirmative.



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Now the question emerges whether a prisoner, while out of prison or jail premises on parole, will remain in lawful custody of State or not.

If the answer is in negative, the inhibition contained in Rule 3(c) of Rules of 1972 will not affect the entitlement of a prisoner for his admission in Open Air Camp, however, if the answer is in affirmative, then the case of such prisoner is required to be considered and decided in the light of Rule 3(c) of the Rules of 1972.

We are of the view that with the authoritative pronouncement of a Constitutional Bench of Hon'ble Supreme Court in ***Sunil Fulchand Shah vs. Union of India (UOI) and Ors., AIR 2000 SC 1023***, it is settled that a prisoner released on parole, remains in legal custody of the State and under the control of its agent. Even while on parole, the prisoner continues to serve the sentence or undergo the period of detention in a different manner than from being in jail. He cannot be termed as a free person.

The Hon'ble Supreme Court in ***Sunil Fulchand Shah vs. Union of India (UOI) and Ors.*** (supra) has summarised the issue as under:

“16. Since, release on parole is only a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms for grant of parole, prescribe otherwise. The period during which parole is availed of is not aimed to extend the outer limit of the maximum period of detention indicated in the order of detention. The period during which a detenu has been out of custody on temporary release on parole, unless otherwise prescribed by the order granting parole, or by rules or instructions, has to be included as a part of the total period of detention because of the very nature of parole. An order made under Section 12 of temporary release of a detenu on parole does not bring the detention to an end for any period - it does not



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interrupt the period of detention - it only changes the mode of detention by restraining the movement of the detenu in accordance with the conditions prescribed in the order of parole. The detenu is not a free man while out on parole. Even while on parole he continues to serve the sentence or undergo the period of detention in a manner different than from being in custody. He is not a free person. Parole does not keep the period of detention in a state of suspended animation. The period of detention keeps ticking during this period of temporary release of a detenu also because a parolee remains in legal custody of the State and under the control of its agents, subject at any time, for breach of condition, to be returned to custody.”

The Division Bench in this case also placed reliance on the above judgment of the Hon’ble Supreme Court.

So in the light of the above judgment, it can be said that a prisoner while out of prison or jail premises on parole will remain in lawful custody of the State.

To clarify further will take note of relevant provisions of some Statutes, which may have some bearing in this matter:-

Sections 418 & 419 of CrPC :-

“418. Execution of sentence of imprisonment.—(1) Where the accused is sentenced to imprisonment for life or to imprisonment for a term in cases other than those provided for by section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant:

Provided that where the accused is sentenced to imprisonment till the rising of the Court, it shall not be necessary to prepare or forward a warrant to a jail, and the accused may be confined in such place as the Court may direct.

(2) Where the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in sub-section (1), the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined; and in such case, the sentence shall commence on the date of his arrest.



419. Direction of warrant for execution.—Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined.”

Form No.34 appended to the Second Schedule of CrPC

**“FORM NO. 34
WARRANT OF COMMITMENT ON A SENTENCE OF
IMPRISONMENT OR FINE IF PASSED BY A [COURT]**

[See Sections 235, 248 and 255]

To the Officer in charge of the Jail at.....

WHEREAS on the day of, (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No..... of the Calendar for 20....., was convicted before me (name and official designation) of the offence of(mention the offence or offences concisely) under section(or sections) of the Indian Penal Code (or ofAct...), and was sentenced to (state the punishment fully and distinctly);

This is to authorise and required you to receive the said..... (prisoner's name) into your custody in the said Jail, together with this warrant, and thereby carry the aforesaid sentence into execution according to law.

Dated, this day of.....,20.....

(Seal of the Court)

(Signature)”

Section 55 of the Prisons Act, 1894 :-

“55. Extramural custody, control and employment of prisoners.— A prisoner, when being taken to or from any prison in which he may be lawfully confined, or whenever he is working outside or is otherwise beyond the limits of any such prison in or under the lawful custody or control of a prison-officer belonging to such person, shall be deemed to be in prison and shall be subject to all the same incidents as if he were actually in prison.”

Rajasthan Prisoners Release on Parole Rules, 2021 :-

The Rajasthan Prisoners Release on Parole Rules, 2021 (hereinafter to be referred as 'Rules of 2021') are enacted by the



Government of Rajasthan in exercise of powers conferred by sub-clause (27-a) of Section 59 of the Prisoners Act, 1894 (Central Act 9 of 1894). In the said Rules, the "Parole" means conditional enlargement of a prisoner from the jail under the Rules. A prisoner sentenced to imprisonment for not less than one year may, subject to good behavior, submit an application for parole (Rule-5). The Rules further prescribes three types of parole, which can be termed as under:

- (i) Regular Parole (Rule-10)
- (ii) Emergent Parole (Rule-11)
- (iii) Special Parole (Rule-13)

A prisoner for regular parole (Rule 10) should have completed with remission, if any, one-fourth of his sentence and subject to good conduct in jail, may be released on first parole for 20 days including the days of journey to home and back and thereafter for 30 days for second parole and 40 days respectively for third parole subject to his good behaviour during first and second parole. If during the third parole, behaviour of a prisoner remains good and his character has been exceedingly well and there are no chance that he is likely to relapse into crime, his case can be recommended for permanent parole.

In case of emergent parole (Rule 11), a prisoner can be released on parole in emergent cases involving humanitarian consideration such as on account of illness of any close relative i.e. father, mother, wife, husband, children, brother or unmarried sister; death of any close relative; damage to life or property from any natural calamity; marriage of a prisoner, his/her son or daughter or brothers/sister in case his/her parents are not alive



and delivery of prisoner's wife. The emergent parole can be granted for 7 days by the Superintendent of Jail and for 15 days by the Inspector General of Prisons or District Magistrate.

A prisoner can be released on special parole (Rule 13) in grave situation such as natural calamity or pandemic or epidemic for a period of 90 days, who has already availed first, second and third parole peacefully and his behaviour has been good during that period.

As per Rule 14, the period for which a prisoner stays on parole under Rule 10, without violation of any conditions, shall be treated as imprisonment served by him, however, all other kinds of parole shall be treated as sentence suspended.

Rule 15 says that aim of parole is to encourage good conduct of prisoner and it cannot be claimed as a matter of right by any prisoner.

Certain categories of prisoners are not entitled for release on parole unless they have not served half of the sentence including remission [Rule 16 (1)] and certain categories of prisoners are not at all entitled for release on parole [Rule 16(2)].

In case of rejection of application for parole, provision of appeal is also provided and in certain conditions, parole can also be revoked (Rule 18 & 19).

Punishment is also provided in case of breach of conditions of parole (Rule 20).

Rajasthan Prisoners Open Air Camp Rules, 1972

In exercise of powers conferred by clause (18) of Section 59 of the Prisoners Act, 1894 (Central Act 9 of 1894), the



State Government has enacted the above referred Rules. Rule 3 elaborates ineligibility of prisons for admission in Open Air Camp. Rule 4 speaks the eligibility of a prisoner for admission to Open Air Camp.

From the combined reading of the above provisions, the picture emerges out is this that a prisoner after being sentenced by a competent court is sent to jail/prison through a warrant to be issued by a court, which has passed the sentence. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined. While serving the sentence, a prisoner can be allowed to avail parole under the Rules of 2021 on fulfilling the certain requirements and can also be sent to the open air camp as per the provisions of Rule 1972.

Jail or prisons, in which the prisoners are or to be, detained, are governed by the provisions of the Prisoners Act of 1894 and the Rules made thereunder.

The Hon'ble Supreme Court in **Global Energy Ltd. & Ors. Vs. Central Electricity Regulatory Commission**, reported in **AIR 2009 SC 3194** has held that "Indisputably, a subordinate legislation should be read in the context of the Act."

As observed earlier, the Rules of 2021 and Rules of 1972 are enacted by the State Government in exercise of powers conferred by sub-clauses (18) and (27-a) of Section 59 of the Act of 1894, therefore, the said rules have to be read in context of provisions of Act of 1894.

A plain reading of Section 55 of the Act of 1894 suggests that a prisoner while outside the jail or prison shall be



deemed to be in prison and shall be subject to all such incidents as if he were actually in prison.

So even if a prisoner is outside the jail or prison on parole, by virtue of Section 55 of the Act of 1894 he shall be deemed to be in prison and subjected to all the same incidents as applicable to a prisoner detained in a jail or prison. Needless to say, a prisoner detained in jail or prison is always in lawful custody of State until proved otherwise.

While keeping into consideration the entire conspectus and being conscious of the fact that the fundamental underlying concept of parole is to provide opportunities to the prisoners to integrate with the society on the incentive of maintaining good behaviour, it is relevant that good behaviour is ascertained through Superintendent of Jail and remains at the fulcrum of the consideration.

The parole, as a privilege, is granted to the prisoners, while keeping the good behaviour of the inmate/parolee as a yardstick of measuring level of discipline while in custody.

The purpose of parole is to release the prisoner so as to enable him to connect with the society to achieve the goals of the golden principles of reformation and rehabilitation. It is important to simultaneously balance the principles of deterrence and prevention.

It is the State's duty that while taking the prisoners towards reformation and rehabilitation, a cautious approach has to be maintained so that the objective of incentivizing the custody is not diluted.



The word 'parole' derives its origin from the French word "*Je donne ma parole*", which means, "I give my word" i.e. the word of honour.

The criteria of good behaviour is incentivized by means of providing the prisoner with relief of parole while nurturing him for rehabilitation and reformation.

The step by step increase of liberties in the shape of parole are to usher the prisoner in a regime of increased freedom and decreased rigour of custody. While taking this in a reverse analogy, in case the discipline of the parole is allowed to be breached without any consequences, the same shall result into denting the incentive of maintaining good behaviour, while undergoing custody.

All the social objectives of the reformation and rehabilitation shall be washed away or surely diluted, if the parole is stigmatized with impunity by frequent breaches without repercussion.

The incentive of freedom has to be weighed against disincentive of breach, while keeping the good behaviour as an effective criteria to measure both.

Thus, it is clear that while weighing the incentive against disincentive, the disciplinary issue has to be of stellar standard, so as to ensure that the parole, which is undoubtedly a part of the custody period, has the same sanctity, as is given to the custody, and any violation of the parole conditions has to be viewed seriously so as to enable the system to grant more and more paroles to the inmates, while strengthening the system of rehabilitation and reformation. The legal position has to give an



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unequivocal mandate that any violation of parole tenure has to be viewed on the same pedestal as breaching of custody.

In view of the above analysis, the only conclusion, which can be drawn is that in the event of failure of a prisoner to report back to the jail authorities on completion of parole would amount to escape from lawful custody.

The contention of the learned counsel for the petitioners that denial of opportunity to a prisoner for admission in open air camp, on account of his overstay amounts to double jeopardy, is without any merit. Rule 15 of Rules of 2021 clearly says that grant of parole to a prisoner should be regarded as occasion to encourage good conduct and it cannot be claimed as a matter of right by a prisoner. Preamble of Rules of 1972 also says that these rules are framed for sending convicts to open air camps with a view to encourage good conduct, satisfactory performance of work and to promote life of self-discipline among the convicts of Rajasthan. When a prisoner cannot claim parole or admission in open air camp as a matter of right, in our view, any ineligibility provided in the Rules of 2021 and Rules of 1972, which disentitles a prisoner to get the benefit of parole or admission in open air camp respectively, cannot be equated with any punishment provided under any law for breach of conditions of parole or for escaping the prison or jail.

So far as contention of learned counsel Mr Ashok Chhangani that in every case, there is no absolute bar in Rule 3(c) of the Rules of 1972 regarding transfer of a prisoner to Open Air Camp is concerned, we are not supposed to enter into this controversy as it is not the question precisely referred to answer.



However, the Division Bench of this Court in

Parvezshah vs. State of Rajasthan & Ors. (D.B.Criminal

Writs No.101/2019) decided on 13.03.2019 has taken into

consideration the Rule 3 of Rules of 1972 and held as under:

“6. Thus as laid down by this Court in Gaju Ram & Mohan Lal’s case (supra), the inhibition covered by Rule 3 of the Rules of 1972 regarding transfer of the prisoners to Open Air Camp cannot operate as absolute bar and the application preferred on behalf of the convict has to be considered on merits after due application of mind, keeping in view the spirit of the provisions of the said rule.”

Hence, in view of the above referred decision, we need not to pass any order on this issue.

Accordingly, we answer the question of law referred for adjudication in the following manner:

(i) The answer to the question of law referred for adjudication is in affirmative. The view expressed by Division Bench of this Court in *Yogesh Kumar Devangan vs. State and Ors.* (supra) is not the correct law.

(ii) Failure of a prisoner to surrender to the prison authorities on completion of parole period would amount to escape from the lawful custody of the State and ordinarily such prisoner would not be entitled to be transferred to Open Air Camp as per Rule 3(c) of the Rules of 1972.

(VINIT KUMAR MATHUR),J (PUSHPENDRA SINGH BHATI),J (VIJAY BISHNOI),J

m.asif/PS