

(2013) 07 BOM CK 0161

In the Bombay High Court

Case No : Criminal Writ Petition No. 1437 of 2013

Abidkhan @ Salman Mukhtar Khan Pathan

APPELLANT

Vs

State of Maharashtra and The Superintendent

RESPONDENT

Date of Decision : 22-07-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 122, 427, 427(1), 428, 482

Penal Code, 1860 (IPC) — Section 120(B), 34, 379, 420, 465

Citation : (2013) 5 ABR 338 : (2014) ALLMR(Cri) 1719 : (2013) 4 BomCR(Cri) 752

Hon'ble Judges : S.C. Dharmadhikari, J; S.B. Shukre, J

Bench : Division Bench

Advocate : A. Karim Pathan, for the Appellant; A.S. Pai for the State, for the Respondent

Final Decision : Allowed

Judgement

S.B. Shukre, J.—In this Petition, the petitioner seeks direction to modify the orders of his sentences given on conviction in three distinct and separate cases so that the sentences in subsequent cases are made to run concurrently along with the previous sentences. This petition has been heard finally at the stage of admission with the consent of the parties. Hence, Rule, returnable forthwith. Respondents waive service.

2. The petitioner No. 1 was original accused No. 1 in three Criminal Cases bearing C.C. Nos. 664/PW/2011, C.C. No. 665/PW/2011 and C.C. No. 666/PW/2011. He was prosecuted in all these cases along with six other accused for offences punishable under Sections 379, 465, 467, 468, 469, 471, 420 read with 34 of the Indian Penal Code. In all these cases, the offences involved were identical, but, the incidents were of three different dates namely, 25th November, 2010, 5th January, 2011 and 29th August, 2009, all relating to different transactions. When this petitioner and other accused persons were charged with

these offences, they pleaded not guilty and claimed to be tried. Later on, the petitioner and all other accused persons, on 11th June, 2012, upon their production before the trial Court, expressed their desire to plead guilty and accordingly, they pleaded guilty voluntarily to all the offences with which they were charged.

3. Since, we are in this petition, concerned only with the petitioner, we would now confine ourselves to the facts relevant to the case of the present petitioner only. The petitioner submitted before the trial Court that he hailed from a poor family and his family members being dependent upon him, prayed for leniency in the matter of awarding of sentences to him. Considering the overall facts and the submissions of the petitioner, the learned Metropolitan Magistrate, Mumbai by his three separate orders passed on the same day, i.e. 11th June, 2012, convicted the petitioner, so also accused Nos. 3, 4, 5 & 6 for all the offences and awarded separate sentences to them. The learned Magistrate, however, directed the sentences to run concurrently only for offences within individual cases and not for all offences in all the three cases, although, he gave the benefit of set off as per the provisions of Section 428 of the Criminal Procedure Code. The sentences in all the three cases were identical for each of the counts of the offences involved therein. A summary of these sentences identically passed in three different cases against the petitioner is as follows:

- a. U/sec. 379 r/w 34, 120(B) of IPC to suffer S.I. for 1 year 3 months.
- b. U/sec. 465 r/w 34, 120(B) of IPC to suffer S.I. for 1 year.
- c. U/sec. 467 r/w 34, 120(B) of IPC to suffer S.I. for 1 year 9 months.
- d. U/sec. 468 r/w 34, 120(B) of IPC to suffer S.I. for 1 year.
- e. U/sec. 471 r/w 34, 120(B) of IPC to suffer S.I. for 1 year.
- f. U/sec. 420 r/w 34, 120(B) of IPC to suffer S.I. for 1 year.

Not satisfied, the petitioner challenged the nature of the sentences awarded to him by the trial Court by filing three appeals before the Sessions Court for Greater Mumbai, at Mumbai. The appeals, however, after hearing both sides, were dismissed by the learned Additional Sessions Judge for Greater Mumbai, by her three separate orders passed on the same day i.e. 7th March, 2013. The learned Additional Sessions Judge found that there was no provision under the Code of Criminal Procedure permitting different sentences passed in different cases to run concurrently and that the petitioner having been convicted in three cases, was, in her opinion, a habitual offender. Being aggrieved by these orders of the trial Court and the first Appellate Court, the petitioner has filed the present writ petition seeking interference of this Court in order to make the sentences passed in two subsequent cases run concurrently along with the sentences passed in the previous case.

4. We have heard learned counsel for the petitioner and learned A.P.P. for the

State and with their assistance we have carefully perused the record and also the impugned orders.

5. Learned counsel for the petitioner has submitted that learned Metropolitan Magistrate has committed a grave error of law and his order has resulted in complete failure of justice. He submits that the learned Magistrate did not at all apply his mind to the aspect of exercise of his discretionary power u/s 427 of Code of Criminal Procedure to make the subsequent sentences run concurrently with the sentences passed in the previous case, though this was a fit case to exercise the power, and thus the order has resulted in great injustice to the petitioner. He puts forward same argument while assailing the legality of the order passed by the first appellate Court. According to him, the first appellate Court committed serious illegality in observing that there was no provision in the Code of Criminal Procedure allowing concurrent running of different sentences in different cases. He further argues that, in the instant case, the petitioner has been convicted on the same day on which he had voluntarily pleaded guilty before the Trial Court and at that time the petitioner was not defended by an advocate nor was he given any legal aid. He further submits that the petitioner believed bonafide that, if he pleaded guilty to the charges against him in all the three cases, the learned Magistrate would take such a gesture on his part in a positive way and would give him the benefit of his discretionary power u/s 427 of Code of Criminal procedure, but that was not to happen. He has also submitted that both the Courts below failed to give effect to the sentencing policy and did not consider the petitioner's young age and responsibility towards his family members. On these grounds, he has urged that the sentences be made to run concurrently with the previous sentences given to the petitioner.

6. Learned A.P.P. for the State has conceded that both the Courts below did not consider the existence of Section 427 on the statute book, but submitted that this is not an appropriate case warranting interference with the impugned orders.

7. Having regard to the rival arguments, it would be necessary for us to take a look at Section 427 of Code of Criminal Procedure. It reads as under:-

427. Sentence on offender already sentenced for another offence.:-

(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where a person who has been sentenced to imprisonment by an order u/s 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.

8. A plain reading of Section 427 makes it clear that ordinarily subsequent sentence of imprisonment commences at the expiration of the imprisonment, not being life imprisonment, to which a person has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence. It is obvious that sub-section (1) of Section 427 confers power upon the Court to order concurrent running of subsequent sentence with the previous sentence of imprisonment for a term and this power being discretionary in nature, has to be exercised prudently in appropriate cases. So, when the power exists, it becomes a part of public duty of the Court to apply its mind to the question of exercise of the power one way or the other.

9. Performance of such a public duty becomes all the more necessary when there is a specific prayer made in that regard or the circumstances peculiar to that case demand it. In the instant case, the circumstances of the case, position of the petitioner and his prayer made before appellate Court required both Courts below to perform the public duty. But unfortunately that was not so. It may be stressed here that there were certain circumstances which could not have escaped attention of any prudent and diligent Court. The petitioner was already in custody when he had pleaded guilty before the trial Court and the trial Court, as it appears from the impugned judgments, had not even offered any legal aid to the petitioner. The petitioner had no way to know that sentences in all cases might run consecutively. In these circumstances, it fell upon the learned Metropolitan Magistrate to be particular in applying his mind to the necessity of making the subsequent sentences run concurrently with the previous sentences or otherwise. The fact that the judgments and orders of the convictions and sentences in three cases were delivered on the same day of 11th June, 2012 could not have been the ground for non-exercise of such a power, for, they were so delivered one after another separately and, therefore, it could not have been said that none of them could be considered as either previous or subsequent convictions and sentences. It is well settled rule of criminal jurisprudence that when a person is convicted and sentenced to suffer imprisonment, the sentence of imprisonment commences immediately upon its pronouncement by the Court unless otherwise directed. It is nobody's case that after the first batch of sentences in Criminal Case No. 664/PW/2011 came out, the operation of the sentences was stayed and the petitioner was directed to be released on bail. Therefore, the order of sentences passed in the first case has to be taken as the one of previous sentences in relation to orders of sentences passed in Criminal Case Nos. 665/PW/2011 and 666/PW/2011. Therefore, we find that Section 427 power ought to have been considered by the learned Magistrate for its appropriate exercise in the present case.

10. In this regard, a reference can usefully be made to the judgment of the Hon'ble Supreme Court reported in Mohd. Akhtar Hussain alias Ibrahim Ahmed Bhatti Vs. Assistant Collector of Customs (Prevention), Ahmedabad and another, explaining the nature of Section 427 power. The Court holds thus:

9. The Section relates to administration of criminal justice and provides procedure for sentencing. The sentencing Court is, therefore, required to consider and make an appropriate order as to how the sentence passed in the subsequent case is to run. Whether it should be concurrent or consecutive?

10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different.

16. We have carefully perused the entire material on record. It may be recalled that the appellant was given the maximum sentence of 7 years in the previous case under Gold (Control) Act. The conviction thereunder was also based on the plea of guilty. The latter sentence under the Customs Act was also on the plea of guilty. Generally, it is both proper and customary for Courts to give credit to an accused for pleading guilty to the charge. But no credit need be given if the plea of guilty in the circumstance is inevitable or the accused has no alternative but to plead guilty. The accused being caught red handed is one such instance. The first case under the Gold (Control) Act against the appellant falls into the latter category. 7000 tolas of Gold of foreign mark of the value of Rs. 1.4 crores were seized from the possession of appellant. The plea of guilty in that case was inevitable. The Court was, therefore, justified in awarding the maximum sentence. But the second case under the Customs Act was not of that type. Here the prosecution has to prove many things. There are 18 other accused facing the trial in the same case. The appellant, however, pleaded guilty perhaps on legal advice. He must have been told that some credit for such plea would be given by the Court and if the credit is not given and the maximum sentence is awarded the appellant is surely entitled to complain for giving the maximum sentence.

17. It is no doubt true that the enormity of the crime committed by the accused is relevant for measuring the sentence. But the maximum sentence awarded in one case against the same accused is not irrelevant for consideration while giving the consecutive sentence in the second case although it is grave. The Court has to consider the totality of the sentences which the accused has to undergo if the sentences are to be consecutive. The totality principle has been accepted as correct principle for guidance. In R.V. Edward Charles French (1982) Cr. App. R. (S) p.1 (at 6), Lord Lane, C.J., observed:

We would emphasize that in the end, whether the sentences are made consecutive or concurrent, the sentencing judge should try to ensure that the

totality of the sentences is correct in the light of all the circumstances of the case.

11. Insofar as availability of discretionary power u/s 427 of Code of Criminal Procedure is concerned, our view expressed above, has also been fortified by the view taken by learned Single Judge of Rajasthan High Court in the case of Paramjeet Singh Vs. State of Rajasthan, , referred to us by learned counsel for the petitioner. Same view has been taken by the Division Bench of this High Court in its judgment delivered on 15th February, 2013 in Criminal Writ Petition No. 3462 of 2012 between Navnit Madhukar Naik & anr. v/s State of Maharashtra.

12. Now the next question is, whether the power u/s 427(1) ought to have been exercised in this case in favour of the petitioner or not. We have already found that the petitioner was not defended by any advocate nor was he offered any legal aid by the trial Court. These factors have not been considered by both the Courts below though they ought to have given due weightage to them. Then, it has been submitted on behalf of the petitioner that he is hardly 19 years of age and his family members are dependent on him. The judgments and orders impugned herein also disclose that the petitioner had prayed for leniency on the ground that he belonged to a poor family and the family members were dependent on him. None of the Courts below have considered these submissions also though relevant for the purpose of determining the length and the nature of the sentences handed out to the petitioner. The sentencing policy of criminal jurisprudence such as ours, mandates Courts to pass such sentences as would meet its primary twin objects of deterrence and re-formation. The deterrent effect of a sentence is necessary not only to prevent the commission of similar offence by the convict by confining him to jail but also to lay down a lesson for all the prospective offenders to learn from it: crime never pays. Even award of compensation some times can be said to have such a deterrent effect apart from the sense of fulfillment that it gives to the victim of crime. A sentence of imprisonment should also have re-formative aim and, therefore, it should be of such a nature and length that it encourages, not demoralizes, the offender to endeavor to improve himself and be a good person. Thus, any sentence must have a proper balance between the deterrent and re-formative contents so that the primary objects of sentencing policy are sufficiently met. Having regard to these objects and also the two factors, namely, young age of the petitioner and dependence of his family members upon him, we are of the view that allowing the subsequent sentences in two criminal cases, namely, Nos. 665/PW/2011 and 666/PW/2011 to commence at the expiration of the previous sentences would be too harsh for the petitioner and may frustrate the very objects for which sentences are handed out.

13. For these reasons, we are of the view that the learned counsel for the petitioner is right when he submits that both the Courts below ought to have given to the petitioner the benefit of discretionary power under sub-section (1) of Section 427 of Code of Criminal Procedure. For these very reasons, we do not find substance in the arguments of learned A.P.P. for the State canvassed in this

regard.

14. This is a case wherein the petitioner has approached this Court under Article 226 of the Constitution of India and has also invoked inherent powers of this Court u/s 482 of Code of Criminal Procedure after having exhausted the remedy of appeals available under the Code of Criminal Procedure. Therefore, the question would arise as to whether this Court can entertain such a petition under Article 226 of the Constitution of India read with Section 482 of Code of Criminal Procedure or not. It is well settled law that when there is a failure to perform public duty or grave error of law apparent on the face of record or there is a miscarriage of justice resulting from the order passed by the Court below or when it is necessary to do so for enforcing fundamental or legal rights or to meet the ends of justice, this Court can entertain a petition of the present nature. A full bench of the Madhya Pradesh High Court in the case of Sher Singh Vs. State of M.P., , after considering a catena of decisions by the Hon"ble Apex Court and other High Courts, has found that inherent powers of the High Court can be invoked u/s 482 even if the trial Court or the appellate or revisional Court has not exercised its discretion u/s 427(1) of the Code of Criminal Procedure and the inherent powers of the High Court are not in any way fettered by the provision of Section 427(1) and that it can be invoked at any stage even if there is no order passed under the said section. This view commends to us. In the instant case, the learned Magistrate has not at all considered the exercise of his power u/s 427(1) even though, as already observed by us, the facts and circumstances of the case required him to do so. To aggravate the situation, the learned Additional Sessions Judge observed that there was no provision in the Code of Criminal Procedure permitting different sentences passed in different cases to run concurrently. This only shows non-application of mind as well as ignorance of law on the part of both the Courts below which has resulted in committing of a grave error of law writ large on the face of the record further leading to miscarriage of justice in the present case. That also shows failure to perform a public duty. Therefore, we find that the present petition can be entertained by us and appropriate direction modifying the impugned orders can be given by this Court.

15. Having considered the impact of the orders passed by both the Courts below, we cannot but hold ourselves from observing, to say the least, that the impugned orders disclose ignorance of basic law on the part of the learned Magistrate as well as the learned Additional Sessions Judge. Both are senior judicial officers and, therefore, it is not expected that they would not even take a look at the statutory provisions in the Code of Criminal Procedure and fail to give effect to them in appropriate cases. These lapses on their part, in our opinion, are required to be considered appropriately. We, therefore, expect the learned Registrar General of this Court to take a note of these observations for taking appropriate steps.

16. In view of the above discussion, we are inclined to allow this petition and direct that all sentences of substantive imprisonments passed in Criminal Case

Nos. 665/PW/2011 and 666/PW/2011 shall run concurrently with the sentences passed in Criminal Case No. 664/PW/2011 and to this extent the impugned orders stand modified. Rule is made absolute in these terms.