
(1983) 01 MAD CK 0017
In the Madras High Court
Case No : Writ Petition No. 10574 of 1982

Chinnasamy

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 03-01-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428, 433
Penal Code, 1860 (IPC) — Section 380, 457, 75

Citation : (1983) 01 MAD CK 0017

Hon'ble Judges : Swamikkannu, J;Natarajan, J

Bench : Division Bench

Advocate : R. Raghupathy, for the Appellant; N. Dhinakar, Government Advocate, for the Respondent

Judgement

Natarajan, J.—A convicted prisoner has filed this writ petition through the good offices of the Madras District Committee for Legal Aid and

Advice. The petition raises an interesting question of law, viz., whether a person who has been convicted in a plurality of cases on the same day

and sentenced to undergo sentences of imprisonment concurrently, can claim the benefit of remission of the period of pre-trial detention under S.

428, Cr.P.C. in respect of all the cases.

2. The brief facts which require mention are as follows : The petitioner was arrested on 19-4-1982 by the third respondent for offences punishable

under Sections 457 and 380, I.P.C. Charge-sheets were filed against the petitioner in three cases under Sections 457 and 380, I.P.C. They were

taken on file as C.C. Nos. 506, 507 and 508 of 1982 on the file of the Judicial First Class Magistrate No. II. Vellore. The petitioner was in

remand from 19-4-1982. On 29-9-1982 the plea of guilt entered by the

petitioner in all the three cases was accepted and he was convicted and sentenced to undergo rigorous imprisonment for six months in each case. The sentences were, however, directed to run concurrently. The learned Magistrate had granted the relief of set-off u/s 428. Cr.P.C. only in respect of the sentence awarded in C.C. No. 506 of 1982, but did not grant any set-off in respect of the sentences awarded in the other two cases.

3. The petitioner moved the Judicial First Class Magistrate No. II. Vellore and requested him to issue a direction to the second respondent to release him forthwith. The petitioner made such a request on the basis that his pre-trial detention was referable to all the three cases filed against him and in such circumstances, the benefit of set-off should enure in all the cases, especially when the sentences have been ordered to run concurrently. The learned Magistrate dismissed the petition filed by the petitioner on the ground that he had become functus officio and as such, he cannot issue any direction to the second respondent. It is, thereafter, the petitioner has filed this petition under Art. 226 of the Constitution of India, seeking the issue of a writ of habeas corpus. According to him, if set-off is given to the detention undergone by him as an under-trial prisoner, in respect of all the three cases, he has already served his sentence and as such, any further detention will amount to illegal detention.

4. Notice was ordered to the Public Prosecutor returnable by 17-1-1983. On 24-12-1982 the Public Prosecutor put forth his contentions in the petition. His stand was that inasmuch as the trial Magistrate has granted set-off only in C.C. No. 506 of 1982 and has specifically stated that no set-off was ordered in the other two cases, it followed that the petitioner can claim the benefit of set-off only in respect of the first case and not the second and third cases. Another contention put forward was that the petitioner has twenty-five previous convictions to his credit and in such circumstances, the petitioner is not entitled to any leniency in the matter of set-off so far as the sentence in the second and third cases are concerned.

5. In support of their respective contentions, Mr. Raghupathy appearing for the petitioner and the Public Prosecutor cited the following authorities.

But, before referring to them, we may appositely refer to S. 428, Cr.P.C. and the underlying object of Parliament in enacting the section, S. 428,

Cr.P.C. runs as follows :-

Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine,

the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction,

shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on

such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

From a reading of the section, it may be seen that an accused person, who has been convicted and sentenced to imprisonment for a term shall be

entitled to claim set-off of the period of detention undergone by him during the investigation, inquiry or trial of the same case against the term of

imprisonment imposed on him on such conviction. The section, however, imposes some restrictions for a convicted person claiming the benefit of

set-off :

(i) The imprisonment should be for a term, therefore, it follows that if a person is sentenced to imprisonment for life, he cannot claim the benefit of

set-off under S. 428. Cr.P.C., because imprisonment for life refers to an indeterminate period and as such, is not imprisonment for a term, vide :

Gopal Vinayak Godse Vs. The State of Maharashtra and Others, and R. A. Rahman v. State of Maharashtra. 1978 Cri LJ 214.

(ii) The imprisonment should not be one awarded in default of payment of fine.

(iii) The period of detention undergone by the accused person during the investigation, inquiry or trial should relate to the same case in which he is

convicted and sentenced to undergo imprisonment for a term.

6. Section 428 is a new section introduced in the Code of Criminal Procedure by the Amending Act XLV of 1978. The reason for the Parliament

enacting the section is not far off to see. In this country of ours, where illiteracy is still prevalent in large measure and where a major section of the

people live below the poverty line, it is not possible for under-trial prisoners to effectively move the Court and get themselves enlarged on bail

during the period of trial of the cases filed against them. On account of that, many under-trial prisoners have to languish in prison for months on

end, it not for years. More than that, it was found that eventually, when the case

ended in conviction and they were sentenced to a term of imprisonment, the term of imprisonment awarded was only a fraction of the period of remand undergone or, when conjoined with the period of remand, the period of incarceration far exceeded the maximum term of sentence provided for the offence under the Indian Penal Code or other Penal Acts, for which they were tried and convicted. It was to obviate this situation and relieve the hardship to such class of accused persons. S. 428 was introduced in the Code of Criminal Procedure. The object of the enactment of S. 428, as pointed out by the Joint Committee of the Parliament while recommending its introduction, is as under : ""In many cases accused persons are kept in prison for very long periods as under-trial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as under-trial prisoners. Indeed, there may even be cases where such persons are acquitted. No doubt, sometimes Courts do take into account the period of detention undergone as undertrial prisoners when passing sentences and occasionally the sentences of imprisonment are restricted to the period already undergone. But, this is not always the case so that in many cases, the accused persons are made to suffer jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also noted that a larger number of persons in the overcrowded jails of today are under-trial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs.

7. By introducing the provision of set-off, the Court could mitigate, to a large extent, the hardship caused to accused persons by reason of their being unable to come out on bail during the trial period and the trial itself getting delayed for one reason or other. While construing S. 428, Cr.P.C. and considering the plea of set-off put forward by an accused person, the underlying object of the section should not be lost sight of. At the same time, any set-off claimed under S. 428 should necessarily be within the terms of the section, and not beyond it. Hence it is not open to an accused person to say that irrespective of the terms of S. 428. Cr.P.C., he is entitled to the benefit of set-off in each and every case.

8. We will now refer to the several cases that were cited before us. The first case is Government of Andhra Pradesh and Another Vs. Anne

Venkatesware and Others, . In that case, the essential features of S. 428. Cr.P.C. were pointed out and, having regard to the terms of the section,

it was held that the period during which an accused person is in detention under the Preventive Detention Act cannot be set-off under S. 428

against the term of imprisonment imposed on him on his conviction in a criminal case. However, the Supreme Court pointed out that an accused

person can be concurrently arrested and made to suffer pre-trial detention even when he was undergoing detention under the Preventive Detention

Act and in such a situation, the accused, on being convicted in a criminal case, can claim the benefit of set-off under S. 428. Cr.P.C. for the period

he was concurrently in detention as an under-trial prisoner.

9. The second case is R. A. Rahman v. State of Maharashtra 1978 Cri LJ 214. In that case, an accused was convicted in a murder case and two

prohibition cases. He was kept in detention for some period in the murder case. On account of that factor, the Bombay High Court held that it was

not a detention in relation to the investigation, inquiry or trial of the prohibition cases and therefore, the accused was not entitled to claim any

remission of the detention period in relation to the prohibition cases. Next, it was held that even in the murder case which resulted in conviction,

the accused would not be entitled to claim the benefit of set-off of the remand period because a life imprisonment was not in law a sentence for a

term as envisaged under S. 428, Cr.P.C. It was further held that even if the sentence of imprisonment for life was commuted to one of

imprisonment for fourteen years under S. 433 of the Code, the accused would not be entitled to claim the benefit of set-off, because the provisions

of S. 428 cannot be read in the context of a separate provision like S. 433, Cr.P.C. and the two sections are independent provisions and their

fields of operation are different.

10. The third case cited is G. Ramulu Naidu v. State of A.P. 1982 MLJ 458 : 1882 Cri LJ 2186 (Andh Pra). The facts of that case were as under

: The accused was convicted in two sessions cases and sentence to R.I. for one year and seven years respectively and the sentences were directed

to run concurrently. The accused was an undertrial prisoner in the two cases from 19-6-1969 to 8-3-1970 (263 days) and from 19-1-1971 to

28-5-1972 (496 days), making the total period of undertrial detention to be 759

days. While matters stood thus, a Sub-Divisional Magistrate ordered the accused, on 9-3-1970, in a security proceeding in M.C. No. 4 of 1969, to furnish security for Rs. 2,000/- with two sureties, each for a like sum, for a period of one year. As the accused could not furnish the security, he was kept in prison from 9-3-1970 to 9-3-1971. The accused wanted this period of one year also to be treated as pre-trial detention and given set-off. The State opposed the prayer of the accused and urged that the period of detention between 9-3-1970 to 9-3-1971 was referable to the order passed by the Magistrate in M.C. No. 4 of 1969 and as such, the detention was not referable to the Sessions cases pending against the accused. The Andhra Pradesh High Court overruled the objection of the State and granted set-off for the period of one year also. In so granting, the learned Judges of the High Court observed as follows :-

When once a person has been convicted and sentenced to imprisonment, then all the periods which he spent in all the cases, which precede the conviction and sentence awarded, in the main case will be deemed to be the period spent in serving out of the sentences, because no person can be deemed to be in jail without serving the sentence passed against him. The petitioner is therefore entitled to get the periods spent by him in jail even if he was arrested on the basis of the orders passed in M.C. No. 4 of 1969 against the sentence awarded to him in the Sessions cases mentioned above.

Again in para 13, the learned Judges have observed as follows :-

Once a person has been convicted and sentenced to jail, then all the period which he spends in jail will be deemed to be the period spent in serving out the sentence.

With great respect to the learned Judges of the Division Bench, we are of the view that the ratio laid down by them is too wide in its amplitude. If

the accused person in that case was an under-trial prisoner in the two Sessions cases even during the period 9-3-1970 to 9-3-1971, it goes

without saying that he would be entitled to claim set-off for that period as well notwithstanding the fact that he was made to suffer imprisonment in

consequence of the order passed by the Sub Divisional Magistrate in M.C. No. 4 of 1969. If, however, the period of detention for one year was

solely referable to the order passed in M.C. No. 4 of 1969 and had no reference whatever to the undertrial detention of the accused in the two

Sessions cases then, it would not be open to him to claim set-off for the period of detention in M.C. No. 4 of 1969, for the detention was not

referable to the investigation, inquiry or trial of the Sessions cases.

11. The fourth case is, K.C. Dass and N.K. Chatterjee Vs. State, . The common question which was raised in a batch of cases before the Delhi

High Court was, whether an accused person, who is convicted in more than one case and claim the benefit of set-off in all the cases. The High

Court has given an illustration which we are not able to accept. The illustration has been set out in the following manner.

Take a simple illustration. An accused is arrested in one case on 1-1-1977. He is arrested in another case on 1-1-1978, while the trial of the first

case is proceeding. In the first case he is convicted and sentenced on 31-1-1978 to two years" imprisonment. Under S. 428 the accused will be

entitled to set-off his period of detention from 1-1-1977 to 31-1-1978 against the term of imprisonment imposed on him in the first case. This legal

position is incontestable.

To take the illustration further, suppose in the second case the accused is convicted on 31-3-1978 and sentenced to three years" imprisonment.

Now, the accused claims that he is entitled to set-off the pre-trial detention in the second case as well. In other words, he claims that the period of

detention from 1-1-1977 to 31-3-1978 be set-off against the sentence of imprisonment imposed on him in the second case. The short question is :

Is he entitled to set-off the period of detention against his sentence in the second case though he had had the benefit of S. 428 once in the first case

?

Then, after dealing with the objection raised by the Delhi Administration to refute the claim of set-off in the second case, the High Court has held as

follows :

On a true interpretation of the section, it appears to us that in the second case also, in which the accused person was convicted on 31st March

1978, he will be entitled to set-off the period of pre-trial detention i.e. 1st January 1977 to 31st March 1978 against the sentence of three years"

imprisonment imposed on him. The Statute does not make any distinction

between the first case and the second case. The principle is the same. It has to be applied to all cases even-handedly and uniformly.

We fail to see how the accused can claim the benefit of set-off in the second case from 1-1-1977 when his arrest itself was on 1-1-1978. In our

opinion, the accused would be entitled to claim set-off in the second case only from 1-1-1978 since his detention from 1-1-1977 to 31-12-1977

was in connection with the first case. In the absence of materials to show that even in the second case the arrest could have been effected earlier,

and it was belatedly effected on 1-1-1978, we fail to see how the accused can claim the benefit of set-off in respect of pre-trial detention in

another case, that the accused as it may, the decision taken in that case, that the accused is entitled to claim set-off in the first case from 1-1-1977

date (date of arrest) to 31-1-1978 (date of judgment), and not merely from 1-1-1977 to 31-3-1978 (date of judgment in the second case), is in

accordance with the terms of S. 428. Cr.P.C.

12. The fifth case is, *Shabbu and Another Vs. State of U.P. and Another*, . The facts of that case need not be set out. But, the ratio laid down

therein needs extraction as, if we may say so with respect in our opinion the correct principle of law has been succinctly laid down :

..... under S. 428, Cr.P.C., the period of detention, as an undertrial, of an accused in a particular case can be set-off only towards the sentence

ultimately awarded to him in that very case. Whether or not the detention of a person in one case should also be treated to be his detention for the

purposes of any other case, wherein he is wanted, is a question to be decided upon the facts and circumstances of each case. No set formula can

be laid down in that behalf. If the facts and circumstances of a particular case indicate that a person already detained in one case was also

subsequently wanted in another case and he was not formally detained in that other case on account of the negligence of the concerned authorities,

and for no fault of his, he can, with all justification, claim that his detention in the earlier case should also be deemed to be his detention for the

purposes of the 2nd case. In that event, benefit of S. 428. Cr.P.C. can be extended to him.

The last case is, *Lalrinfela Vs. State of Mizoram and Others*, . It was held in that case that if an accused is arrested and detained in two cases, the

computation for the period of set-off must be done separately and he shall be entitled to claim set-off in both the cases. We are in respectful agreement with the view taken in that case.

13. In the light of the decisions set out above, if we examine the facts of the present case, we find that the petitioner was arrested on 19-4-1982

and subsequently he was charged in three cases for similar offences, viz., under Ss. 457 and 380. I.P.C. The three cases were numbered

consecutively as C.C. Nos. 506, 507 and 508 of 1982. Convictions in all the three cases were awarded on the same day and the petitioner was

sentenced to undergo rigorous imprisonment for six months in each case, the sentences to run concurrently. In such circumstances, it has to be

taken that the arrest of the petitioner on 19-4-1982 was in respect of all the three cases and his being remanded to custody is referable to each of

the three cases filed against him. Such being the case, it necessarily follows that the petitioner will be entitled to claim the benefit of set-off in each

of the three cases. The trial Magistrate was not justified in granting set-off in C.C. No. 506 of 1982 alone and in refusing to grant set-off in the

other two cases. The petitioner's claim for set-off in the second and third cases satisfies all the requirements of Section 428, Cr.P.C. It is by now

well established that an accused can undergo pre-trial detention in more than one case at the same time, and, likewise there is also no bar to

preventive and pre-trial detention as well as preventive and punitive detention running simultaneously. In view of this position, it follows that the

benefit of set-off given to the petitioner in the first case cannot be denied to him in the second and third cases as well.

14. The learned Public Prosecutor made a submission that the petitioner had twenty-five previous convictions to his credit and having regard to

that fact, the learned Magistrate may have refused to grant set-off in the second and third cases. We cannot accept this argument for more than

one reason. If the petitioner had numerous previous convictions to his credit, it was the duty of the investigating officer to have charged the accused

under S. 75. I.P.C. as well and brought to the notice of the Magistrate that the petitioner is an old offender and therefore deserves enhanced

punishment. Secondly, the order of the Magistrate does not disclose, and indeed it cannot disclose, for there was no charge under S. 75. I.P.C.,

that the Magistrate was aware of the fact that the petitioner had previous convictions and as such, he should be awarded a deterrent sentence.

15. In the result, the writ petition will stand allowed and the claim of set-off made in respect of the sentences awarded in C.C. Nos. 507 and 508

of 1982, will stand allowed. By reason of that, the period of sentence has already been undergone by the petitioner and hence he is ordered to be

set at liberty forthwith, unless he has been sentenced to undergo imprisonment in any other case.

16. Petition allowed.