

**(2013) 01 MAD CK 0153**  
**In the Madras High Court**  
**Case No : Criminal A. No. 417 of 2012**

Donatus Tony Ikwanusi

APPELLANT

Vs

The Investigating Officer, NCB

RESPONDENT

**Date of Decision :** 30-01-2013

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 29, 30, 30(2), 31, 31(1)  
Penal Code, 1860 (IPC) — Section 122, 380, 427, 63, 64, 64

**Citation :** (2013) CriLJ 1938 : (2013) 2 CTC 1 : (2013) 1 LW(Cri) 105 : (2013) 2 RCR(Criminal) 967

**Hon'ble Judges :** T. Sudanthiram, J;P. Devadass, J;K.N. Basha, J

**Bench :** Full Bench

**Advocate :** T.S. Sasikumar, for the Appellant; N.P. Kumar Special Public Prosecutor for NCB Cases, Mr. A.R.L. Sundaresan Senior Counsel, Mr. A. Ganesh and Mr. C.R. Malarvannan, for the Respondent

## Judgement

K.N. Basha, J.—This Full Bench is constituted by the Hon''ble The Chief Justice on the basis of the reference made by one of us (Hon''ble

Mr. Justice T. Sudanthiram) in this appeal on 03.08.2012 as the Hon''ble Judge has taken a different view from that of the view taken by a

Division Bench of this Court in its order dated 27.03.2012 M. Balasubramaniam v. State represented by the Inspector and others reported in

2012 (1) L.W. (Cri.) 429 to the effect that there is no prohibition for the Court to order the default sentence also to run concurrently. The Hon''ble

Judge by quoting a catena of decision right from (1911) 5 SLR 263 (Emperor Vs. Akidullah) rendered by this Court and various. High Courts

pointed out that they are consistent that the default sentence of imprisonment cannot be made to run concurrently. Therefore, the learned Judge felt

that the decision rendered by the Division Bench of this Court in M.

Balasubramaniam v. State represented by the Inspector and others reported in 2012 (1) L.W. (Crl.) 429 by taking a view that "there is no prohibition for the Court to order the default sentence also to run concurrently

requires reconsideration for an authoritative pronouncement by a Full Bench. In view of the above, the crux of the question involved in this

reference for the decision of this Full Bench is to the effect "whether there is any prohibition or not for the Court to order the default sentence of

imprisonment imposed for the non-payment of fine also to run concurrently".

2. Mr. A.R.L. Sundaresan, learned Senior Counsel, volunteered to assist the Court as an Amicus Curiae. Mr. C.R. Malarvannan, learned counsel,

who has already appeared before the learned single Judge as amicus curiae, also assisted this Court as amicus curiae and Mr. A. Ganesh, learned

counsel also joined with them.

3. Heard Mr. N.P. Kumar, learned Special Public Prosecutor for NCB Cases appearing for the respondent and Mr. T.S. Sasikumar, learned

counsel for the appellant.

4. Mr. A.R.L. Sundaresan, learned Senior Counsel appeared as Amicus Curiae took us through the provisions u/s 64 IPC and under Sections

421, 427, 428 and 429 Cr.P.C. and contended that the legislators, namely, Law Makers have thought it necessary that the default sentence cannot

be allowed to run concurrently. It is pointed out by the learned Senior Counsel that the discretion was not conferred on the Court by any

provisions of the Code of Criminal Procedure (hereinafter referred to as "the Code") for ordering the default sentences also to run concurrently and

when it is not conferred on the Court, the Court has no such power to exercise the discretion. It is contended that the Court cannot take up the

legislation work and it cannot expand the legislation, the Court can only apply the legislation as it is. It is further contended that the Law makers did

not think it proper to give the power to Court to order that the default sentence also can run concurrently, then, no person will have the inclination

to pay fine imposed on him and as such, the very purpose of imposing fine will get defeated if the discretion is given to the Court as the Court may

order the default sentences to run concurrently.

5. Mr. A. Ganesh, learned counsel, contended that as per the provision u/s 64 IPC, the default sentence should be in excess of the sentence

awarded to the prisoner and there is no bar u/s 64 IPC for ordering the default sentences to run concurrently. The learned counsel also submitted a

compilation of judgments containing the decisions relied on in the referral order of the learned Single Judge as well as other decisions.

6. Mr. CR. Malarvannan, learned counsel, who has appeared as Amicus Curiae before the learned Single Judge, also reiterated the contentions as

that of the learned Senior Counsel and submitted a compilation of decisions.

7. Mr. N.P. Kumar, learned Special Public Prosecutor for NCB Cases, contended that there is absolutely no provision for ordering the default

sentences, in the event of non-payment of fine by the accused, to run concurrently. We have also heard the learned counsel for the appellant.

8. We have carefully considered the contentions put forward by the learned Senior Counsel and other learned counsel, who have appeared as

Amicus Curiae and the contentions of the learned Special Public Prosecutor for NCB Cases and also perused the referral order dated 03.08.2012

and the entire materials available on record.

9. As already pointed out, the crux of the question arises for the decision of this Full Bench is "whether there is any prohibition or not for the court

to order the default sentence of imprisonment imposed for the non-payment of fine also to run concurrently".

10.0. It is relevant to refer the following provisions for deciding the issue involved in this matter.

10.1. Sections 30, 31, 427 and 428 Cr.P.C. read thus:

Section 30. Sentence of imprisonment in default of fine - (1) The court of a Magistrate may award such term of imprisonment in default of payment

of fine as is authorised by law:

Provided that the term-

(a) is not in excess of the powers of the Magistrate u/s 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the

Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable

by the Magistrate u/s 29.

Section 31. Sentence in cases of conviction of several offences at one trial - (1)  
When a person is convicted at one trial of two or more offences,

the court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several

punishments, prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence the one

after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences

being in excess of the punishment, which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher

court:

Provided that-

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment, which the court is competent to inflict for a single offence.

(3) For the purpose of "appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be

deemed to be a single sentence.

Section 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 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.

10.2, Section 64 of IPC reads as follows:

Section 64, Sentence of imprisonment for non-payment of fine - In every case of an offence punishable with imprisonment as well as fine, in which

the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or

with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the

sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of

any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

A reading of the above said provisions clearly shows that as per Section 30 of the Code, the Court of a Magistrate was empowered to award

such term of imprisonment in default of payment of fine and as per the provision, the term is not in excess of the powers of the Magistrate u/s 29.

As per Section 30(2) of the Code, the imprisonment awarded under the said section may be in addition to a substantive sentence of imprisonment.

Section 31 of the Code deals with sentences in cases of conviction of several offences at one trial and as per Section 31(1) of the Code, the

punishment awarded for several offences consisting of imprisonment to commence the one after the expiration of the other in such order as the

Court may direct, unless the Court directs that such punishments shall run concurrently. Therefore, as per this provision, the Court is empowered

to order the punishments for several offences to run concurrently and the default sentences is excluded from the said provision. As per Section 427

of the Code, the Court can direct the subsequent sentence awarded against the person, who was undergoing the sentence of imprisonment, to run

concurrently with such previous sentence. Here again, the default sentences is specifically excluded. Therefore, a reading of the above said

provisions makes it crystal clear that the Courts have been empowered to order the substantive sentences to run concurrently and the default

sentences cannot be ordered to run concurrently.

11. However, the Division Bench of this Court in M. Balasubramaniam V. State

represented by the Inspector and others reported in 2012 (1)

L.W. (Crl.) 429 in paragraph 25 observed as hereunder:

25. Under Sec 31 of Cr.P.C., if a person is convicted and sentenced for several punishments such punishment commences one after the other

unless the court directs such punishment shall run concurrently. There is no prohibition for the court to order the default sentences also to run

concurrently either under Sec. 30 or 31 of Cr.P.C. However, Rule 242 of Prison Manual alone would state that while calculating the sentence of

imprisonment, sentence imposed in default of payment of fine, cannot run concurrently.

12. In the above said paragraph, the Division Bench, by placing reliance on the provisions under Sections 30 and 31 of the Code, held that there is

no prohibition for the Court to order the default sentences also to run concurrently either u/s 30 or u/s 31 of the Code.

13. At the risk of repetition, it is to be reiterated that as per provision u/s 30 of the Code, the Court of a Magistrate was empowered to award

default sentence on the ground of default of payment of fine. u/s 30 (2) of the Code, it is made clear that awarding such default sentence may be in

addition to the substantive sentence of imprisonment for the maximum term awardable by a Magistrate u/s 29.

14. As far as Section 31 is concerned, the said provision relates to conferring power on the Court for a direction that the punishment awarded on

the accused for two or more offences in the same trial to run concurrently. The said provision is nothing to do with the power of the Court to order

the default sentences to run concurrently.

15. Therefore, we are unable to subscribe to the view of the Division Bench in M. Balasubramaniam's case (cited supra) to the effect that the

Court can order the default sentences also to run concurrently either u/s 30 or u/s 31 of the Code.

16. It is also observed by the Division Bench that as per Rule 242 of the Prison Manual, while calculating the sentence of imprisonment, sentence

imposed in default of payment of fine amount, cannot run concurrently. However, in paragraph 26, the Division Bench expressed its opinion to the

effect that Rule cannot prevail over the provision under the Statute of the Code of Criminal Procedure. We are of the considered view that there is

absolutely no provision under the Code empowering the Court to order the default sentences to run concurrently and such being the position, the

question of any provision under the Code prevailing over the rule does not arise.

17. It is relevant to state that there are provisions under the Code, as pointed out earlier, to order the substantive sentences to run concurrently and

the legislature specifically excluded such power to the court in respect of ordering the default sentences to run concurrently. The Court cannot add

or substitute any additional words to any particular provision of the Code. It is not for the Court to take up the work of legislation and the Court

can only apply the provision contained under the Code as it is. It is well-settled in a catena of decisions that the term of imprisonment in default of

payment of fine cannot be deemed to be a sentence, but a penalty which is incurred on account of non-payment of fine.

18.0. At this juncture, it is worthwhile to refer the line of decisions relied in the referral order as hereunder:

18.1. A decision was rendered by His Lordship T.S. Arunachalam, J. reported in 1990 MLJ (Cri.) 534 = 1990 L.W. (Crl.) 263 (P. Balaraman

V. State represented by the Inspector of Police, Ennore Police Station), in respect of the question involved in this matter. His Lordship dealt with

this aspect elaborately by placing reliance on the earlier decisions as hereunder:

29. In Re: Kanda Mooppan, Pandrang Row, J., held that order directing sentence of imprisonment in default of fines to run concurrently was

illegal.

30. To the same effect is the ruling of the Lahore High Court in Emperor vs. Chanan Singh

31.....

32.....

33. In AIR 1942 Sindh 80 a Division Bench, dealing with Section 35 of the Criminal Procedure Code and Section 64 of the Indian Penal Code,

held that if substantive sentence of imprisonment with fine was imposed, the sentence in default of payment of fine must be consecutive to the

substantive sentence of imprisonment.

34.....

35. It cannot be overlooked, that the term of imprisonment in default of

payment of fine, cannot be deemed to be a sentence, but a penalty, which is incurred on account of non-payment of fine, A sentence is something which must be undergone unless it is remitted in part or in whole, on appeal or otherwise. When however, a term of imprisonment is imposed in default of payment of fine, the accused may always avoid it, by paying the fine. In such a case, of sentence of fine, the imprisonment in default is merely a penalty for non-payment of fine. Therefore, the imprisonment awarded in the event of default of payment of fine, cannot be added up to the substantive sentence of imprisonment to negative the jurisdiction of the trial Judge...

18.2. In Emperor Vs. Subrao Sesharao, the Bombay High Court held as follows:

In this case the accused was convicted u/s 380, Indian Penal Code, in respect of two separate acts of theft and he was sentenced to suffer

rigorous imprisonment for one day and to pay a fine of Rs. 50, or in default to suffer rigorous imprisonment for one day and to pay a fine of Rs. 50,

or in default to suffer rigorous imprisonment for three months, for each of the two offences. The Magistrate further directed that the two sentences should run concurrently.

The question is raised by the Superintendent of the jail, in which the accused was confined, whether the sentences of imprisonment in default of

payment of the fine could run concurrently. The Jail Superintendent on the authority of Section 64, Indian Penal Code, and a Government

Resolution No. 5851, dated October 26, 1888, Judicial Department was of opinion that they could not run concurrently. The Director Magistrate

has referred the question to us. The only judicial authority on the point that has been brought to our notice is the case of Emperor V. Akidullah (1),

where it was held that Section 35, Criminal Procedure Code (New Section 31), did not permit the passing of concurrent sentences of

imprisonment in default of fines imposed for two or more offences. It was remarked in the course of the Judgment:-

In case of part payment of the fine it would be difficult to estimate what portion of which term of imprisonment should terminate u/s 69, Indian

Penal Code. We agree with this ruling. Section 35, sub-section (1), only authorises concurrent punishments in the case of imprisonment or

transportation. It does not for instance authorise concurrent fines. And a



Magistrate, if he wants to make the fine for a second or further offence extremely light, in consideration of the fine already imposed for another offence, can easily make it nominal. Then if a Magistrate imposes a sentence of imprisonment in default of payment of fine u/s 64, Indian Penal Code, the provisions of that section require that that term of imprisonment "shall be in excess of any other imprisonment to which he may have been sentenced.

This implied that it cannot be made to run concurrently with another term of imprisonment.

18.3. The Hon'ble Apex Court in *Shanti Lal Vs. State of M.P.*, considered the question of imprisonment in default of payment of fine with

reference to various provisions under the Indian Penal Code and the Code of Criminal Procedure, 1973 and held as hereunder:

31.....The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment

of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision

or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different

footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He,

therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but

the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other

relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine. (Emphasis Supplied)

18.4. In a latest decision in *Shahejadjkhan Mahebubkhan Pathan Vs. State of Gujarat*, the Hon'ble Apex Court after referring the *Shantilal's* case

reiterated the same view and held as hereunder:

12. It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a

person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is

modified or varied in part or whole in the judicial proceedings. However, the

imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.

13. While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court, In other words, the appellants have been ordered to undergo substantive sentence of RI for 10 years which is minimum.

The Hon''ble Apex Court in the said decision ultimately ordered that in default of payment of fine of Rs. 1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.

19. The principle laid down by the Hon''ble Apex Court in the decisions cited supra makes it crystal clear that imposition of the term of imprisonment in default of payment of fine is not a sentence and it is a penalty which a person incurs on account of non-payment of fine. It is also made clear that if such default sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. Therefore, there is no power for the Court to order the default sentences to run concurrently. The Hon''ble Apex Court also

made it clear that when such a default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount.

20. Though the Division Bench of this Court also in M. Balasubramaniam's case (cited supra) observed, as stated earlier, that there is no prohibition for the Court to order the default sentences to run concurrently, ultimately held that the accused in the said case had undergone the substantive sentence of two years and further period of six years towards default sentence on the ground of default of payment of fine amount and set the accused at liberty. Therefore, the Division Bench has not ordered the default sentences to run concurrently in respect of the accused in the said decision.

21. The Division Bench also placed reliance on the decision of the Hon''ble Apex Court in Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another, The Hon''ble Apex Court in the said decision has dealt with the scope and object of the provision u/s 428 of the Code. Section 428 of the Code deals with the power of the Court to set off the period of detention undergone by the accused against the sentence of imprisonment. The Hon''ble Apex Court, in the said decision, held as follows:

4.....When a accused person is sentenced to imprisonment for a term in default of payment of fine, it is a much a sentence of imprisonment imposed upon him as a substansive sentence of imprisonment. It is true that where an accused person is sentenced to imprisonment for a term in default of payment of fine, he can avoid undergoing such imprisonment by making payment of the fine, but it he does not, he would have to undergo such imprisonment and that would be for the full term specified in the sentence. No distinction can be made in principle between a substantive: sentence of imprisonment and a sentence of imprisonment in default of payment of fine and both must be held to be within the scope and intendment of Section 428. The object of enactment of Section 428 is, as pointed out by the Joint Committee of Parliament while recommending its introduction:

...in many cases accused persons are kept in prison for very long period 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 prisoner.

Indeed, there may even be cases where such a person is acquitted.

No doubt, sometimes courts do take, into account the period of detention undergone as under-trial prisoner when passing sentence and

occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case so that in many cases, the

accused person is 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 large number of persons in the overcrowded jails of today are under trial prisoners. The new clause

seeks to remedy this unsatisfactory state of affairs.

We fail to see how, having regard to this object of Section 428, any differentiation can be made between a substantive sentence of imprisonment

and a sentence of imprisonment in default of payment of fine. The nature of the mischief arising by reason of the accused person being 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" would be the same in

the both cases and it is impossible to imagine that the legislature should have sought to remedy this mischief in one case and leave it untouched in

the other. Therefore, even if two constructions of Section 428 were possible, we should adopt that which suppresses the mischief and advance the

remedy and carries out the subject of the legislature as fully and effectually as possible. We accordingly take the view that Section 428 applies not

only in relation to a substantive sentence of imprisonment but also in relation to a sentence of imprisonment in default of payment of fine. The period

for which an accused person has been detained during investigation, inquiry or trial of the case is liable to be set off not only against a term of

substantive imprisonment but also against the term of imprisonment in default of payment of fine. The set off, however, does not absolve the

accused person from the liability to pay the fine imposed on him. Section 421 of the new Code provides that even if the accused person has

undergone the whole of the imprisonment in default of payment of fine, the Court passing the sentence can issue a warrant for the recovery of the

fine if, for special reasons to be recorded in writing, it considers it necessary so to do or it has made an order for payment of expenses or

compensation out of the fine u/s 357. (Emphasis Supplied)

The Hon''ble Apex Court has clearly held that when an accused person is sentenced to imprisonment for a term in default of payment of fine, he has to undergo such imprisonment for the full term specified in the sentence. It is also further made clear by the Hon''ble Apex Court that the set off, however, does not absolve the accused person from the liability of paying the fine amount imposed on him. Therefore, it is crystal clear that in the event of non-payment of fine, he has to undergo the default sentences. The Hon''ble Apex Court in the said decision has dealt with only in respect of set off the period of detention undergone by the accused before the date of such conviction. We are of the considered view that the set off cannot be equated with the relief of ordering the default sentences to run concurrently, Therefore, the decision of the Hon''ble Apex Court Boucher Pierre Andre (cited supra) is not applicable to the question involved in this matter, viz., whether the default sentences can be ordered to run concurrently.

22. In view of the aforesaid reasons, we are answering the reference to the effect that the default sentences for non-payment of fine cannot be ordered to run concurrently. As per the referral order, the conviction and sentence imposed on the appellant was confirmed with regard to the substantive sentence of three years and in respect of fine amount imposed on the accused/appellant, the amount was reduced to Rs. 10,000/- for each offence and the default sentence was also reduced to 10 days for each offence. Therefore, there is no need for any further hearing by the learned Single Judge.