

(2008) 09 MAD CK 0182
In the Madras High Court
Case No : H.C.P. No. 1406 of 2008

Gladys L. Paulsamy

APPELLANT

Vs

The Deputy Inspector General of Prisons Chennai Range,
Chennai and The Superintendent Central Prison Vellore -2

RESPONDENT

Date of Decision : 30-09-2008

Acts Referred:

Citation : (2008) 09 MAD CK 0182

Hon'ble Judges : V. Periya Karupiah, J;Prabha Sridevan, J

Bench : Division Bench

Advocate : S. Shanmuga Velayutham, for the Appellant; P. Kumaresan, Addl. PP., for the Respondent

Final Decision : Dismissed

Judgement

Prabha Sridevan, J.—The petitioner is the wife of the detenu. According to her, the detenu has been detained even beyond the expiry of the sentence imposed on him. The detenu was involved in a case relating to offences under Narcotic Drugs and Psychotropic Substances Act 1985. After trial, he was convicted in C.C No. 521 of 1998 and sentenced to undergo Rigorous Imprisonment to 15 years and to pay a fine of Rs. 2,00,000/- and in default to undergo Simple Imprisonment for a period of two years and he was also convicted u/s 29 of the Narcotic Drugs and Psychotropic Substances Act 1985 and sentenced to undergo for a term of 15 years and to pay a fine of Rs. 2 lakhs and in default to undergo 2 years Simple Imprisonment. The period of sentence undergone by the accused was directed to be set off in the judgment dated 15-09-2006. The detenu preferred an appeal, C.A No. 868 of 2000 by judgment dated 01-08-2003 the Trial Court's sentence and conviction were confirmed. Against that, he appealed to the Supreme Court. In C.A No. 57 of 2004, the Supreme Court by its judgment dated 26-10-2004 allowed the appeal in part, while upholding the conviction reduced the sentence to 10 years from 15 years and the fine was also reduced. The detenu is now serving the unexpired period of sentence.

The detenu was arrested on 08-05-1998 at Madurai since he was found in possession of 2Kgs of heroin and he was remanded to judicial custody on 09-05-1998 and he remained there until he was released on bail on 09-11-1999. He was out on bail between 11-11-1999 to 14-03-2000. The bail was cancelled by the Supreme Court and he was taken back into custody pursuant to the said order. During the period when he was serving his sentence, the detenu had went out on parole for about 230days. The details are given as follows:

EMERGENCY LEAVE / MEDICAL LEAVE

15-04-2006 to 20-04-2006 -6 days

21-07-2006 to 23-07-2006 -3 days

10-11-2006 to 12-11-2006 -3 days

09-02-2007 to 11-02-2007 -3 days

05-05-2007 to 10-05-2007 -6 days

22-09-2007 to 24-09-2007 -3 days

09-12-2007 to 11-12-2007 -3 days

29-01-2008 to 03-02-2008 -6 days

08-05-2008 to 10-05-2008 -3 days

Total -36 days

Minister Leave -180 days

High Court Leave -14 days

Emergency Leave - 36 days

230 days

It is admitted on behalf of the petitioner that the period of four months and three days, viz., 125 days when he was out on bail, the detenu will have to undergo imprisonment, to complete the sentence of ten years. According to the petitioner's calculation, this period of 125 days would expire on 11-09-2008 and any detention thereafter would be illegal and therefore, this habeas corpus petition has been filed.

2. Mr. S. Shanmuga Velayutham, learned Senior Counsel would submit that the decision in Sunil Fulchand Shah v. Union of India and Others (2000 SCC Cri. 659) is squarely on the point where the Constitution Bench has clearly said that the period during which the detenu is on parole must be counted towards the total period of detention. The learned Senior Counsel also referred to Dadu alias Tulsidas v. State of Maharashtra (2000 SCC Cri. 1528), Shri Bhagzvan v. State of Rajasthan (2001 SCC (Cri)1095), State of Haryana v. Nauratta Singh and Others (2000 SCC Cri. 711 : 2000 2 L.W.(Cri.) 932) and the unreported judgment of this

Court in H.C.P No. 794 of 2008 (N. Padmini v. State) dated 02-07-2008 (since reported in this issue at 2008 2 L.W. (Cri.) 1329). The learned Senior Counsel submitted that even if there are any Rules which provide for inclusion for the period of parole for calculating the period of imprisonment, the same cannot be taken into account. To support this, the learned Senior Counsel referred to 2001 SCC (Cri) 1095 (cited supra), where the Supreme Court has clearly held that the Rules framed under the Prisons Act or the Jail Manual do not affect the total period which the prisoner has to suffer, but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time.

3. The learned Additional Public Prosecutor on the other hand would submit that the Prison Rules and the Manual are clear and it provides that the period of leave will not account towards sentence. The learned Additional Public Prosecutor also referred to Avtar Singh v. State of Haryana (2002 SCC (Cri) 504) where it was held that the period of temporary release of a prisoner on parole needs to be counted to the total period of detention but the said condition can be curtailed by the legislative acts, rules or terms of grant of parole. The learned Additional Public Prosecutor would therefore, submit that the law laid down by the Constitution Bench to the effect that the period of detention would not be automatically extended by any period of parole is subject to the condition whether any rules or instructions exist to the contrary.

In the present case, there are rules regarding periods that will not count towards sentence. The relevant rules read as follows:

The Tamil Nadu Prison Manual Volume ? II:

239. Periods that will not count towards sentence.- (1) In the following cases, the period spent by prisoners outside the prison shall not count towards sentence namely:

- (i) Escape
- (ii) Bail
- (iii) Suspended period of sentence including emergency leave
- (iv) Unauthorised extension of temporary release
- (v) Suspended period of sentence if directed by the Court
- (vi) Suspension of sentence for police investigation
- (vii) Violation of conditional release
- (viii) Extradition

(2) A prisoner released on bail in court on the day he is sentenced without having been sent to prison, shall not be deemed to have served any part of his sentence.

(3) Convicted prisoners removed from a prison in one State to a prison in another State under the provisions of the Transfer of Prisoners Act, 1950 (Central Act XXIX of 1950) shall be deemed to be undergoing their original sentence in the prison where they have been transferred.

(4) When a conditionally released prisoner is readmitted owing to an infringement of the terms on which he was released, the unexpired portion of his sentence shall be carried out without waiting for the receipt of the Government orders which shall however be applied for through the Inspector General immediately on admission of the prisoner, In such cases, the unexpired portion of sentence shall be deemed to have commenced from the date of re-admission in prison.

(5) A prisoner released on bail on a day subsequent to that on which he was committed to prison but who is again committed to undergo sentence in the same case shall be entitled to count every day of admission and every day of release as days of imprisonment in respect of such sentence.

(6) In cases where there are more than one out periods, the aggregate total of all out periods shall be worked out in terms of days and added to the substantive sentence. The date on which the sum of these periods elapses, counting from the date of conviction is the date of expiry of sentence.

Tamil Nadu Suspension of Sentence Rules, 1982

36. Treatment of the period of leave:

The day on which the prisoner was released and the day on which he was readmitted shall both be counted as days of imprisonment but the period of leave shall not be taken as period of sentence undergone by the prisoner.

4. In the counter affidavit filed by the State, the calculation of the Emergency Leave has been given and it reads as follows:

1 29-07-2002 to 13-09-2002 -45 days

2 17-10-2003 to 17-11-2003 -30 days

3 29-01-2004 to 11-02-2004 -14 days

4 21-12-2004 to 20-02-2005 -60 days

5 17-11-2005 to 02-01-2006 -45 days

6 13-04-2006 to 20-04-2006 -6 days

7 20-07-2006 to 24-07-2006 -3 days

8 09-11-2006 to 13-11-2006 -3 days

9 08-02-2007 to 12-02-200 7-3 days

10 04-05-2007 to 11-05-2007 -6 days

11 21-09-2007 to 25-09-2007 -3 days

12 08-12-2007 to 12-12-2007 -3 days

13 28-01-2008 to 04-02-2008 -6 days

14 07-05-2008 to 11-05-2008 -3 days

Total 230 days

The date of release is calculated as below:

Date of commencement of sentence : 15-09-2000 Add (+): 10 years

14-09-2010 Remand Set off(-): 734 days

10-09-2008 Add. Leave atlarge(+): Probable date of release : 28-04-2009 230 days

Therefore, it is quite clear that the only dispute is how the aforesaid 230 days must be treated. According to the petitioner this 230 days should be counted as period of sentence undergone whereas according to the respondents it cannot be counted as period of sentence undergone.

4. In 2000 SCC (Cri) 659(cited supra), the Constitution Bench dealt with the concept of parole and had held that "parole" is a form of "temporary release from custody but it does not suspend the sentence or the period of detention(vide paragraph No. 27). Paragraph No. 30 reads as follows:

30. 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 answer to the question, therefore, is that the period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. The period during which the detenu is on parole, therefore, requires to be counted towards the total period of detention.

Therefore, clearly the ratio of the aforesaid decision is that normally the period of parole should be included in the period of detention and will not extend the period of detention unless there are rules or instructions or conditions of parole to the contrary.

5. In 2001 SCC (Cri)1095 (cited supra), the case dealt with the words "imprisonment for life" and what the words connote. The Supreme Court held that ordinarily it means the sentence of imprisonment for whole of the remaining period of the convicted person's natural life and in those circumstances, following the judgment in State of Madhya Pradesh Vs. Ratan Singh and Others, held that, the Rules framed under the Prisons Act do not substitute a lesser

sentence for a sentence of transportation of life and when a sentence of imprisonment for life is imposed, it is prima facie to be treated as imprisonment for the whole of the remaining period of the convicted persons natural life. It is in these circumstances that they held that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term is served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose. This does not come to the aid of the detenu, who claims that he is entitled to have the period of parole to be counted as sentence undergone.

6. On the other hand, in 2002 SCC (Cri) 504 (cited supra) this very question came up before the Supreme Court. It was contended by the appellant that Section 3(3) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 (28 of 1988) was discriminatory since a prisoner released on parole u/s 3 is not entitled for counting the period of release towards the total period of sentence of imprisonment undergone by him whereas, a prisoner released on furlough, period of such temporary release shall be counted towards his total period of imprisonment. The Supreme Court rejected the said contention in the following words:

18. The second contention of the learned counsel for the appellant has also to be rejected in view of the decision of this Court in Sunil Fulchand Shah Vs. Union of India and Others, . The Constitution Bench has clearly held that though ordinarily the period of temporary release of a prisoner on parole needs to be counted towards the total period of detention but this condition can be curtailed by legislative Acts, rules, instructions, or terms of grant of parole.

7. In 2000 SCC (Cri) 711 (cited supra) which again dealt only with the question of remission and not parole, the Supreme Court incidentally also referred to the Constitution Bench only in the context of highlighting the facts that the benefits extended for those who are on parole cannot be extended to those who are on bail.

8. The unreported judgment, (in H.C.P No. 794 of 2008) which was relied on was a case which arose in identical circumstances but at that time, the provisions of the Jail Manual was not brought to the notice of the Division Bench as can be seen from Paragraph Nos. 9 and 10.

9. In cases where there is no statute or jail manual or government instructions excluding the period of parole in the period of sentence, the convict cannot be made to suffer imprisonment for the period when he was on parole. Though the

learned Additional Public Prosecutor has brought to our notice one notification of the Government of Karnataka in their order dated: 20-2-2004 relating to the regulation of parole system under rule 191(2)(h) and submitted that the period spent on ordinary or emergency parole shall not count towards sentence undergone as it is a temporary suspension of sentence, is unable to produce such a notification issued by the State Government or any statute or jail manual. There is no dispute that the case was registered, the detenu was tried by the Courts within the jurisdiction of the State, found guilty, convicted and sentenced and was lodged in the Central Prison, Bangalore only to undergo the sentence. Under these circumstances, the notification of the Government of Karnataka relied upon by the learned Additional Public Prosecutor would have no application for the present case.

10. In the absence of any such statute, notification or instructions by the Government of Tamil Nadu, we must necessarily hold, following the above judgments of the Apex Court, that the parole is not a suspension of sentence and it is essentially the function of the executive and it cannot be excluded in the period of sentence and therefore the period of sentence should be counted right from the date the detenu was arrested on 17-5-98 till he served the sentence of ten years rigorous imprisonment on 16.5.2008. As the period of ten years had already been undergone by the detenu and the period of 222 days of parole cannot be excluded to the period of sentence, the detention of the detenu on and from 17.5.2008 would be illegal.

9. In fact in the unreported judgment in H.C.P No. 2822 of 2000, an identical prayer was asked for, citing Sunil Fulchand Shah's (cited supra) case and claiming that the period of leave should be counted towards sentence. But the Division Bench rejected it. The following paragraphs are relevant:

7d. In fact, in the Jail Manual also, there is a specific provision. Clause 239 (Chapter XVI of the Jail Manual mentions as to what are the cases where the period spent by prisoners outside the prison shall not count towards sentence. It reads thus:-

Periods that will not count towards sentence:-

- i) Escape
- ii) Bail
- iii) Suspended period of sentence including emergency leave
- iv) Unauthorised extension of temporary release
- v) Suspended period of sentence if directed by the Court
- vi) Suspension of sentence for police investigation.
- vii) Violation of conditional release.
- Viii) Extradition.

Even the Emergency Leave is not treated differently. There is no question of treating the Ordinary Leave as the period during which the prisoner was behind the bars.

10. The judgment in 2002 SCC (Cri) 504 (cited supra) clearly lays down that though ordinarily the period of parole needs to be counted towards the period of detention, this can be curtailed by Legislature or by statutory instructions or even by the terms of grant of parole. We have already extracted the relevant rule.

11. In these circumstances, we are not inclined to accept the respondents' stand and hold that the 230 days during which he was in parole(emergency leave and other leave) cannot be counted towards sentence and therefore, the prayer cannot be granted. The petition is dismissed.