

(2015) 04 RAJ CK 0098

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 57 of 2015

Jagdish

APPELLANT

Vs

State (Home Department) and Others

RESPONDENT

Date of Decision : 24-04-2015

Acts Referred:

Constitution of India, 1950 — Article 21

Penal Code, 1860 (IPC) — Section 147, 148, 302, 304, 428

Citation : (2015) 04 RAJ CK 0098

Hon'ble Judges : Ajay Rastogi, J;J.K. Ranka, J

Bench : Division Bench

Advocate : Anshuman Saxena, for the Appellant; Rajendra Pd., Additional Advocate General, B.N. Sandu, GA-cum-AAG and Meenakshi Pareek, Dy. Govt. Advocate, Advocates for the Respondent

Final Decision : Allowed

Judgement

Ajay Rastogi, J.—Instant habeas corpus petition has been filed by accused petitioner seeking permission to immediately release him from the Jail who is in the illegal custody of the respondents, as presently lodged in Open Air Camp Sanagner, Jaipur.

2. Brief facts giving rise to the instant habeas corpus petition are that the petitioner was convicted for the offence u/S. 147, 148 and 302 IPC by the Id. Sessions Judge, Sawai Madhopur in Sessions Case No. 69/2004 vide judgment Dt. 21.10.2005 and was sentenced as under:

"- For offence u/S. 147 IPC, one year RI.

- For offence u/S. 148 IPC, two years RI

- For offence u/S. 302 IPC, life imprisonment and to pay a fine of Rs. 5,000/- and in default, to suffer three months additional simple imprisonment."

3. Against the aforesaid judgment passed by the Id. Trial Court, the petitioner

preferred D.B. Criminal Appeal No. 1033/2005 titled as Jagdish and Anr. v. State of Rajasthan before this court and vide judgment Dt. 30.01.2015, the appeal came to be partly allowed by this Court and his conviction was converted from 302 IPC to 304 Part-II IPC and sentenced to 7 years RI with fine of Rs. 10,000/- and in default thereto to undergo one year SI.

4. It has been stated by the convict petitioner that he was arrested on 02.06.2004 and since then he is in continuous custody and while passing of the judgment Dt. 30.01.2015, he has completed 7 years RI and thereafter has also undergone one year imprisonment which he has to undergo in default of payment of fine and still when the representation was made by him to be released forthwith, he was informed by the jail authorities on 13.03.2015 that since judgment has been passed on 30.01.2015 and was asked to deposit fine of Rs. 10,000/- and in default thereof has to undergo one year SI and even after the substantive sentence of 7 years has been undergone by him but as regards the sentence which he has to undergo in default of payment of fine, certainly that would commence from the date of judgment Dt. 30.01.2015 and is not entitled to be released as prayed for.

5. The grievance of the petitioner is that he has already served substantive sentence of 7 years awarded to him long back from the date of his arrest i.e. 02.06.2004 and further custody is liable to be adjusted against the sentence in default of payment of fine and at present juncture he need not to deposit fine according to S.69 of the Indian Penal Code and Part-25 of the Rajasthan Prisons Rules, 1951 and after expiration of substantive sentence of 7 years and serving of additional sentence of one year thereafter, he has served the full sentence awarded to him in regard to both the counts and still not released and further detention of the petitioner is illegal and violative of Art. 21 of the Constitution.

6. After notices of the present petition came to be served, reply has been filed by the respondents and it has been averred that S.428 of the Code has no application since it is not a case of set-off and the judgment which was initially passed by the Id. Trial Judge, he was sentenced for life imprisonment and fine of Rs. 5,000/- in default thereto to further undergo three months SI and after his conviction being converted from 302 IPC to 304 Part-II IPC and sentenced him to 7 years RI and to pay a fine of Rs. 10,000/- and in default thereto to further undergo one year SI vide judgment Dt. 30.01.2015. According to the respondents after his conviction being converted from 302 IPC to 304 Part-II IPC and enhancement of fine from Rs. 5,000/- initially awarded by the Id. Trial Judge to Rs. 10,000/- and in default thereof to further undergo one year SI after passing of the judgment Dt. 30.01.2015 and is not entitled to be released as prayed for.

7. What is being contended by the petitioner, we are clear in our mind that S.428 of the Code has no application to the present case and it applies in the case where an accused person has on conviction being 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.

8. In other words, when a person, on his conviction, is sentenced to imprisonment for a term, the period of detention, if any, undergone during investigation, enquiry or trial of the case, shall be set off against the remaining period, if any, of the term of imprisonment imposed on him and these provisions of set off, however, would not apply to the period of imprisonment, which such a person may have to suffer in default of payment of fine and Section 428 of the Code coupled with the Sec. 64 of the Indian Penal code makes it clear that when an offence is punishment with imprisonment as well as fine and the offender is sentenced to a fine with or without imprisonment and also when an offence is punishable with fine only and offender is sentenced to a fine, it shall be competent for the Court, which sentence such an offender to direct, by the sentence, that in default of payment of fine, the offender shall suffer imprisonment for a certain term, wherein 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.

9. In other words, imprisonment, in default of payment of fine or fines, is in addition to the punishment or imprisonment. Consequently, the period of imprisonment, in default of payment of fine or fines, shall be consecutive and not concurrent with the result that after the period of imprisonment, suffered by a convict, the sentence of imprisonment, in default of payment of fine or fines, would start running meaning thereby that after the period of imprisonment is suffered by a convict, his sentence of imprisonment, in default of payment of fine or fines, would commence. This is precisely what Sec. 64 of the Indian Penal Code conveys.

10. It is also settled that the provisions of Sec. 428 of the Code would apply only to the period, which a convict might have undergone during investigation, enquiry or trial of the case in which he comes to be subsequently convicted. Thus, the period spent by a person as an under-trial prisoner, i.e. during investigation, enquiry or trial in one case, would not be available to him for set off against the sentence of imprisonment, which may be subsequently passed against him in another case. As embodied in Sec. 428 of the Code, it may apply only to the period, which a person spent as under-trial prisoner, i.e. during investigation, enquiry or trial if he comes to be subsequently convicted in a case. But, at the same time, if he is convicted of more than one case, the remand period of each case at least would be set off against the sentence passed in the case concerned and not in every case and, therefore, the period which the person spent while serving a sentence of imprisonment as a convict in one case, would not be taken into account and be treated as a remand period or as a

period undergone by him as an under-trial prisoner in the other case wherein the accused comes to be subsequently convicted.

11. However, in the instant case, we find that the petitioner was initially convicted for the offence u/S. 302 IPC and sentenced to life imprisonment with fine of Rs. 5,000/- and in default thereto, to suffer three months" additional simple imprisonment and admittedly he is in judicial custody since 2.6.2004 and on appeal his sentence and conviction was converted from Sec. 302 IPC to 304 Part II IPC and has been sentenced to seven years" rigorous imprisonment with a fine of Rs. 10,000/- and in default thereto, to further undergo one year simple imprisonment.

12. When a person is convicted in appeal, it follows that the appellate court has exercised its power in the place of the original court and the guilt, conviction and sentence stands substituted for and shall have retroactive effect from the date of judgment of the trial court and conviction at the appellate stage relate back to the date of trial court's verdict and appeal is a continuation of an appellate judgment as a replacement of the original judgment.

13. Keeping these principles into consideration what has been observed by Hon"ble Supreme Court in the case Maru Ram and Others Vs. Union of India (UOI) and Others, AIR 1980 SC 2147 : (1980) CriLJ 1440 : (1981) 1 SCC 107 : (1981) SCC(Cri) 112 : (1981) 1 SCR 1196 , it may be in context of applicability of Sec. 433A of the Code for grant of remission but the logical corollary remains the same and keeping those principles into consideration after the judgment in appeal which converts the conviction from 302 IPC to 304 Part II IPC and sentenced to seven years rigorous imprisonment, it is substitution/replacement of the original judgment and as he was arrested on 2.6.2004 indisputably has completed seven years of substantive sentence and after the period of substantive sentence being served by the appellant the sentence of imprisonment of one year in default of payment of fine would start running and we are of the considered view that the petitioner has undergone full substantive sentence of imprisonment of seven years and one year thereafter in default of payment of fine which he has certainly undergone from his arrest Dt. 2.6.2004 and in the light of judgment of the Court of appeal Dt. 30.1.2015, the petitioner has undergone full substantive sentence and also sentence of imprisonment of one year in default of payment of fine as well.

14. Thus, we do not find substance in the submission of the respondent for the reason that once the judgment of the trial court stands substituted by the Court of appeal and have retroactive effect from the date of judgment of the trial court as being observed by the Apex Court in the judgment referred to supra the period of substantive sentence after conversion from Sec. 302 IPC to Sec. 304 Part II IPC will start from the date of arrest i.e. 2.6.2004 and as already observed the sentence of imprisonment in default of payment of fine would start running after substantive sentence which also indisputably has undergone thereafter and the submission of counsel for respondent that period of one year

sentence of imprisonment in default of payment would start from the date of judgment of the court of appeal Dt. 30.1.2015 is wholly without substance and deserves rejection.

15. In the result, the instant habeas corpus petition is allowed and the petitioner is directed to be released forthwith, if not required in any other case.