

(1998) 11 KL CK 0003
In the High Court Of Kerala
Case No : Criminal M.C. No. 5195 of 1998

J.S. Naik

APPELLANT

Vs

Asst. Commissioner, Air Customs and Another

RESPONDENT

Date of Decision : 13-11-1998

Acts Referred:

Army Act, 1950 — Section 2
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 428, 482
Customs Act, 1962 — Section 108, 123, 135
Penal Code, 1860 (IPC) — Section 120A, 120B, 395, 447

Citation : (1999) CriLJ 425 : (1999) 1 ILR (Ker) 880 : (1999) 3 RCR(Criminal) 124 : (1999) 1 RCR(Criminal) 743

Hon'ble Judges : K.A. Mohamed Shafi, J

Bench : Single Bench

Advocate : K. Rajagopalan and J. Jiothis Kiran, for the Appellant; K.V. Sabu, ACC SC for Respondent No. 1 and Suresh Babu, Public Prosecutor C.M., for the Respondent

Final Decision : Allowed

Judgement

K.A. Mohamed Shafi, J.—This application is filed by the accused in C.C. No. 34/1998 pending before the Additional Chief Judicial Magistrate's Court (Economic Offences), Ernakulam to quash the entire proceedings u/s 482 of the Cr. P.C.

2. In connection with the seizure of foreign currencies of several countries valued at Rs. 1,02,92,400/- as per the exchange rate then prevailing on 11-9-1995 from a brief case while the Air Customs Intelligence Unit, Calicut Airport conducted random checking of the registered baggages of the passengers bound for Sharjah in Flight No. 1C 993 from Calicut Airport, the Customs officials registered a case in O.S. 185/ 1995 u/s 135 of the Customs Act, 1962 against the petitioner and two others. During the relevant period the petitioner was employed with the Indian Airlines as Headloader and working at Karipur Airport, Calicut. The

petitioner was arrested on 22-9-1995 after summoning him and recording his statement u/s 108 of the Customs Act. When produced before the Addl. Chief Judicial Magistrate's Court, (Economic Offences), Ernakulam, he was remanded to custody. Though the application for grant of bail filed by the petitioner in Cri. M.P. No. 4537/95 was originally dismissed by the Addl. C.J.M., (E.O.) Ernakulam, subsequently the learned Addl. C.J.M. granted bail to the petitioner as per order in Cri. M.P. No. 6266/95 dated 22-11-1995 directing the petitioner to deposit Rs. 1 lakh in cash and to execute bond for Rs. 2 lakhs with two sureties having solvency certificates for Rs. 2 lakhs each. According to the petitioner, as he cannot meet the aforesaid onerous conditions, he filed Cri. M.P. No. 966/98 seeking to delete the onerous conditions imposed while granting bail to him. The learned Addl. C.J.M. modified the condition and granted bail to the petitioner on execution of bond for Rs. 2 lakhs with two solvent sureties having solvency certificates for the like amount. It is also contended by the petitioner that as he could not comply with that condition also he continues to be in custody even now.

3. The petitioner has further contended that while he was in judicial custody he was detained under the COFEPOS A for a period of two years from 23-1-1996 to 23-1-1998 at the instance of the 1st respondent and he was removed from the Sub-jail, Ernakulam while in custody to the Central Prison, Thiruvananthapuram to undergo detention and on expiry of the period of detention under COFEPOSA he was returned to the Sub-Jail, Ernakulam to continue in judicial custody. It is also contended by the petitioner that the 1st respondent deliberately delayed the investigation and filing of complaint against the petitioner and others in this case and at last after several representations made by the petitioner and the directions issued by the learned Addl. C.J.M., the 1st respondent filed complaint before the Court on 30-11-1997 and even after filing the belated complaint absolutely no step is taken by the respondents to try and dispose of the case in spite of the repeated requests made by the petitioner in that behalf narrating the hardship and misery caused to him due to his continued detention in prison. Therefore, he filed the above application to quash the entire proceedings against him since the offence that can be sustained against him is only punishable u/s 135 of the Customs Act which provides a maximum punishment of imprisonment of three years and he has been in custody for the purpose of this case for more than three years and as such this is an eminently fit case wherein the provisions of Section 482 of the Cr. P.C. have to be exercised and the proceedings against him should be quashed in the interests of justice.

4. The learned Addl. Central Government Standing Counsel opposed this application on behalf of the 1st respondent submitted that the allegation made against the petitioner is the only offence punishable u/s 135 of the Customs Act and the maximum sentence provided u/s 135 of the Customs Act is imprisonment for three years, since the provisions of Section 123 of the Act are not applicable in this case.

5. The apprehension of the petitioner on 22-9-1995 and his continuance in

custody are not in dispute. It is also admitted that while in judicial custody the petitioner has undergone detention under COFEPOSA from 23-1-1996 to 23-1-1998. The only contention raised by the learned Addl. Central Govt. Standing Counsel is that since the detention of the petitioner under the provisions of COFEPOSA is only a preventive detention intended and pertaining to maintenance of the security of the country, the period of detention of two years undergone by the petitioner under the provisions of the COFEPOSA cannot be treated or reckoned as the pre-trial detention of the petitioner which can be set off towards the sentence u/s 428 of the Cr. P.C. Therefore, he contended that after deducting the detention under the COFEPOSA for a period of 2 years, the actual pre-trial detention undergone by the petitioner is only one year one month and some days till now and therefore, the petitioner cannot contend that he had been under detention for more than the maximum period of imprisonment provided u/s 135 of the Customs Act.

6. The counsel for the petitioner vehemently submitted that since the petitioner was in judicial custody in connection with the investigation in this case and while he was in custody as such he was detained under the COFEPOSA, the period of preventive detention he had undergone at a time when he was in jail under judicial custody should be reckoned and set off as against the term of imprisonment that can be imposed upon him by invoking the provisions of Section 428 of the Cr. P.C. In support of this contention the counsel for the petitioner relies upon the two decisions of this Court in *Juanhaniff v. State of Kerala* 1987 (1) KLT 437 : 1988 Cri LJ 75 and *Venilal Mehta v. Asst. Collector of Central Excise* 1991 (2) KLT 295.

7. In the decision reported in 1987 (1) KLT 437 : 1988 Cri LJ 75 *Juanhaniff v. State of Kerala* this Court held that since the accused therein was refused bail and continued as under-trial prisoner during trial, the period of preventive detention undergone by him at the time when he was in jail under judicial custody can be set off against the term of imprisonment awarded by the Court. In the decision reported in 1991 (2) KLT 295 *Venilal Mehta v. Asst. Collector of Central Excise* this Court has held that as the revision petitioners in that case were under detention during the period they have undergone preventive detention under the COFEPOSA while the investigation of the customs case was going on, they are entitled to set off the period they have undergone detention under the COFEPOSA towards the sentence awarded to them in that case.

8. The Addl. Central Govt. Standing Counsel submitted that since the provisions of Section 428 of the Cr. P.C. contemplate set off of the pre-trial detention undergone by the accused during the investigation, enquiry or trial of the same case and before the date of conviction, the preventive detention under the COFEPOSA cannot be construed as detention of the petitioner herein during the investigation, enquiry or trial of this case and therefore, the contention of the petitioner that the period of two years he has undergone detention under the COFEPOSA should be construed as pre-trial detention entitled to be set off u/s

428 of the Cr. P.C. cannot be accepted.

9. It is well settled that a person undergoing pre-trial detention in a case is not entitled to set off that period of detention in another case even if the investigation in another case was also being conducted during that period and subsequently sentence for the latter offence. For the contention that the period of detention undergone by the petitioner under the COFEPOSA cannot be construed as pre-trial detention entitling the petitioner to set off u/s 428 of the Cr. P.C., the learned Addl. Central Govt. Standing Counsel relied upon the decision in *Government of Andhra Pradesh and Another Vs. Anne Venkatesware and Others*, wherein the Supreme Court has held that the period of detention underwent under the Preventive Detention Act or Maintenance of Internal Security Act will not come within the purview of the period of detention entitled to be set off u/s 428 of the Cr. P.C. In that case the Supreme Court has observed as follows (at page 939 of Cr LJ):

The argument is that the expression "period of detention" in Section 428 includes detention under the Preventive Detention Act or the Maintenance of Internal Security Act. It is true that the section speaks of the "period of detention" undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused on conviction must be during the investigation, enquiry or trial in connection with the "same case" in which he has been convicted. We therefore agree with the High Court that the period during which the writ petitioners were in preventive detention cannot be set off u/s 428 against the term of imprisonment imposed on them.

10. In that case the appellant therein while undergoing detention under the Preventive Detention Act, an FIR was registered against him on 18-12-1969 and after completing investigation he was tried by the Sessions Court for the offences punishable under Sections 120A and 120B read with Section 395, and Section 120B read with Section 447 of the IPC and was convicted and sentenced to undergo various terms of imprisonment. His preventive detention was revoked by the State Government on 11-4-1970 and was released on 12-4-1970. Though the appeal preferred against the conviction and sentence was dismissed, he filed a writ petition before the High Court seeking set off of the period of detention from December 19, 1969 till April 13, 1970 against the term of imprisonment passed against him. In that case the Apex Court held that the period of detention undergone by him under the Preventive Detention Act cannot be set off against the term of imprisonment passed against him, u/s 428 of the Cr. P.C. Therefore, the above decision of the Supreme Court is of no help to the respondents since the facts and circumstances in that case and in the present case are entirely different in so much as the case was registered against the accused in that case while he was undergoing preventive detention under the Preventive Detention

Act. But in this case while the petitioner was undergoing pre-trial detention in the above case, he was detained under the provisions of the COFEPOSA. Likewise the decision relied upon by the learned Addl. Central Govt. Standing Counsel in *Ajit kumar Vs. Union of India (UOI) and Others*, is also of no help to the respondents, since in that case the Supreme Court has held that a person convicted and sentenced by the General Court Martial under the Army Act, 1950 is not entitled to the benefit u/s 428 of the Cr. P.C. of set off of his pre-trial detention against the sentence of imprisonment since the Army Act is a special enactment applicable to persons covered u/s 2 of the Act and the Act also provides special procedure for Court Martial.

11. It is clear from the two decisions of this Court referred to above that this Court specifically held that the period during which the accused was detained under the COFEPOSA while he was under custody as a pre-trial prisoner for the offence punishable u/s 135 of the Customs Act, is entitled to set off that period of detention under COFEPOSA towards the sentence awarded in the case. I find absolutely no reason to depart from the view taken by this Court in the aforesaid two decisions in this case, in the absence of any decision of this Court or the! apex Court brought to my notice to establish that the view taken by this Court is erroneous. There-! fore, it has to be held that the petitioner is entitled to set off the two years detention undergone by" him under the COFEPOSA while he was undergoing detention as pre-trial prisoner, in this case! u/s 428 of the Cr. P.C.

12. The further question to be considered is whether the petitioner is entitled to be enlarged on bail or the entire proceedings against him should be quashed in view of the fact that he had been in custody for a period, more than the maximum term of imprisonment that can be awarded to the petitioner u/s 135 of the Customs Act.

13. The counsel for the petitioner vehemently submitted that in view of the fact that there is deliberate inaction and negligence on the part of the respondents in filing the complaint against the petitioner and prosecuting the case against him before the Addl. Chief Judicial Magistrate"s Court (Economic Offences), Ernakulam, this is an eminently fit case wherein the entire proceedings against him should be quashed and he should be set at liberty forthwith.

14. It is clear from the complaint filed by the 1st respondent against the petitioner, copy of which is produced as Annexure-5 to this petition, that in spite of the fact that the petitioner was arrested on 22-9-1995 the complaint which is filed before the Court is dated 30-11-1997. it is also clear from the other documents that the complaint itself is filed after several directions from the court, in pursuance of the several applications filed by the petitioner praying to expedite the filing of the complaint and the trial of the case. It is seen from the complaint filed by the Ist respondent before the Addl. Chief Judicial Magistrate"s Court, a copy of which is marked as Annexure-5 that there was unnecessary and inordinate delay in filing the complaint before the Court, as it is evident from the list of witnesses and the documents produced along with the complaint to prove

the prosecution in this case that the investigation was almost completed in the year 1995 itself. Even after filing of the complaint no step is seen to have taken by the 1st respondent to proceed with the trial of the case, though the petitioner has been filing petitions after petitions to expedite the trial and exonerate him from the prosecution since he was under custody for the maximum period of imprisonment, that can be awarded against him in case the offence alleged against him is proved u/s 135 of the Customs Act.

15. In the decision in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar*, the Supreme Court after finding that the accused in that case were under pre-trial custody for a period more than the maximum sentence that can be awarded on conviction, and they should not be allowed to continue in jail for a moment longer, directed release of the accused forthwith. In para 2 of the judgment the apex Court has observed as follows :

2. Mrs. Hingorani has handed over to us a list of under-trial prisoners who are accused of multiple offences and who have already been in jail for the maximum term for which they could be sentenced on conviction, even if the sentences awarded to them were consecutive and not concurrent. Now ordinarily when a person is accused of more offences than one, the sentences of imprisonment imposed on him are directed to run concurrently, but even on the assumption that the sentence of imprisonment may be consecutive, these under-trial prisoners, mentioned in the list of Mrs. Hingorani, have already suffered incarceration for the maximum period for which they could have been sent to jail on conviction. There is absolutely no reason why they should be allowed to continue to remain in jail for a moment longer, since such continuance of detention would be clearly violative not only of human dignity but also of their fundamental right under Article 21 of the Constitution. We, therefore, direct that these under-trial prisoners be released forthwith.

16. It is clear from the above judgment of the apex Court that the detention of the accused as an under-trial prisoner for more than the period of maximum sentence awardable to him on conviction, is not only in violation of human dignity but also of his fundamental right under Article 21 of the Constitution. Therefore, the petitioner who has been under custody from 22-9-1995 onwards and who has been in detention as an under-trial prisoner in excess of the period of imprisonment which could be awarded to him on conviction for the offence punishable u/s 135 of the Customs Act, is entitled to be released forthwith, quashing the entire prosecution proceedings initiated against him.

Therefore, this Crl. M.C. is allowed and the entire proceedings against the petitioner in C.C. 34 of 1998 pending before the Additional Chief Judicial Magistrate's Court (Economic Offences), Ernakulam are quashed. The petitioner is directed to be released forthwith, if his custody is not required in any other case.