

(2003) 01 PAT CK 0061
In the Patna High Court
Case No : C.W.J.C. No. 400 of 2002

Shambhu Nath Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 17-01-2003

Acts Referred:

Citation : (2003) 01 PAT CK 0061

Judgement

S.N. Jha and P.N. Yadav, JJ.—This writ petition on behalf of the sole petitioner has been filed for a direction upon the respondents to release him from custody forthwith. The petitioner has been convicted and sentenced to various terms of imprisonment in as many as seven cases. According to him, the entire period of custody from the date of first remand should be counted for the purpose of set-off u/s 428 of the Criminal Procedure Code, and so counted, it would appear that he has served sentence in different cases and therefore, his further custody is illegal and he should be released forthwith. According to the respondents where a person is convicted and sentenced to imprisonment in more than one case on different dates, the period of custody for the purpose of set-off can be reckoned upto the date of first conviction and thereafter, he has to be treated as convict entitled to remission under the different provisions of the Jail Manual. The State Government has taken a general decision to this effect vide letter No. 8913/Jail dated 4-8-1975 of the Home (Jail) Department.

2. The only point for consideration is whether the entire period of custody including the period undergone as a convict can be counted for the purpose of set-off u/s 428 Cr. PC. Section 428 Cr. PC runs as under :

"Period of detention undergone by the accused to be set-off against the sentence of imprisonment 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, if the term of imprisonment imposed on him."

It may be mentioned that u/s 427 Cr. PC when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment such imprisonment would 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. In other words, in the absence of any order to the contrary in the subsequent case, upon imposition of sentence of imprisonment therein, the period of sentence will commence at the expiration of the period of imprisonment awarded in the previous case. In the instant case, it is not in dispute that no such order as envisaged in Section 427 Cr. PC was passed by the Court below while convicting the petitioner in the subsequent cases. Thus, in the ordinary course, if the provision of set-off were not there (in fact, there was no such provision in the old Cr. PC) the sentences awarded to the petitioner would have commenced at expiration of the periods of sentence awarded in the previous cases. In this background the question as to whether a person awarded sentence of imprisonment in more than one cases is entitled to count entire period of custody whether as under trial prisoner or as convict for calculating the effective period of imprisonment assumes significance.

3. The plea of the State, it would appear, is in consonance with the decision of the Supreme Court in the case of Raghbir Singh Vs. State of Haryana, , wherein in no unmistakable terms a two Judge Bench of the Court held, construing the scope of Section 428 Cr. PC, that the period elapsed in inquiry or trial in one case while undergoing sentence of imprisonment in an earlier case cannot be set-off against the term of imprisonment imposed in the latter case. The facts of that case were that the petitioner was convicted and sentenced to a term of imprisonment by the Sessions Court, Karnal on 1-2-1980. He was in judicial custody from 11-1-1980 in connection with another case before the Metropolitan Magistrate, Delhi which ended in his conviction and sentence for a term of imprisonment on 16-2-1981. There was no order that the subsequent sentence would run concurrently. The petitioner claimed that the entire period of his detention from 11-1-1980 to 16-2-1981 should be set-off against the sentence of imprisonment imposed by the Metropolitan Magistrate. The stand of the State was that the petitioner was entitled to set-off u/s 428 Cr. PC only the period between 11-1-1980 and 1-2-1980 when he was convicted and sentenced by the Karnal Court, against the sentence imposed by the Delhi Court. Upholding the stand of the State and rejecting that of the petitioner the Supreme Court held that an accused cannot claim double benefit u/s 428 i.e. to count the same period as part of the period of imprisonment imposed for committing the former offence and also set-off against the period of imprisonment imposed for committing the latter offence as well. If a person is undergoing the sentence of imprisonment imposed by a Court of law on being convicted of an offence in one case during the period of investigation, inquiry or trial of some other case, he

cannot claim that the period occupied by such investigation, inquiry or trial should be set-off against the sentence of imprisonment to be imposed in the latter case even though he was under detention during such period. In such a case the period of imprisonment is really a part of the period of imprisonment which he is undergoing having been sentenced earlier for another offence.

4. On behalf of the petitioner, however, it was submitted that a three Judge Bench of the Supreme Court in *State of Maharashtra and Another Vs. Najakat Alia Mubarak Ali*, has taken a contrary view and overruled the earlier decision. By majority decision the Court gave a wider interpretation to the provisions of Section 428 holding that the period of imprisonment undergone by an accused as an under trial during investigation, inquiry or trial of a particular case irrespective of whether it was in connection with that very case or any other case can be set-off against the sentence of imprisonment imposed on conviction in that particular case. It would be useful to quote the relevant part of the observation at page 320 of the report as under :

"Reading Section 428 of the Code in the above perspective, the words "of the same case" are not to be understood as suggesting that the set-off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words "of the same case" were used to refer to the per-sentence period of detention undergone by him. Nothing more can be made out of the collocation of those words."

5. The above decision of the Apex Court would seem to squarely cover the case of the petitioner in his favour. However, in fairness to the parties it would be appropriate to give particulars of convictions/sentences awarded to the petitioner, case-wise, as under :

Sl No.	Case No.	Date of Custody/remand	Date of Sentence	Term of imprisonment
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|----|------------------------------------|------------|------------|---|
| 1. | RC 33 (A)/95 | 13-11-1997 | 4-4-2000 | 9 Months |
| 2. | RC 75 (S)/96 | 14-5-1998 | 25-4-2000 | 2 Years 9 Months |
| 3. | RC 61 (B)/96 | 22-11-1996 | 31-5-2000 | 3 Years |
| 4. | RC 62 (S)/96 | 6-9-1997 | 14-7-2000 | 3 Years |
| 5. | RC 69 (S)/96 | 27-9-1999 | 17-11-2000 | 3 Years |
| 6. | RC 72 (S)/96 | 9-1-1998 | 4-7-2001 | 2 Years |
| 6. | RC 72 (S)/96 | 9-1-1998 | 4-7-2001 | 2 Years, Additional 4 Months if fine is not paid. |
| 7. | Phulwari Sharif PS Case No. 493/99 | 23-2-2000 | 1-7-2002 | 2 Years |

6. According to the respondents, 4-4-2000 being the date of first conviction the petitioner is entitled to count the period of custody spent during investigation only up to 3-4-2000 for the purpose of set-off u/s 428 Cr. PC the period from 4-4-2000 being the period spent as under trial prisoner covered by the provisions of the Jail Manual. Thus the sentence of imprisonment of two years nine months awarded to the petitioner in the second case i.e. RC 75 (S)/96 would be counted upto 24-4-2000 for the purpose of set-off, that is, he would be entitled to set-off of one year eleven months and eleven days between 14-5-1998 and 24-4-2000 when he was convicted in the second case. (The first conviction though awarded earlier, the sentence of nine months" imprisonment was infructuous as the petitioner was in custody, in that case, since 13-11-1997 itself). The remaining period of nine-months nineteen days is to be counted from 25-4-2000 when he was awarded the sentence. Likewise, so far as the fourth case is concerned (ignoring the conviction in the third case as being in custody since 22-11-1996 in the same case, he had already served full sentence), the period of custody spent during investigation and trial between 6-9-1997 and 24-4-2000 only can be counted for the purpose of set-off. As the petitioner would be deemed to be serving the remainder of the sentence (9 months 19 days) in the second case i.e. RC 75 (S)/96 upto 12-2-2001, the remainder of the sentence of four months eleven days (out of three years in the fourth case) would be counted from 13-2-2001 i.e. at the expiration of the sentence in the second case on 12-2-2001. In this manner by virtue of sentence awarded to the petitioner in the fifth and seventh case sentence in the sixth case again being infructuous the petitioner is liable to remain in custody as under trial up to 23-9-2005.

7. It is relevant to mention here that a chart to this effect has been furnished in the counter-affidavit as per which the due date of the petitioner's release is 23-1-2006. Counsel for the State however agreed in course of hearing that the said date had been determined after adding the period of four months which the petitioner was liable to serve as part of the sentence is default of payment of fine but as he has already deposited the fine, as stated in the re-joinder-affidavit, the due date of release would be 23-9-2005.

8. As indicated above, the relevant particulars of the dates of remand and sentence in different cases have been mentioned only to make them part of the judgment. As otherwise, the case of the petitioner is covered by the recent decision of the Supreme Court in the case of Nazakat Alia Mubarak Ali (Supra). The entire period of custody has to be counted for the purpose of set-off notwithstanding that during part or whole of the period he was serving sentence in another case. It is admitted position that the due date of release of the petitioner has been counted, as above dis-allowing the period of custody spent in other cases as an undertrial or convict; In view of the clear finding of the Apex Court that the total period of custody whether as undertrial prisoner or as convict in different cases has to be taken into account, the stand of the respondents cannot be accepted and it has to be held that the petitioner is entitled to count the entire period spent in custody as undertrial prisoner or as convict, in different

cases, notwithstanding that no order as contemplated in Section 427 Cr. PC was passed by the Courts concerned that the sentences shall run concurrently.

9. In the above view of the matter, it was submitted on behalf of the petitioner that the petitioner had already served the sentences in the previous cases counting the sentence from the date of remand and if thus the term of sentence did not spill over, the term of the last sentence of two years imprisonment, dated 1-7-2002 the petitioner being in custody in that case since 23-2-2000, it would follow that he has served more than the sentence awarded and the Court should direct his immediate release.

10. In our opinion, having clarified the legal position, the matter should be left to the concerned authority to make necessary calculation and do the needful. If the authority comes to the conclusion that the petitioner has already served the sentence they shall release him forthwith. Such calculation should be made by the Superintendent, Adarsh Central Jail, Beur, Patna where the petitioner is presently lodged and this should be done within two weeks of receipt of a copy of this judgment.

11. With the above observations and directions the writ petition is disposed of.