
(2004) 09 BOM CK 0082
In the Bombay High Court
Case No : Criminal W.P. No. 366 of 2004

Vinod Kumar Kelkar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-09-2004

Acts Referred:

Border Security Force Act, 1968 — Section 121A, 46
Criminal Procedure Code, 1973 (CrPC) — Section 428
Penal Code, 1860 (IPC) — Section 302

Citation : (2005) 1 ALT(Cri) 29 : (2004) 4 MhLj 561

Hon'ble Judges : S.T. Kharche, J;J.N. Patel, J

Bench : Division Bench

Advocate : V. Khaparde and S.S. Sirsat, for the Appellant; C.S. Kaptan, for Respondent Nos. 1 and 2 and Mujumdar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

S.T. Kharche, J.—Rule. Rule taken up for final hearing with the consent of the parties.

2. The short and important question which requires consideration in this petition is; whether the petitioner prisoner who is undergoing imprisonment on his conviction by the Security Force Court for the offence u/s 302 of the Indian Penal Code and u/s 46 of the Border Security Force Act, 1968 (for short, the B.S.F. Act) is entitled to set off for the period he has undergone detention as an under-trial prisoner, before the date of conviction.

3. The petitioner was working as Hawaldar (Constable) in Border Security Force. He was posted at Putshahi village, District Kupwada (J and K) in the year 1991 and was performing internal security duty. He was a member of 132 Battalion Border Security Force. He was put on for the trial for the offence punishable u/s 302 of the Indian Penal Code and Section 46 of the B.S.F. Act. Consequent upon his prosecution, he was found guilty and was convicted by the General Security

Court and was sentenced to undergo life imprisonment and also directed his dismissal from his service vide order dated 17-7-1992. The petitioner-prisoner was transferred to Nagpur Central Prison, Nagpur on 26-12-1993 for undergoing the sentence.

4. Prior to the conviction, the petitioner was in custody of Border Security Force Police from the date of his arrest, i.e. 29-6-1991 till the date of his conviction, and therefore, he was in detention as an under-trial prisoner for the period of 1 year 7 days. He claimed the benefit of Section 428 of the Criminal Procedure Code (for short, the Code) and also benefit of the provisions of Section 121-A of the B.S.F. Act by making representation to the respondent Nos. 1 and 2 through respondent No. 3 vide letter dated 29-2-2001. The respondent Nos. 1 and 2 communicated to respondent No. 3 vide letter dated 14-3-2002 that the petitioner is not entitled for the benefit of set off for the period he was in detention as an under-trial prisoner before conviction. This communication cum order dated 14-3-2002 has been challenged in this petition.

5. The learned counsel for the petitioner contended that the impugned order dated 14-3-2002 denying benefit of Section 428 of the Code is not sustainable in law and that the respondents have misconstrued the provisions of Section 121A of the B.S.F. Act which contemplate that the period of custody undergone by a person to be set off against the imprisonment when any person subject to this Act is sentenced by a Security Force Court or fine, the period spent by him in civil or Force custody during investigation, inquiry or trial of the same case, and before the date of order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him. He contended that respondent Nos. 1 and 2 have not construed the provisions of Section 428 of the Code which inter-alia provides for setting off the period of detention undergone by the accused as under-trial against the sentence of imprisonment ultimately awarded to him. He further contended that though Section 121A of the B.S.F. Act is introduced by way of amendment by the B.S.F. Act 35 of 2000 w.e.f. 1-9-2000, the petitioner-prisoner cannot be denied the benefit of the provisions of Section 428 of the Code on the ground that Section 121A of the B.S.F. Act would be prospective in application. In support of these submissions, the learned counsel for the petitioner relied on the decisions of the Supreme Court in the case of Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another, , decision of the Constitution Bench of the Supreme Court in the case of Bhagirath Vs. Delhi Administration, , Ashok Kumar alias Golu Vs. Union of India and others, and also on the decision of the Division Bench of Calcutta High Court in the case of Anand Singh Bishit v. Union of India 1986 Cri.L.J. 563.

6. Shri Kaptan the learned senior standing counsel for respondents contended that on the date i.e. 17-7-1992 the petitioner was convicted and sentenced to suffer imprisonment for life and ordered to be dismissed from service. Prior to

1-9-2000 there was no provision in the Border Security Force Act regarding grant of set off against the term of imprisonment imposed upon the convict and for the first time by the B.S.F. (Amendment) Act 35 of 2000 Section 121A came to be introduced in the B.S.F. Act w.e.f. 1-9-2000 which cannot be made applicable retrospectively. He therefore contended that the petitioner was tried and convicted under the Border Security Force Act which is a special law and since the amended provision of Section 121A is prospective in application and the petitioner was convicted on 17-7-1992, question of granting benefit under the said provision or u/s 428 of the Code does not arise. Secondly, the petitioner is convicted and sentenced to suffer imprisonment for life and not for a term therefore otherwise also the provision of Section 121A of the B.S.F. Act or Section 428 of the Code will not be applicable as held in Kartar Singh and Others Vs. State of Haryana, , and therefore, the impugned order passed by respondent Nos. 1 and 2 is perfectly legal and correct and no interference into the same is warranted.

7. We have carefully considered the contentions canvassed by the learned counsel for the parties. It is undisputed position that Section 121A of the B.S.F. Act has been introduced in the Border Security Force Act w.e.f. 1-9-2000 and the petitioner-prisoner has been convicted by the Border Security Court by the order dated 17-7-1992. It may be useful to reproduce Section 121A of the Border Security Force Act, which is *pari materia* to Section 428 of the Code, which reads as under:

Section 428. -- "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, 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 reminder, if any, of the term of imprisonment imposed on him."

Section 121A -- "Period of custody undergone by a person to be set off against the imprisonment. -- When any person subject to this Act is sentenced by a Security Force Court or fine, the period spent by him in civil or Force custody during investigation, inquiry or trial of the same case, and before the date of order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person to undergo imprisonment on such order of sentence shall be restricted to the reminder, if any, or the term of imprisonment imposed upon him."

8. In *Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another*, the Hon"ble Supreme Court observed as thus; "Section 428 embraces cases where a person has been convicted before the coming into force of the new Criminal Procedure Code. But his sentence is still running at the date when the new Code of Criminal Procedure came into force. Section 428 on a plain natural

construction of its language, posits for its applicability a factual situation which is described by the clause "Where an accused person has, on conviction, been sentenced to imprisonment for a term". There is nothing in this clause which suggests, either expressly or by necessary implication, that the conviction and sentence must be after the coming into force of the new Code of Criminal Procedure. Hence, even where an accused person has been convicted prior to the coming into force of the new Code but his sentence is still running, it would not be inappropriate to say that the "accused person has, on conviction, been sentenced to imprisonment for a term", and he would be entitled to claim u/s 428 that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term.

This construction of the Section does not offend against the principle which requires that unless the legislative intent is clear and compulsive, no retrospective operation should be given to a statute. On this interpretation, the Section is not given any retrospective effect. It does not seek to set at naught the conviction already recorded against the accused person. The conviction remains intact and unaffected and so does the sentence already undergone. It is only the sentence, insofar as it yet remains to be undergone, that is reduced. The Section operates prospectively on the sentence which yet remains to be served and curtails it by setting off the period of detention undergone by the accused person during the investigation, inquiry or trial of the case. Any argument based on the objection against giving retrospective operation is, therefore, irrelevant.

The same conclusion as to construction of Section 428 is also reached with the help of Section 484(2), Clause (b). Under that provision, the sentence of imprisonment and fine passed under the provisions of the old Code of Criminal Procedure must be deemed to have been passed under the corresponding provisions of the new Code of Criminal Procedure. It is now well settled law that where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion. The Court must, therefore, imagine the sentence imposed upon the accused as one imposed under the new Code of Criminal Procedure and then give effect to all the consequences and incidents which would inevitably flow from or accompany a sentence imposed under the new Code of Criminal Procedure against him. 1952 A. C. 109 (132) relied on."

9. On the point of construing the words "imprisonment for a term" Mr. Kaptan the learned advocate has contended that the petitioner will not be entitled to the benefit of Section 428 Criminal Procedure Code or Section 121A of the B.S.F. Act as the same can only be extended to accused person who has on conviction, been sentenced to "imprisonment for a term" and not for life as in the case of petitioner by relying on a decision rendered by the Supreme Court in *Kartar Singh v. State of Harayana* (cited supra). The question has been settled by

Constitution Bench of the Supreme Court in Bhagirath Vs. Delhi Administration, , overruling the decision in Kartar Singh's case, which reads as under :

"Persons sentenced to imprisonment for life are sentenced to a term of imprisonment and as such are entitled to set off the period of detention undergone as undertrial prisoner subject to the provision contained in Section 433-A and, provided that orders have been passed by the appropriate authority u/s 432 or Section 433 of the Criminal Procedure Code. In this connection, the assumption that the word "term" implies a concept of ascertainability or conveys a sense of certainty is contrary to the letter of the law in that Section. Even the marginal note to the Section does not bear out that assumption. It rather belies it. And, marginal notes are not legislative and not editorial exercises. The marginal note of Section 428 shows that the object of the legislature in enacting the particular provision was to provide that "the period of detention undergone by the accused" should be set off against the sentence of imprisonment imposed upon him. There are no words of limitation either in the Section or in its marginal note which would justify restricting the plain and natural meaning of the word "term" so as to comprehend only sentences which are imposed for a fixed or ascertainable period. To say that a sentence of life imprisonment imposed upon an accused is a sentence for the term of his life does offence neither to grammar nor to the common understanding of the word "term". To say otherwise would offend not only against the language of the statute but against the spirit of the law, that is to say, the object with which the law was passed. A large number of cases in which the accused suffer long under-trial detentions are cases punishable with imprisonment for life. Usually, those who are liable to be sentenced to imprisonment for life are not enlarged on bail. To deny the benefit of Section 428 to them is to withdraw the application of a benevolent provision from a large majority of cases in which such benefit would be needed and justified. Kartar Singh and Others Vs. State of Haryana, Overruled. Decision of Delhi High Court Reversed."

Therefore, the contention of respondents that the petitioner cannot avail of the benefit of set off having been sentenced to imprisonment for life is not sustainable in law and only deserves to be rejected.

10. In Ashok Kumar alias Golu Vs. Union of India and others, the Supreme Court observed in para 12 as under :

"It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted u/s 432, in which case the remission would be subject to limitation of Section 433A of the Code, or Constitutional power has been exercised under Articles. 72/161 of the Constitution. In Bhagirath Vs. Delhi Administration, the question which the Constitution Bench was required to consider was whether a person sentenced to

imprisonment for life can claim the benefit of Section 428 of the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him. Referring to Section 57 Indian Penal Code the Constitution Bench reiterated the legal position as under (at p. 1181, Para 9 of Cri.L.J.):

The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose."

These observations are consistent with the ratio laid down in Godse 1961(1) Cri.L.J. 736 and Maru Ram and Others Vs. Union of India (UOI) and Others, . Coming next to the question of set off u/s 428 of the Code, this Court held (at p. 1182, Para 11 of Cri.L.J.):

"The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority u/s 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life".

We fail to see any departure from the ratio of Godse's case : on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the Court while allowing the appeal/writ petition. The Court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433A and, "provided that orders have been passed by the appropriate authority u/s 433 of the Code of Criminal Procedure." These directions make it clear beyond any manner of doubt that just as it the case of remissions so also in the case of set off the period of detention as undertrial would ensure to the benefit of the convict provided the appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of Bhagirath's case, therefore, does not run counter to the ratio of this Court in the case of Godse or Maru Ram"

11. The Border Security Force authorities did not dispute that the petitioner was in detention for more than one year as an under trial prisoner. The learned counsel for the respondents contended that the B.S.F. Act was a special law within the meaning of Section 5 of the Code, and therefore, in view of the provision of the said Section of the Code and in that matter the provision of Section 428 thereof would not be applicable. According to him there was no provision either in the Code or in the B.S.F. Act to indicate that Section 428 of the Code was "a specific provision to the contrary" within the meaning of Section 5 of the Code so as to make it applicable. We are unable to subscribe to this

contention and it may be useful to reproduce Section 5 of the Code, which reads as under:

"Saving :-- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

12. In interpreting Section 5 in the case of Maru Ram and Others Vs. Union of India (UOI) and Others, , the Supreme Court observed as under :

"The anatomy of this saving Section is simple, yet subtle. Broadly speaking there are three components to be separated. Firstly, the Procedure Code generally governs the matters covered by it. Secondly, if a special or local law exists, covering the same area this latter law will be saved and will prevail. Now comes the third component which may be clinching. If there is a specific provision to the contrary, then that will override the special or local law."

13. The Division Bench of the Calcutta High Court has considered the scope of Section 5 of the Code in the case of Anand Singh Bishit 1986 Cri.L.J. 563 cited supra and relied on the decision of the Supreme Court in the case of Maru Ram and observed in para 10 as under :

"Besides referring to the above provisions of the B.S.F. Act and the Rules no other provision has been brought to our notice where from we can say that Section 428 of the Code cannot co-exist with the provisions of the B.S.F. Act. In other words, there is no provision in the B.S.F. Act or the Rules which operates in the area of Section 428 of the Code so as to override the later and as such it must be held that the beneficent provision of Section 428 of the Code is fully and totally applicable to sentences imposed under the B.S.F. Act. Since Section 428 of the Code does not "affect" the B.S.F. Act, the question whether this Section is a "specific provision to the contrary" within the meaning of Section 5 of the Code is redundant."

We are in respectful agreement with the view taken by the Calcutta High Court in the case of Anand Singh Bishit. However, it may be mentioned that the time when the conviction of the petitioner was recorded, Section 121A was not in existence in the B.S.F. Act, and therefore, by virtue of the application of Section 5 of the Code it must be held that the beneficent provision u/s 428 of the Code is fully and totally applicable to the sentences imposed under the B.S.F. Act and the question whether this Section is a specific provision to the contrary within the meaning of Section 5 of the Code, would be redundant.

14. In view of the aforesaid legal position, it is obvious that where a member of the Border Security Force is sentenced to imprisonment, on his conviction by Security Force Court under the B.S.F. Act of 1968 for the offence punishable u/s 302 of the Indian Penal Code read with Section 46 of the B.S.F. Act, is entitled to the benefit of Section 428 of the Code and the period of detention undergone by

him prior to conviction as undertrial prisoner has to be set off. The said Section operates prospectively on the sentence which yet remains to be served and curtails it by setting off the period of detention undergone by the accused person during the investigation, inquiry or trial of the case, and therefore, the argument based on the objection against giving retrospective operation cannot be sustained.

15. Formerly there was no provision in the Border Security Force Act regarding the period of custody undergone by a person to be set off against the imprisonment but by the B.S.F. Act No. 35 of 2000, the amendment has been made and the wording of the Section would clearly indicate that; when any person subject to this Act is sentenced by a Security Force Court or fine, the period spent by him in civil or Force custody during investigation, inquiry or trial of the same case and before the date of order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, or the term of imprisonment imposed upon him. So, granting benefit of this provision to the persons who are convicted before coming into force of the amendment, does not offend against the principle which requires that unless the legislative intent is clear and compulsive, no retrospective operation should be given to a statute. On this interpretation, the Section is not given any retrospective effect. It does not seek to set at naught the conviction already recorded against the accused person. The conviction remains intact and unaffected and so does the sentence already undergone. It is only the sentence insofar as it must remain to be undergone, that is reduced. The Section operates prospectively on the sentence which yet remains to be served and curtails it by setting off the period of detention undergone by the accused person during the investigation, inquiry or trial of the case, and therefore, question of giving any retrospective operation the said provision does not arise.

16. In that view of the matter, we are of the considered opinion that the petitioner prisoner is entitled to the benefit of set off u/s 121A of the B.S.F. Act read with Section 428 of the Code of Criminal Procedure, and therefore, the question framed has been answered by us in the affirmative. In the result, the petition is allowed. The impugned order is quashed and set aside and we direct the respondents to grant set off for the period of pre-trial detention from the term of imprisonment imposed on the petitioner on conviction, under the provisions of Section 428 of the Code and Section 121A of the B.S.F. Act. Sentence imposed on the petitioner be construed accordingly.

17. Rule is made absolute in the aforesaid terms.