

(2013) 12 DEL CK 0125

In the Delhi High Court

Case No : Writ Petition (Criminal) 1828 of 2013

Zile Singh

APPELLANT

Vs

State GNCT of Delhi

RESPONDENT

Date of Decision : 12-12-2013

Acts Referred:

Arms Act, 1959 — Section 25
Criminal Procedure Code, 1973 (CrPC) — Section 428
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20
Penal Code, 1860 (IPC) — Section 302, 304, 305, 307, 333

Citation : (2014) 140 DRJ 80

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Jai Bansal, Mr. Tarun Satija, Mr. Pushpendra Singh and Mr. Atul Nagrajan, for the Appellant; Pawan Sharma for State Along and Ms. Priyanka Kapoor, for the Respondent

Final Decision : Disposed Off

Judgement

G.S. Sistani, J.—By the present petition, the petitioner seeks a direction to the respondent to grant benefit of the statutory provision, as

mentioned in Section 428 Cr.P.C., and set off the period of imprisonment already undergone by him as an under trial prisoner against the term of

imprisonment imposed on him or else the petitioner would be forced to languish in jail despite completion of his sentence. The necessary facts, to

be noticed for disposal of this petition, are that the petitioner herein was convicted in a case arising out of FIR No. 201/2007, registered under

Sections 397/411/34 IPC and Sections 25/54/59 Arms Act, P.S. Mandir Marg, Delhi, on 6.11.2008 by the Court of Additional Sessions Judge,

New Delhi. The petitioner was sentenced to RI for seven years and fine on 6.11.2008. Petitioner is stated to be confined in Central Jail No. 2,

Tihar, New Delhi, and is undergoing sentence of seven years, which was likely to be completed when the petition was filed and according to the

petitioner his sentence has now been completed. The petitioner has also preferred an appeal against the judgment and order on sentence dated

6.11.2008. The said appeal, being CrI. A. No. 1017/2008, is pending adjudication before this Court.

2. It is the case of the petitioner that while petitioner was in custody in FIR No. 201/2007 he was also convicted and sentenced to RI for six

months in another case arising out of FIR No. 258/2010 u/s 20 of the NDPS Act, P.S. Sabzi Mandi, Delhi, vide order dated 3.8.2011 passed by

learned Metropolitan Magistrate. The said sentence was directed to commence after serving sentence of seven years awarded in a case arising out

of FIR No. 201/2007. It is clarified that the maximum punishment u/s 20 of NDPS Act is six months, however, the petitioner was undertrial for a

period w.e.f. 29.10.2010 to 2.8.2011 i.e. approximately ten months.

3. The petitioner thereafter made an application on 27.8.2013 and applied to the Superintendent, Central Jail, No. 2, Tihar, seeking details and

information regarding his custody period in case FIR No. 258/2010 u/s 20 of NDPS Act. In response to the petitioner's application on 5.9.2013

Deputy Superintendent informed the petitioner that he would not be given benefit of Section 428 Cr.P.C. undertrial period undergone by him from

29.10.2010 to 2.8.2011. This communication has led to the filing of the present petition.

4. Learned counsel for the petitioner submits that for the offence committed on 19.10.2010 (FIR No. 258/2010 registered u/s 20 NDPS Act) the

petitioner was convicted vide order dated 3.8.2011 and sentenced to RI for six months. At that point of time the petitioner was already serving a

sentence in FIR No. 201/2007 and he had remained as an undertrial prisoner from 19.10.2010 to 2.8.2011 in FIR No. 258/20110 and

accordingly in view of Section 428 Cr.P.C. the period of detention undergone by the petitioner is to be set off against the sentence of imprisonment

awarded to the petitioner in case arising out of FIR No. 201/2007.

5. Learned counsel for the petitioner further submits that it is the case of the petitioner that in view of clear statutory mandate of Section 428

Cr.P.C. the petitioner cannot be denied of this benefit. Counsel further submits

that it is settled law by a catena of judgments of the Supreme Court of India and the High Courts wherein it has been held that all accused persons are entitled to the benefit of Section 428 Cr.P.C. as a mandate and not as a discretion even when a person is undergoing sentence of imprisonment in another case.

6. Learned counsel for the petitioner has relied upon the decision rendered in the case of State of Maharashtra and Another Vs. Najakat Alia

Mubarak Ali, , wherein a three Judge Bench of the Apex Court after considering in detail the earlier pronouncement of the Supreme Court of India

and various High Courts and the scope of Section 428 Cr.P.C., held that after conviction and sentence in a criminal case, if arrested in the second

case, the accused shall be entitled to claim the benefit of Section 428 of the Code.

14. The purpose of Section 428 of the Code is also for advancing amelioration to the prisoner. We may point out that the section does not contain

any indication that if the prisoner was in jail as an under-trial prisoner in a second case the benefit envisaged in the section would be denied to him

in respect of the second case. However, learned counsel for the appellant contended that the words ""of the same case"" in the section would afford

sufficient indication that the benefit is intended to cover only for one case and not more than that. It must be remembered that the ideology

enshrined in Section 428 was introduced for the first time only in the Code of Criminal Procedure, 1973. For understanding the contours of the

legislative measure involved in that section, it is advantageous to have a look at the Objects and Reasons for bringing the above legislative

provision. We therefore extract the same here:

The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as under-trial prisoners

and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as under-trial prisoner. Indeed, there

may even be cases where such a person is acquitted. No doubt, sometimes courts do take into account the period of detention undergone as

under-trial prisoner when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is

not always the case so that in many cases the accused person is made to suffer

jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also noted that a large number of persons in the overcrowded jails of today are under-trial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. The new clause provides for the setting off of the period of detention as an under-trial prisoner against the sentence of imprisonment imposed on him. The Committee trusts that the provision contained in the new clause would go a long way to mitigate the evil. (emphasis supplied)

15. The purpose is therefore clear that the convicted person is given the right to reckon the period of his sentence of imprisonment from the date he was in jail as an under-trial prisoner. In other words, the period of his being in jail as an under-trial prisoner would be added as a part of the period of imprisonment to which he is sentenced. We may now decipher the two requisites postulated in Section 428 of the Code.

(1) During the stage of investigation, inquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case.

16. If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, inquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words ""if any"" in the section amplifies that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, inquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.

17. In the above context it is apposite to point out that very often it happens when an accused is convicted in one case under different counts of offences and sentenced to different terms of imprisonment under each such count, all such sentences are directed to run concurrently. The idea

behind it is that the imprisonment to be suffered by him for one count of offence will, in fact and in effect be imprisonment for other counts as well.

18. 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 pre-sentence period of detention undergone by him. Nothing more can be made

out of the collocation of those words.

19. Various High Courts have expressed on this question. A Division Bench of Delhi High Court has dissented from a contrary view taken by a

Single Judge of that High Court and held in *K.C. Dass and N.K. Chatterjee Vs. State*, that the statute does not make any distinction between the

first case and the second case for application of Section 428 of the Code. A Division Bench of the High Court of Lalrinfela Vs. State of Mizoram

and Others, has adopted the same view. Lahiri and Hansaria, JJ, said in the said decision that: (Crl.L.J. p. 1797, para 7)

if the accused is simultaneously arrested and detained in two or more cases and on conviction obtains set off for the period of his detention in the

first case he is not ineligible to obtain set off for the period in the subsequent cases; in each case the court is to count the number of days the

accused was in such detention separately and the liability to undergo imprisonment on conviction should be restricted to the remainder of the terms

of the imprisonment imposed on him in that case.

20. A Division Bench of the Andhra Pradesh High Court in *Gedala Ramulu Naidu Vs. State of Andhra Pradesh and Another*, and a Division

Bench of the Madras High Court in *Chinnasamy Vs. State of Tamil Nadu and Others* have also adopted the same view in tune with the

interpretation given by us. While speaking for the Division Bench of the Madras High Natarajan, J (as he then was) has made a survey of most of

the decisions thus far rendered by different High Courts and opted to flow with

the view adopted by all the other High Courts almost uniformly.

21. We have no reason to think that the High Courts mentioned above have gone wrong in taking the view that Section 428 of the Code permits

the accused to have the period undergone by him in jail as an under-trial prisoner set off against the period of sentence imposed on him irrespective

of whether he was in jail in connection with the same case during that period. We therefore, respectfully dissent from the view expressed by the

two Judge Bench of this Court in *Raghubir Singh Vs. State of Haryana*, .

44. The only question which according to me needs consideration is the true effect of the expression ""same case"" as appearing in section 428 of the

Code of Criminal Procedure. The provision is couched in clear and unambiguous language and states 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 one undergone by him during investigation, enquiry or

trial in connection with the ""same case"" in which he has been convicted. Any other period which is not connected with the said case cannot be said

to be reckonable for set-off. The view of learned Brother Mr. Justice Thomas according to me accords the legislative intent. Acceptance of any

other view would mean necessary (sic. necessarily) either adding or subtracting words to the existing provision, which would not be a proper

procedure to be adopted while interpreting the provision in question.

45. I am, therefore, in respectful agreement with the views expressed by my learned Brother Mr. Justice Thomas.

7. Learned counsel for the petitioner submits that a similar view was also expressed by a Division Bench of this Court in the case of *K.C. Dass and*

N.K. Chatterjee Vs. State, , more particularly paras 7 to 12.

(7) On a true interpretation of the section it appears to us that in the second case also in which the accused person was convicted on 31st March,

1978 he will be entitled to set off the period of pre-trial detention i.e. 1st January, 1977 to 31st March, 1978 against the sentence of three years

imposed on him. The Statute does not make any distinction between the first case and the second case. The principle is the same. It has to be

applied to all cases even-handedly and uniformly.

(8) The key words of the section are ""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". This "period of detention" shall be set off against the term of imprisonment imposed on him on conviction.

The liability of such person to undergo imprisonment shall be restricted to the remainder of the term of imprisonment imposed on him.

(9) The words "of the same case" are important. The section speaks of the "period of detention" undergone by the accused person, but it expressly

says that the detention mentioned refers to the detention during the investigation, inquiry 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, inquiry or trial in connection with the "same case" in which he has been convicted. (See

Government of A.P. v. A.V. Rao, AIR 1977 SC 1097 (1100) (1).

(10) S. 428 provides that the period of detention of an undertrial prisoner shall be set off against the term of imprisonment imposed on him on

conviction. Will it not be true to say that the accused is an undertrial prisoner in the second case in our illustration. If it is so he will be entitled to set

off his pre-conviction period against the term of imprisonment imposed on him in the second case as in the first. We see no ground to deny him the

benefit in the second case.

(11) The provision as to set off expresses a legislative policy (See Government of A.P. supra). We sit here to carry out the will of Parliament. The

Supreme Court has said:

S. 428 is absolute in its terms. It provides for set off the pre-conviction detention of an accused person against the term of imprisonment imposed

on him on conviction" (Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another, .

(12) The principle of s. 428 has to be applied in all cases whether the accused is convicted in one case or many, whether simultaneously or at

different times. The reason is that in the second case the accused person remains an untried and unsentenced prisoner till his trial is concluded. At

the end of the trial he is convicted and sentenced to a term of imprisonment. Before trial is finished he remains an unconverted person accused of a

crime. Nothing more than this. The statute says that if on trial he is convicted and a term of imprisonment is imposed allow him set off of the period

of pre-trial detention. Therefore, if the accused person is in detention as an unconvicted, untried or unsentenced prisoner and is, on trial, convicted

and sentenced to a term of imprisonment he is entitled to set off. Whether such period of pre-trial detention is common to a considerable extent in

the two cases is of no consequence to the application of s. 428.

8. In the case of Dinesh Soni v. State of CG, reported at 2001 LS (CHH) 506, similar view was taken by the High Court of Chhattisgarh. Para 13

reads as under:

13 It is thus clear in the case of State of Maharashtra and Another Vs. Najakat Alia Mubarak Ali, , the Supreme Court finally concluded by saying

that the period, during which, the accused was in prison subsequent to the inception of a particular case, should be counted towards the period of

imprisonment awarded as sentence in that particular case. It was held that it is immaterial that the prisoner was undergoing sentence of

imprisonment in another case also during the said period. What therefore follows from the aforesaid decision is that even the period of

imprisonment, while undergoing sentences in other case, is to be reckoned for the purpose of allowing the set-off against the sentence of

imprisonment awarded in the case in hand. In the present case, the result, therefore, would be that the entire period of imprisonment undergone by

the petitioner from the date of his arrest i.e. 20-02-2010 till the date of conviction i.e. 02-07-2011 is required to be reckoned for the purpose of

set-off notwithstanding conviction in the earlier case vide judgment of conviction and order of sentence dated 11-03-2011. It need be noted that in

both the cases, the petitioner has been granted set-off u/s 428 of the Cr.P.C. with effect from the date of his arrest i.e. 20-02-2010.

9. Similar view has been taken by Madras High Court in the case of Daulat v. The State of Tamil Nadu, reported at Habeas Corpus Petition No.

1083/2009.

10. In the case of Ram Chandra and Another Vs. State of Rajasthan, , a similar view was taken by Rajasthan High Court. Paras 6 and 7 read as

under:

6. Section 428, CrPC makes a clear provision to the effect that when an accused has been sentenced to an imprisonment for a term, the period of

detention undergone by him during investigation, inquiry or trial before the date

of conviction shall be set off against the term of imprisonment and

the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder.

7. Thus, the accused petitioner Ram Chandra was entitled to the benefit of provisions of Section 428, CrPC and the directions given by the

learned Special Judge in the warrant of commitment to jail dated 13.9.1995 that the accused petitioner Ram Chandra would not get benefit of the

provisions of Section 428, CrPC are wholly illegal and liable to be set-aside and this petition from jail deserves to be allowed.

11. The trial court in its order on sentence has observed that the accused would not be entitled to set off. The Apex Court in the case of Mohd.

Aslam Vs. State of Maharashtra, held that the jail authorities shall give benefit of set off provided u/s 428 Cr.P.C. notwithstanding such an

observation. Para 9 reads as under:

9. Learned counsel lastly made a plea for reduction of the sentence as he is sentenced to RI for 10 years. We pointed out the futility of the said

argument in view of the fact that A-1 was already convicted in another case for the offence u/s 302 IPC and was sentenced to imprisonment for

life. For him to complete that period of life imprisonment he would have to suffer imprisonment of about 4 years more which will complete almost

with the sentence imposed in this case. But learned Counsel pointed out that the Designated Court has observed in paragraph 5 of the operative

part of the sentencing order that A-1 will not be entitled to set-off u/s 428 of the Criminal Procedure Code for the period between 8-12-1994 to

19-7-1998. The jail authorities shall give the benefit of set-off provided u/s 428 of the CrPC notwithstanding such observations, if he is otherwise

entitled to it as per the law declared by this Court.

12. Reliance is also placed in the case of Ranjit Singh Vs. State of Punjab, , wherein the Supreme Court of India made an observation with regard

to the benefit of set off u/s 428 of Cr.P.C. and accordingly granted the benefit of set off. Paras 2 to 4, which read as under:

2. The appellant was sentenced to imprisonment for life u/s 302 of the Indian Penal Code (I.P.C.), 10 years" rigorous imprisonment u/s 307 I.P.C.

and 10 years" rigorous imprisonment u/s 333 I.P.C. While sentencing the appellant, the Additional Sessions Judge, Ludhiana, did not grant him

benefit of set off u/s 428 of the Code of Criminal Procedure, on the basis of the judgment of this Court in Kartar Singh and Others Vs. State of Haryana, .

3. A Constitution Bench of this Court in the case of Bhagirath Vs. Delhi Administration, , has specifically overruled Kartar Singh's judgment

(supra), the relevant paragraph of which reads as under:

We have considered with great care the reasoning upon which the decision in Kartar Singh and Others Vs. State of Haryana, proceeds. With

respect, we are unable to agree with the decision. We have already discussed why imprisonment for life is imprisonment for a term, within the

meaning of section 428. We would like to add that we find it difficult to agree that the expressions "imprisonment for life" and "imprisonment for a

term" are used either in the Penal Code or in the Criminal Procedure Code in contradistinction with each other. Sections 304, 305, 307 and 394

of the Penal Code undoubtedly provide that persons guilty of the respective offences, shall be punished with imprisonment for life or with

imprisonment for a term not exceeding a certain number of years. But, that is the only manner in which the Legislature could have expressed its

intention that persons who are guilty of those offences shall be punished with either of the sentences mentioned in the respective sections. The

circumstances on which the learned Judges have placed reliance in Kartar Singh, do not afford any evidence, intrinsic or otherwise, of the use of

the two expressions in contradistinction with each other. Two or more expressions are often used in the same section in order to exhaust the

alternatives which are available to the Legislature. That does not mean that there is, necessarily, an antithesis between those expressions.

4. In our considered view, the appellant is entitled to the benefit of set off u/s 428 of the Code of Criminal Procedure.

13. Mr. Sharma, learned counsel for the State submits that the petitioner is not entitled to set off. Counsel relies on a recent decision rendered by a

Division Bench of the Supreme Court of India in the case of Atul Manubhai Parekh Vs. Central Bureau of Investigation, . Paras 14 and 15 read as

under:

14. The wording of Section 428 is, in our view, clear and unambiguous. The heading of the Section itself indicates that the period of detention

undergone by the accused is to be set off against the sentence of imprisonment. The Section makes it clear that the period of sentence on

conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry or trial of the same case. It is

quite clear that the period to be set off relates only to pre conviction detention and not to imprisonment on conviction.

15. Let us test the proposition by a concrete example. A habitual offender may be convicted and sentenced to imprisonment at frequent intervals.

If the period of pre-trial detention in various cases is counted for set-off in respect of a subsequent conviction where the period of detention is

greater than the sentence in the subsequent case, the accused will not have to undergo imprisonment at all in connection with the latter case, which

could not have been the intention of the legislature while introducing Section 428 in the Code in 1973.

14. Mr. Sharma further submits that in the above decision the Apex Court has taken note of the decision of a three Judge Bench in the case of

Najakat Ali and, thus, it cannot be said that this judgment is per incuriam. Mr. Sharma has also drawn a distinction to the facts of this case and the

facts in the case of State of Maharashtra v. Najakat Ali (supra). He further submits that in the case of State of Maharashtra (supra), the person

was convicted by two separate courts in one day and in this backdrop Section 428 Cr.P.C. was invoked by the Supreme Court of India.

15. In my view, this submission of learned counsel for the State cannot come to his aid and rescue in view of the observations of a Three Judge

Bench of the Supreme Court in the case of State of Maharashtra (supra) more particularly para 18 wherein it has been categorically held that 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 a person

exclusively for the case in which the sentence is imposed. It was further clarified that 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 was

further clarified that it would be immaterial that the prisoner was undergoing sentence of imprisonment in another case during the said period as is

the case in the present matter where the petitioner was undergoing sentence in the first FIR and he was awarded a sentence of seven years and it is

during the period when he was serving the sentence that a subsequent FIR was lodged u/s 20 of the NDPS Act and he was convicted and

sentenced to 6 months of RI.

16. This court will be bound by a decision rendered by a Three Judge Bench in view of the mandate of the Supreme Court in the case of State of

Tripura Vs. Tripura Bar Association and Others, , wherein the Apex Court has observed that Division Bench of High Court, being a coordinate

Bench, could not have taken a view different from that taken by the earlier Division Bench, however, in the instant case the judgment relied upon

by the petitioner is of Three Judges Bench on the contrary the respondent has relied on a decision rendered by a Division Bench. In the cases of

Official Liquidator Vs. Dayanand and Others, ; Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, ; Central Board of

Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, , a similar view has been taken by the Apex Court that a Bench

of lesser quorum cannot doubt the correctness of view of law taken by a Bench of Larger Quorum. Similar view has also been taken in State of

Uttaranchal v. Sandeep Kumar Singh & amp, Civil Appeal No. 4494/2006, and Siddharam Satlingappa Mhetre Vs. State of Maharashtra and

Others, ; Union of India (UOI) and Another Vs. Hansoli Devi and Others, .

17. In view of clear mandate of the Supreme Court in the case of State of Maharashtra (supra) which in my view is applicable to the facts of the

present case, the present petition is allowed. Petitioner will be given benefit of Section 428 Cr.P.C. Petition stands disposed of.