AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRMP No. 1458 of 2017

In Reference High Court of Chhattisgarh On Its Own Motion Matter
Relates To Malti @ Priya @ Shani **--- Petitioner**

Versus

State f Chhattisgarh Through The District Magistrate, Raipur
Chhattisgarh. **--- Respondent**

For the applicant : Mr. Kishore Narayan, Advocate.
For the Respondent : Mr. Ashish Shukla, Dy. A.G.

HON'BLE SHRI JUSTICE GOUTAM BHADURI

CAV ORDER / JUDGMENT

(Reserved on 24.07.2018)

(Pronounced on 26.09.2018)

1. A letter was preferred by Malathi @ K.S. Priya, wife of K.S. RamachandraReddy @ Vijay @ Gudda Usendi to Hon'ble Chief Justice, High Court of Chhattisgarh, Bilaspur, Chhattisgarh which was forwarded by the Superintendent of Special Prisons for Women, Government of Telengana, Prisons Department on receipt of the same from Jailer. The said letter purports that applicant Malathi was convicted in Sessions Trial No.76 of 2008 and Sessions Trial No.95 of 2008 and has prayed that she was convicted in both the Sessions Trials and considering her long stay in prison and deteriorating health condition as also the future career of her both children, permission was sought to run both the sentences concurrently so as to set her free to be with her

children and further provide them higher education and to perform the marriage of her daughter etc. The said letter dated 15.09.2017 was forwarded by the Jailer, Special Prison for Women, Chanchalguda, Hyderabad, which was registered as Cr.M.P. No.1458 of 2017. Subsequently the appearance was made through the counsel in the reference and memo of submission has been filed.

2. It is contended by Mr. Kishore Narain, Advocate, appearing on behalf of the prisoner that in Sessions Trial No.95/2008 she was convicted by judgment/order dated 29th July 2010 and sentenced to undergo R.I., for 10 years which started from 04.02.2008 and thereafter she was also convicted by judgment dated 09th July, 2013 passed in Sessions Trial No. 76/2008 and sentenced to undergo R.I., for 7 years wherein her date of arrest was shown as 22.01.2008. It is stated that initially on a search being made on 21.1.2008, K.S. Priya @ Malathi @ Shanti Priya was arrested under different sections of IPC and Unlawful Activities (Prevention) Act on the ground that they were supplying materials like Pistol, Wireless Sets, uniforms, literatures etc., to the Naxalites and crime was registered which was bearing Sessions Trial No.95/2008. Subsequently, while she was in custody, another search was made on 03.02.2008 at different place at Supela where C.D. & Telugu transcribes were recovered so it was in a single transaction, the material was recovered. It is contended that the entire exercise of Police was made only to prepare two cases and two sessions trials were conducted. It is stated that the CD recovered on the subsequent date i.e., 03.02.2008 could have been made on the same date but the

trial having been done in two sessions trials, the sentences of the undertrial in both the sessions trials may be allowed to run concurrently. Reliance was placed in a case law reported in ***(2013) 7 SCC 211 – V.K. Bansal v. State of Haryana*** and submits that accordingly the direction may be issued to run the sentences in both the cases concurrently.

3. The State has filed its reply and opposed the submission made by the convict. It is stated that two judgments having been passed separately were subject of appeal before the High Court and by judgment dated 29.07.2010 passed in Sessions Trial No.95/2008 she was awarded a maximum sentence of R.I., for 10 years and fine of Rs.4500/-, in absence of payment of fine, further additional R.I., of 9 months was awarded and subsequently by judgment/order dated 09.07.2013 passed in other sessions Trial No.76/2008, the maximum sentence of R.I. for 7 years has been awarded alongwith fine of Rs.28,000/- and in default of payment of fine, additional 48 months' imprisonment was ordered. It is contended that after getting remission the petitioner has already completed the first set of maximum sentence of R.I., for 10 years awarded in Sessions Trial No.95/2008 vide judgment dated 29.07.2010. However, she is undergoing the jail sentence since 27.05.2016 as per second judgment of dated 09.07.2013 passed in S.T. No. 76 of 2008. It was further stated that the convict was transferred from Central Jail, Raipur to the Special Prison for Women, Hyderabad, Telangana State and in pursuance thereof, she is undergoing jail sentence at Hyderabad since 01.08.2016.

4. It is further contended by the State that the petition is not

maintainable and further stated that the first sentence of convict ended on 26.05.2016, thereafter she is serving sentence in connection with sentence awarded in Sessions Trial No.76/2008 which starts from 27.05.2016. It is further stated that against the order dated 29.07.2010 appeal was preferred which too was dismissed by the High Court on 13.06.2013 and during such pendency of criminal appeal, the petitioner had not sought before the Court that both the sentences may run concurrently. It is further stated that against the conviction of Sessions Trial No.76/2008, the appeal was preferred being Cr. A. No. 939/2013 which is pending adjudication wherein it is stated that the convict is free to file such application and pray to run the sentences concurrently. Further it has been contended on behalf of the State that as per section 427(1), the discretion though is vested in the Court, the same cannot be exercised mechanically and due weightage has to be given to the nature of offence and facts situation of a particular case and here in this case, the petitioner was charged with highest degree of offence as she was involved in anti-national activities which is punishable under the major sections of IPC and Unlawful Activities (Prevention) Act. Therefore, the prayer to issue a direction to run the sentences concurrently cannot be allowed. The memo of submissions have been placed by the State as also by the convict.

5. The judgments in respective Sessions Trials have been placed on record.

6. The facts would reveal that the accused was tried in two cases, one was Sessions Trial No.95/2008 under sections

117/34, 121-A/34, 124(a)/34, 153(a)/34, 505/34 of IPC and section 10(a) (1, 3, 5), 18, 20, 21 of Unlawful Activities (Prevention) Act and was convicted by 14th Additional Sessions Judge, FTC, Raipur and maximum sentence of R.I., for 10 years was awarded. In S.T.No.95/2008, the maximum sentence of 10 years started from 04.02.2008 and it was observed in the judgment that 2 years, 5 months & 22 days already undergone during trial shall be set off against the sentence of imprisonment imposed upon her. The said sentence of imprisonment came to an end on 26.05.2016. This fact has not been disputed either by the convict or by the State and the State has also admitted this fact in reply that the sentence of imprisonment in Second Sessions Trial no.95/2008 came to an end on 26.05.2016.

7. Another judgment in Sessions Trial No.76/2008 was passed on 09th July, 2013 wherein the conviction was made u/s 121(a) read with section 120-B IPC, 124(a) IPC and sections 8(1), 8(2), 8(3), 8(5) of Chhattisgarh Vishesh Jan Suraksha Adhiniyam and further sections 18 & 21 of Unlawful Activities (Prevention) Act, 1967 and also section 25(1)(a) of the Arms Act, and section 3, 6 (1-a) of the Indian Wireless and Telegraphic Act, 1933 and maximum sentence of R.I., for 7 years was awarded. In such judgment, the sessions Court observed that the period spent in jail during trial from the date of arrest i.e., 22.01.2008 till the date of subsequent judgment on 09.07.2013 i.e., 5 years 5 months & 18 days shall be set off against the sentence of imprisonment imposed upon her. Therefore, according to the judgment, after set off remaining sentence to undergo comes to be 1

year 7 months & 12 days i.e., after deducting 5 years 5 months and 18 days from 7 years. No dispute is raised about the fact that the first sentence came to an end on 26.5.2016 then if the sentence starts from 27.05.2016, the same expires on 09.01.2018 thereby it apparently appears that the convict has already sufferred the entire jail sentence.

8. In the memo of submission by the convict the sentence and release date have been calculated by the jail authorities on the basis of Notification No.178/Warrant/ Petition/ Bhopal dated 03.10.1997 and has stated that the convict will get advantage of judicial custody in second sentence till the judgment date of the first case and hence in second conviction, the judicial custody would be considered from 22.01.2008 to 28.07.2010 i.e., a date before the judgment was pronounced on 19.07.2010.

9. The Supreme Court in ***(2001) 6 SCC 311 – State of Maharashtra v. Najakat Alia Mubarak Ali*** dealt with similar kind of situation interpreted section 428 of the Code of Criminal Procedure and held and observed as under .

> "13. Thus the sentence of life imprisonment imposed on the same person in two different convictions would converge into one and threreafter it would flow through one stream alone. Even if the sentence in one of those two cases is not imprisonment for life but only a lesser term the convergence will take place and the post-convergence flow would be through the same channel. In all other cases, it is left to the court to decide whether the sentences in two different convictions should merge into one period or not. If no order is passed by the Court, the two sentences would run one after the other. No doubt, section 427 is intended to provide amelioration to the prisoner. When such amelioration is a statutory operation in cases falling under the second sub-section it

is a matter of choice for the court when the cases fall within the first sub-section. Nonetheless, the entire section is aimed at providing amelioration to a prisoner. Thus a penumbra of the succeeding section can be glimpsed through the former provision.

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 undertrial prisoner in a second case the benefit envisaged in the secontion would be denied to him in respect of second case. However, learned counsel for the appellant contended that the words “of the same case” in section would afford sufficient indication that the benefit is intended to cover only 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-trail prisoners and in some cases the sentence of imprisonment ultimately awarded is 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 undertrial 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 setting-off of the period of detention as an undertrial 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 undertrial prisoner. In other words, the period of his being in jail as an undertrial 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, enquiry 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 larger than the period of detention undergone by him during the stages of investigation, enquiry 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 amplify 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, enquiry 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 continued 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.”

10. The record would show that fine of Rs.28,000/- was paid on 31.07.2013 in connection with Sessions Trial No.76/2008. The judgment in Sessions Trial was pronounced on 09.07.2013.

11. The trial Court while passing the judgment on 09.07.2013 in ST No. 76/2008 observed that the period of 05 years, 05 months & 18 days is to be held as judicial custody. The Court further observed that since the accused is in jail from 22.01.2008 till the date of judgment on 09.07.2013 the said

period shall be set off against the jail sentence imposed on the convict. Admittedly, no appeal has been filed by the State against such finding. In this context, section 428 of Cr.P.C., would be relevant which reads as under :

> "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, 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/her 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:
>
> Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section."

12. In ***AIR 1985 S.C. 1050 – Bhagirath v. Delhi Administration,*** the Constitution Bench of the Supreme Court has interpreted the word "term" in section 428 of Cr.P.C. Para 7 of the said judgment is relevant here and quoted below:

> "7. We see but little warrant for qualifying the word 'term' by the adjective 'fixed which is not to be found in Section 428. 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, as we find it in that section. Even the marginal note to the section does not bear out that assumption. It rather belies it. And, marginal notes are now legislative and not editorial

exercises. The marginal note of S.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 comprehended only sentences which are imposed for a fixed or ascertainable period."

13. The Jail Superintendent while calculating the period of jail sentence has referred to a notification No.178/Warrant/ Petition/Bhopal, dated 31.10.1997 which is reproduced herein-below :

"CALCULATION OF SENTENCE AND RELEASE DATE

Both of sentences are from separate criminal cases and according to Sections 427 (3) & 428(4) of Cr.P.C., and as per rule 290 of Jail Manual both of the sentences will run consecutively.

(I) CONVICTION :

Admission date	04.02.2008
1st Sentence	00-00-2018
ODR	03.03.2018

The female convict has been awarded remission according to C.G. Jail Manual which is entered in year-wise in last page of history ticket. The female convict earned remission of 01 year, 01 month and 7 days till May 2016 and **her first sentence (S.T. No.95/2010) has completed on date 26.05.2016.**

"As per first sentence has been completed, **the sentence of 7 years rigorous imprisonment in Second Case ST No.76/2008 started from date 27.05.2016.**"

II sentence start dates	27-05-2016
II Sentence	00-00- 07
(-) II under-trail period	08-11-2020
ODR	18-11-2020

Note: **(1)** The female convict has been **convicted in first case on 29.07.2010** and as per the orders of jail head quarters M.P.Bhopal Notification No.178/Warrant/ Petition/ Bhopal dated 03.10.1997 she will get advantage of judicial custody in second sentence till the judgment date of first case. Hence in **second conviction judicial custody will be considered from 22-01-2008 to 28-07-2010.**
(Total = 02 years, 06 months, 08 days)

(2) Advantage of remission earned will be counted in first case till date 26.05.2016 hence counting of remission in second sentence will be started from 26.05.2016."

14. By application of such notification, the judicial custody was reduced from 22.01.2008 that is from the date of arrest in Sessions Trial No.76/2008 as the subsequent judgment was passed on 09.07.2013. 29.07.2010 is the date of judgment of Sessions Trial No.95/2008 which was passed earlier. As such by reckoning the period between the two dates, 2 years 6 months & 7 days has been considered as a custody period according to the following calculation :

Date of first conviction/judgment in S.T. No. 95/2008	29.07.2010
Arrest made in S.T. No.76/2008	22.01.2008

Period of custody : 2 years 6 months & 7 days

Admittedly, there is no appeal by the State against the judgment of Sessions Trial No.76/2008 wherein the benefit of section 428 of Cr.P.C., was given by specific word by the Court.

15. It is trite law that official instructions in absence of any statutory support cannot over ride the law in view of provisions of Sections 427 & 428 of Cr.P.C., and the principles laid down by the Supreme Court in *State of Maharashtra v. Najakat Alia Mubarak Ali (Supra)*. Here in the

case in hand, by categorical wording, the Sessions Court has given set-off in exercise of power u/s 428 of Cr.P.C to the convict in second conviction on 09.07.2013. Therefore, the executive instructions of erstwhile State of Madhya Pradesh of the year 1997 cannot be applied to over-ride the wording and the set-off given by judgment in subsequent order by Court in exercise of power u/s 428 of Cr.P.C. In view of the subsequent judgment dated 09.07.2013 in S.T.No.76/2008, taking into account the set-off period of 5 years 5 months 18 days from 7 years R.I, the jail sentence has ended on 09.01.2018 whereas as on date she remained in jail over 8 months and 17 days.

16. In the result, accused Malti is directed to be released forthwith if she is not required in any other case. The set-off granted by the Court u/s 428 Cr.P.C., will prevail over the Executive Instruction. The reference is answered accordingly.

Sd/-
GOUTAM BHADURI
JUDGE

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