Jaswantlal Harjivandas Dholakia Vs The State of Maharashtra

Court: Bombay High Court

Date of Decision: July 14, 1978

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 427, 428
Prisons Act, 1894 â€" Section 27, 3

Citation: (1978) 80 BOMLR 411 : (1978) MhLj 672

Hon'ble Judges: Dharmadhikari, J; Aggarwal, J

Bench: Division Bench

Judgement

Dharmadhikari, J.
This criminal application is registered on the basis of a letter received from the Superintendent Nasik Road Central

Prison, Nasik, who sought clarification regarding the set off to be granted to prisoner Jaswantlal Harjivandas Dholakia. It appears from the record

that prisoner Jaswantlal was sentenced to undergo imprisonment for one year and six months and to pay a fine of Rs. 300 or in default to undergo

further imprisonment for two months in Case No. C.C. 77O/P/1973 vide judgment of 33rd Court, Ballard Pier, Bombay dated October 1, 1973.

Thereafter by the 7th Court, Dadar, Bombay he was again sentenced to undergo two years" imprisonment in C.C. 833/P/1971 by judgment dated

December 21, 1973. It further appears from the record that prisoner Jaswantlal had approached this Court through jail in Criminal Application

No. 1160 of 1974 requesting that while counting the period of sentence he should be granted the set off as contemplated by Section 428 of the

Code of Criminal Procedure. The division Bench of this Court by the order dated February 3, 1975 observed that the record before the Court did

not indicate in, which case he was sentenced, for what offence and on what date. However, relying upon the decision of this Court in Narayanan

Nambeesan Vs. The State of Maharashtra, as well as the decision of the Supreme Court reported in B.P. Andre v. Suptd., C. Jail Tihar [1975]

Mh. L.J. 1, this Court allowed the application filed by the prisoner and directed the Superintendent, Thana Jail to compute the period of his

sentence by excluding that period when he was under detention during investigation or trial. Thereafter it appears that the prisoner himself

approached the Metropolitan Magistrate, 33rd Court, Ballard Pier, Bombay as well as the Metropolitan Magistrate, 7th Court, Dadar, Bombay

through the Superintendent, Nasik Road Central Prison, Nasik for necessary clarification and instructions. The Metropolitan Magistrate, 33rd

Court Ballard Pier, Bombay vide his letter dated October 29, 1975 informed the Superintendent, Central Prison, Nasik that the accused was in

custody in Case No. 770/P of 1973 from May 2, 1973 to October 1, 1973 and this period of detention should be adjusted as set off u/s 428 of

the Criminal Procedure Code. The Metropolitan Magistrate, 7th Court, Bombay vide his letter dated November 28, 1975 also informed the

Superintendent, Central Prison, Nasik that prisoner Jaswantlal was arrested on July 27, 1971 and was in custody up to October 18, 1971 on

which date he was released on bail. Again he was taken in custody on July 21, 1972 and was in custody up to April 13, 1973. Thereafter he was

released on parol from Thana Tail as per intimation given by the Commissioner of Police vide his letter dated April 7, 1973. While the prisoner

was on parol, he remained absent and hence a warrant was issued against him and he was brought by execution of warrant on September 4, 1973

and as such he was in custody from September 4, 1973 till December 21, 1973 on which date he was convicted. Hence the period shown above

should be granted as set off as far as the case before the Metropolitan Magistrate is concerned. From the bare reading of these two letters it is

quite obvious that the set off was granted for over-lapping period in both these cases and, therefore, the Superintendent of the Central Prison,

Nasik has sought clarification from this Court as to how the set off should be counted in these two cases.

2. On the notice being issued by this Court, the prisoner appearing in person has filed his detailed reply. It is not necessary to refer to his reply in

detail because we are not concerned in this case with other cases in which he was already granted set off. We do not intend to disturb the said

grant. In this case we are merely concerned with the set off granted by the Metropolitan Magistrate, 33rd Court and the Metropolitan Magistrate,

7th Court in the aforesaid two cases viz. Case No. 770/P of 1973 and 833/P of 1971. From the bare reading of these two letters it is quite

obvious that in both these cases the period from September 4, 1973 onwards is overlapping. So far as case No. 770/P of 1973 is concerned, he

is granted set off from May 2, 1973 to October 1, 1973 and again in Case No. 883/P of 1971 he is granted set off from September 4, 1973 to

December 21, 1973. In our opinion the set off granted in the subsequent case viz. in Case No. 833/P of 1971 from September 4, 1973 to

December 21, 1973 is wholly uncalled for because the period from April 1, 1973 to October 1, 1973 was already counted while counting the set

off in Case No. 770/P of 1973 and after October 1, 1973 till December 21, 1973 prisoner was undergoing a substantive jail sentence as a convict

prisoner in Case No. 770/P of 1973.

3. From the bare reading of Section 428 of the Code of Criminal Procedure it is quite obvious that it confers a benefit on a convict reducing his

liability to undergo imprisonment out of the sentence imposed for the period which he has already served as an undertrial prisoner in the case

concerned. It lays down that the period of detention of an accused as an undertrial prisoner shall be set off against the term of imprisonment

imposed on him on conviction. The section only provides for set off. It does not change the nature of detention or sentence imposed. It does not

do away with two different kinds of detention nor it puts them on the same footing for all purposes. The detention contemplated by this section is

detention during investigation, inquiry or trial of the case in which the accused person has been convicted. The section makes it very 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. The case with which we are deal ring is not a case

wherein the sentences are directed to run concurrently. If he was undergoing substantive jail sentence in Case No. 770/P of 1973 in which he was

convicted on October 1, 1973, he was not detained as an undertrial prisoner in another case because at the relevant time he was undergoing

substantive jail sentence as a convicted criminal prisoner. Section 3(3) of the Prisons Act, 1894 defines the term ''convicted criminal prisoner'' and

Section 27(1) of the said Act provides for their separation. Separate provisions are made for the employment of these prisoners in chap. VII of the

Prisons Act. Therefore, it is difficult to hold that a prisoner who was undergoing substantive jail sentence on conviction in one case was also an

undertrial prisoner in another case. If such a construction is accepted, it is bound to create anomaly. It is no doubt true that the question will

obviously stand on different footing if sentences in two cases are directed to run concurrently, but we are not concerned with such a case in the

present application and hence it is not necessary to express any opinion in that behalf. As per provisions of Section 427(1) of the Code of Criminal

Procedure a sentence imposed on the accused on his subsequent conviction shall commence at the expiration of the imprisonment to which he had

been previously convicted, unless it is made concurrent with the previous sentence. Section 428 of the Code applies only to a stage before

conviction. It does not alter the nature of sentence. If the sentence is to run consecutively by indirect methods of invoking benefit of set off u/s 428

of the Code, in the absence of specific direction it cannot be altered to run concurrently. Therefore, Sections 427 and 428 will have to be read

together and harmoniously.

4. Even otherwise, once the period from September 4, 1973 to October 1, 1973 is already counted by granting a set off to the prisoner in

Criminal Case No. 770/P of 1973, the same period cannot be counted in another case because once a set off is granted, it becomes a part and

parcel of the sentence imposed and undergone. In this view of the matter, in our opinion, this double counting of the period or its overlapping while

granting set off in these two cases is not contemplated when the sentence is not directed to run concurrently and the prisoner was convicted and

sentenced in two different cases, by two different courts and on two different occasions and the sentences are to run consecutively. Therefore,

while counting the period of set off the petitioner will not be entitled to get a set off from September 4, 1973 to December 21, 1973 in Criminal

Case No. 833/P of 1971. In our opinion this practically covers all the questions raised by the Superintendent of Central Prison, Nasik and as

already observed, so far as the other cases are concerned, we do not intend to disturb the period of set off if already granted to the prisoner.

4. In the letter written by the Superintendent, Central Prison, Nasik as well as the reply filed by the prisoner a reference is made to certain

decisions of this Court, viz. the decision of single Judge of this Court in Maneklal Lalchand Shah v. The State of Maharashtra (1976) Criminal

Application No. 1160 of 1974 as well as the decision of this Court in Jasvantlal Harjivandas Dholakia v. The State of Maharashtra (1975)

Criminal Application No. 1160 of 1974 decided by the division Bench of this Court. So far as the decision in Jasvantlal Harjivandas Dholakia v.

The State of Maharashtra is concerned we have already made a reference to it and by that order the Superintendent of Jail was only directed to

compute the period of sentence of the prisoner by excluding that period when he was under detention during investigation or trial. It is further made

clear in the said decision that the record of the case was not before the Court to indicate in which case he was sentenced, for what offence and on

what date. So far as the decision of Sapre J. in Maneklal Lalchand Shah v. The State of Maharashtra is concerned it is quite obvious from the bare

reading of the said decision that such a question was not at all posed nor decided by the learned Judge. The question posed therein related to the

retrospective operation of the provisions of Section 428 of the Code of Criminal Procedure. Relying upon the decision of this Court in Narayanan

Nambeesan v. The State as well as the decision in Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another, Sapre J.

observed that the benefit of the said section is equally available to those persons who are convicted before April 1, 1974 i.e. before coming into

force of the new Code. From para. 4 of the said order it is further clear that the factual position was not controverted and, therefore, the

application was allowed. The question as to double counting of the same period in two different cases when the sentences arc to run consecutively

was neither raised nor considered in the said decision. In this view of the matter, in our opinion, the decision in that case cannot help the convicted

prisoner and hence the said decision is of no assistance while deciding the controversy raised before us.

5. Rule is discharged. A copy of this order be sent to the Superintendent, Central Prison, Nasik.