

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Cr.M.P. No. 588 of 2016****Reserved on 30.08.2016****Delivered on 16.09.2016**

- Nasibuddin S/o Salimuddin Musalman Aged About 42 Years Through Son Sonu Malik, S/o Nasibuddin, Aged About 22 Years, Occupation Labour Work, R/o Ghosiyan Mohalla, Sarghana, Police Station Sarghana, District Merath (Utter Pradesh).

---- Petitioner**Versus**

1. State Of Chhattisgarh Through The Secretary, Department Of Home, Secretariat, Mahanadi Bhawan, New Raipur, P.S. & Post Office Rakhi, District Raipur, Chhattisgarh.
2. Superintendent Of Jail, Central Jail Bilaspur, District Bilaspur, Chhattisgarh.

---- Respondents

For Petitioner	:	Mr. Y.C. Sharma, Advocate
For Respondents /State:		Mr. O.P. Sahu, Govt. Advocate

SB: Hon'ble Shri Justice P.Sam Koshy**C.A.V. Order**

1. The present Petition has been filed under provisions of Section 482 of CrPC by the Petitioner seeking for a direction to be issued to the Respondents for immediate release from jail as he has already undergone the entire jail sentence and all his further period spent in custody amounts to illegal detention. Apart from releasing from illegal detention he also seeks for an enquiry against the erring officers on whose count the Petitioner is being subjected to illegal

detention.

2. The case of the Petitioner in brief is that the Petitioner was accused in five different criminal cases. The details of the cases, offence, date of conviction and the sentences imposed as also the name of the Courts which had convicted the Petitioner for ready reference is given in tabular form as under :-

Sl. No.	Case No../ Sessions Trial No.	Offence u/s	Date of conviction /judgment	Period of conviction	Fine	Court
1.	235/2004	412 of IPC	28/03/2006	10 years RI	5000/-. In case of default further RI for 1 year.	Additional Sessions Judge Bhatapara
2.	189/2004	395 of IPC	29/08/2008	Life Imprisonment	5000/-. In case of default further RI for 6 months.	12 th Additional Sessions Judge FTC Raipur
3.	78/2007	224, 328/120B of IPC	15/07/2011	7 years RI	500/-. In default of fine further RI for 2 months	4 th Additional Sessions Judge, Durg
4.	-----	294, 506, 323, 353 of IPC	30/07/2012	6 months RI	-	Special Railway Magistrate, Bilaspur
5.	166/2011	328, 120-B, 224 of IPC	26/06/2013	7 years RI	1500/-. In default of fine further RI for 6 months.	7 th Additional Sessions Judge, Raipur.

3. In the aforesaid chart the dispute revolves around the conviction and sentence imposed by the fourth Additional Sessions Judge, Durg in Sessions Trial No. 78/2007 whereby he was convicted for the offence under Sections 224, 328/120B IPC and have been sentenced to undergo R.I. for 7 years with fine of Rs. 500/- vide judgment of conviction dated 15.07.2011. The details of the said case is reflected

at serial number 3 of the table above.

4. The case of the prosecution in the Sessions Trial No. 78/2007 is that on 20.11.2006 the Petitioner along with other accused persons were taken to the Court at Durg and while they were being taken back to the Central Jail, Raipur enroute the Petitioner along with the other accused persons said to have provided some poisonous substance mixed in cake to the guards who were accompanying them on account of which the guards became unwell and the Petitioner thereafter got the handcuff opened and escaped from the custody of the police personnels.

The Police authorities registered the case against the Petitioner as Crime No.0/06 under Sections 224, 328, 307 and 120B IPC and the charge-sheet was submitted on 20.02.2007 in the Court of the Additional Chief Judicial Magistrate, Durg from where the case was transferred to the Sessions Court, Durg on 20.03.2007. The 4th Additional Sessions Judge, Durg vide order dated 15.07.2011 passed judgment of conviction in Sessions Trial No. 78/2007 and sentenced the Petitioner to undergo R.I. for 7 years for the offence under Sections 224, 328, 307 and 120B IPC.

5. Learned Counsel for the Petitioner submits that the Petitioner initially was arrested on 03.01.2007 and later has been convicted vide order dated 15.07.2011 and the sentence is of 7 years and that he has been in custody all along i.e. for more than 7 years and therefore it should be construed as if he has undergone the entire sentence and he is entitled to be released forthwith. According to the Petitioner all

further detention that the Petitioner is facing amounts to illegal detention. It was also the case of the Petitioner that even otherwise the Petitioner in the instant case is entitled for the benefit of provisions of Section 428 CrPC whereby the period spent during the investigation / trial has to be set off against the period of imprisonment imposed upon him upon his conviction for the said offence.

6. The State Counsel however opposing the Petition submits that there is no illegal act on part of the Respondents in retaining the Petitioner in confinement on account of the various convictions and sentences that he is undergoing against the different Sessions Trials wherein he has been convicted.
7. According to the State Counsel Petitioner is in custody as per the provisions of Section 427 Cr.P.C. wherein it has been enunciated that when a person is already undergoing a sentence of imprisonment and is sentenced again on account of subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced.
8. According to the State Counsel for the offence reflected in serial No. 1 in the table shown in the preceding paragraph he stood convicted on 28.03.2006 for a period of 10 years and the said sentence got complete only on 30.09.2012. Therefore any period in custody undergone by the present Petitioner during the currency of the sentence period for the Sessions Trial reflected as serial No. 1 of the

table the same can not be counted for the purpose of the subsequent conviction and it would only be counted from 01.10.2012 i.e. after his sentence for the previous offence was completed.

9. The State Counsel further added that the even before the sentence could have been completed so far as the Petitioner in the case of Serial No.1 is concerned he was involved in another Sessions Trial for an offence under Section 395 IPC i.e. Sessions Trial No. 189/2004 wherein he was convicted vide judgment dated 29.08.2008 sentencing him to undergo imprisonment for life and in the said case the Petitioner could get bail only on 21.05.2015 but he could not be released on bail, as by then he became a detainee in jail because of the conviction in Sessions Trial No.78/2007 wherein he has been convicted on 15.07.2011 and sentenced to undergo R.I. for 7 years. So far as the case mentioned at Serial No. 4 and 5, there are no dispute so far as these cases are concerned, as the Petitioner has already undergone the entire sentence awarded therein. The entire dispute revolves around the judgment of conviction and sentence undergone by the Petitioner in the three Sessions Trial referred to at Serial No. 1,2 & 3. According to the State Counsel since the Petitioner has been ordered to be released on bail on 21.05.2015 therefore since the life imprisonment imposed upon the Petitioner vide Sessions Trial No. 189/2004 commence w.e.f. 01.10.2012 i.e. after he had completed sentence of 10 years in Sessions Trial No. 235/2004. The sentence of the Petitioner for the Sessions Trial No. 78/2007 also would start with effect from 01.10.2012 and as such till

date the sentence of 7 years have not been completed and therefore he remains in custody.

10. For better understanding of the issue involved in the case, it would be trite at this juncture to refer to the provisions of Sub-section 1 of Section 427 Cr.P.C. which for ready reference is reproduced herein :-

“(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall 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:

11. A plain reading of the aforesaid provision referred to as above clearly stipulates that it deals with the situation of a person sentenced to undergo imprisonment for more than one offence. It has been clearly envisaged in the said section that where a sentence of imprisonment is already undergoing and meanwhile the convict stands convicted for another offence and has been ordered to undergo imprisonment for a term or for life, his subsequent sentence shall commence after expiry of the previous sentence **unless** the Court directs that the subsequent sentence shall also run concurrently. In the instant case admittedly it is nobody's case that there is an order of the Sessions Court directing the two sentences to run concurrently.

12. Now if we peruse the record what clearly reflects is the admitted position in the instant case that the sentence awarded in the Sessions Trial at serial No. 1 stood completed by the Petitioner only

on 30.09.2012. Therefore the subsequent sentence which has been imposed upon the Petitioner for a subsequent offence would only commence after 30.09.2012 i.e. w.e.f. 01.10.2012. Thus the life imprisonment imposed upon the Petitioner for the offence referred to at serial No. 2 in the chart would start only from 01.10.2012 onwards. Thus, the Petitioner already was a convict undergoing life imprisonment when Sessions Trial No. 78/2007 also resulted in his conviction. Thus as per Section 427 of Cr.P.C. the sentence of the Petitioner in Sessions Trial No. 78/2007 would also commence only with effect from 01.10.2012. The Petitioner would not be an under trial prisoner but would be a detainee once being convicted for an offence and therefore the Petitioner would not have got the advantage under Section 428 of CrPC.

13. Now, so far as the appeal preferred against the judgment of conviction dated 15.07.2011 is concerned a plain reading of the order passed by the High Court in Criminal Appeal No. 999/2015 dated 02.09.2015 clearly reflects that the appeal stood dismissed and the High Court has clearly mentioned that it does not find any scope for interference in the impugned judgment. According to the Court hearing the Appeal it did not find any illegality or impropriety committed by the Trial Court in convicting and sentencing the Appellant. Thus, the conviction and sentence of the Petitioner under Section 224, 328/120B IPC stood affirmed. For ready reference the relevant portion in respect of the appeal preferred by the Petitioner against the judgment dated 15.07.2011 is reproduced herein :-

“12. Even from perusal of the entire evidence I do not find any illegality or impropriety committed by the trial Court in convicting and sentencing the appellant.

13. Consequently, I do not see any scope for interference in the impugned judgment.

14. Consequently, the appeal is hereby dismissed.”

14. Now, the only issue left to be considered by this Court is whether the sentence so far as the Petitioner is concerned in Sessions Trial No. 78/2007 would commence from the date of arrest i.e. 03.01.2007 or would commence after the sentence in the previous offence is completed.

15. That the Sessions Judge while convicting the Petitioner in paragraph 40 of the judgment has held that the period spent under judicial custody shall be considered for set off as per provisions of Section 428 CrPC. That in Section 428 CrPC it has been envisaged that a person on conviction 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 before date of conviction shall be set off against the term of imprisonment imposed upon him on such conviction.

However, what can not be lost sight of is the fact that Section 427 CrPC at the same time clearly stipulates that in the event if a person is undergoing a sentence of imprisonment and is subsequently also convicted to imprisonment for a term such imprisonment shall commence only on 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 sentences. In the instant case there is no such order passed by the Trial Court or for that matter the High Court in Criminal Appeal No. 999/2015 holding that the sentences imposed upon the Petitioner shall run concurrently along with the sentences that the Petitioner is undergoing from the previous convictions. In the absence of any such specific order of the different sentences to run concurrently the sentence has to be undergone by the Petitioner strictly in accordance with the provisions of Section 427 CrPC and that the order made by the Trial Judge for setting off the period spent in judicial custody does mean it would have an overriding effect over the statutory provisions under Section 427 CrPC. Section 428 is only in respect of an instance where he is not an accused or a convict in another case.

16. So far as the five Sessions Trial in which the Petitioner has been convicted are concerned there is no dispute so far as the sentence part in respect of Sessions Trial placed at serial numbers 4 and 5 of the table shown in the paragraph 2 of the present judgment. So far as the first three Sessions Trials are concerned the Petitioner in the first trial i.e. Sessions Trial No. 235/2004 stood convicted and sentenced for a period of 10 years. The said sentence got completed only on 30.09.2012 starting from the period of custody in Sessions Trial No. 235/2004 till 30.09.2012 when the sentence got completed. The Petitioner was not an under trial prisoner but was a convict undergoing the sentences and as such would be known as a

sentence serving prisoner. Though the Trial Judge has ordered for setting off the period of judicial custody but it is not the case where he was in custody as an under trial prisoner during the said period but was rather a sentence serving prisoner. Therefore for the period the Petitioner remained in custody he was a sentence serving prisoner. The said period can not be calculated for set off as per Section 428 CrPC in view of the Section 427 CrPC.

17. Similarly, even before the sentence in Sessions Trial No. 235/2004 could get complete on 30.09.2012, the Petitioner got convicted in Sessions Trial No. 189/2004 for the offence under Section 395 IPC vide judgment of conviction dated 29.08.2008 and was sentenced to undergo R.I. for life. The said judgment also further dis-entitles the Petitioner to be known as under trial prisoner but would be a convict undergoing life imprisonment as awarded in Sessions Trial No. 189/2004. The sentence of which would commence as per Section 427 CrPC only with effect from the date after the sentence from the first conviction is complete i.e. after 30.09.2012.
18. So immediately after the sentence in the first Trial i.e. Sessions Trial No. 235/2004 got complete on 30.09.2012. Life imprisonment of the Petitioner in Sessions Trial No. 189/2004 started with effect from 01.10.2012 therefore the period spent in custody before conviction of the Petitioner in Sessions Trial 78/2007 cannot be treated as under trial prisoner for the reason that he already stood convicted and was sentence servicing prisoner in two Sessions Trials i.e. Sessions Trial No. 235/2004 and 189/2004 as reflected at serial No. 1 and 2 of the

chart in paragraph No. 2. That in Sessions Trial No. 189/2004 where the Petitioner has been sentenced to undergo R.I. for life has got bail only on 21.05.2015. Thus, from the date of conviction in the said Sessions Trial 189/2004 dated 29.08.2008 to 21.05.2015 the Petitioner was a convict undergoing sentence in other words was a sentence serving prisoner. Therefore, the period from the date of arrest of the Petitioner in Sessions Trial 78/2007 till 15.07.2011 i.e. the date of conviction, the Petitioner would not get the benefit of set off for the reasons that during the said period the Petitioner was already a sentence serving prisoner upon his being convicted for two different Sessions Trials.

19. However, it would be relevant at this juncture to refer to the sub-section 2 of Section 427 CrPC which for ready reference is reproduced herein under :-

“(1)....

(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence. “

20. A plain and simple reading of the sub-section 2 of Section 427 CrPC stipulates that when a person is already undergoing a sentence of imprisonment for life then the subsequent conviction even it is for a term, the subsequent sentence shall run concurrently with the previous sentence and keeping that in mind if we look into the facts of the present case the Petitioner has been convicted and sentenced

to undergo life imprisonment in Sessions Trial No. 189/2004 vide judgment dated 29.08.2008 and he has got bail only on 21.05.2015. Pending that conviction and sentence of imprisonment of life, the Petitioner in the instant case i.e. Sessions Trial 78/2007 was convicted on 15.07.2011 and applying the provisions under Sub-section 2 of Section 427 CrPC the subsequent imprisonment for a term which in the instant case is of 7 years shall run concurrently with such previous sentences whereby the Petitioner has been undergoing sentence of imprisonment for life. Thus, in view of the sub-section 2 of Section 427 CrPC for all the practical purposes the sentence of the Petitioner shall commence from 01.10.2012 i.e. the date on which life imprisonment of the petitioner in Sessions Trial No.189/2004 commences.

21. In the opinion of this Court the stand of the State Government that so far as the sentence part of the Petitioner in Sessions Trial No. 78/2007 is concerned the same would start only with effect from 01.10.2012 is proper, legal and justified. The custody period that he has remained prior to the conviction can not be taken into account for set off under Section 428 CrPC in view of the provisions of Section 427 which deals with the cases where a prisoner has been convicted for more than one offence in continuation.

22. So far as Sections 427 and 428 CrPC are concerned the co-ordinate Bench of this Court in the case of **Tulsi Sarthi v. State of Chhattisgarh and Others**¹ has exhaustively dealt with the provisions of law, as also the judicial pronouncement of the Supreme

¹ 2015 CRI. L.J. 2267

Court in this regard.

23. This Court is in total agreement with the law laid down by the Lordship in the case of Tulsi Sarthi (Supra) and the various decisions of the Supreme Court referred to in the said judgment has no hesitation in reaching to the conclusion that there is no illegality or infirmity on part of the State Government in holding that for the period he has spent in custody prior to conviction he cannot be called as under trial prisoner but all along was a sentence serving prisoner. In addition to the judgment of Tulshi Sarthi (Supra) the view of this Court also stands fortified from the decision rendered by the Division Bench of the Kerla High Court in case of **Benson v. State of Kerla**²

24. Consequently, the relief sought for by the Petitioner being totally misconceived and unsustainable and the Petition itself being devoid of merits deserves to be and is accordingly dismissed.

Sd/-

(P. Sam Koshy)
JUDGE

kishore

² I (2008) CCR 120 (DB)