

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 09.02.2021

PRONOUNCING ORDERS ON : 11.02.2021

CORAM

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH
Crl.O.P No.19843 of 2020

Rajan @ Italy Rajan
@ Soundararajan

... Petitioner

.Vs.

1.State rep.by
The Inspector of Police,
Q-Branch Police (Crime Investigation),
Nagapattinam District.

Crime No.1 of 2012.

2.The Superintendent of Prison,
Central Prison,
Puzhal,
Chennai District.

..Respondents

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to direct the respondents to include the period of detention in special camp at Chengalpet from 31.05.2012 to 18.06.2013 and special camp at Thiruchirapalli 19.06.2013 to 31.07.2013 in Crl.A.No.709 of 2013, on the file of this Hon'ble Court enabling the petitioner to get the benefit.

For Petitioner : Mr.V.Raghavachari
for Mr.S.N.Arun Kumar

For Respondents: Mr.M.Mohamed Riyaz
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed for a direction to the respondents to include the period of detention in Special Camp at Chengalpattu from 31.05.2012 to 18.06.2013 and at Special Camp at Tiruchirappalli from 19.06.2013 to 31.07.2013 and give the benefit of Set Off to the petitioner who was convicted and sentenced for various offenses and which was later confirmed by this Court in the Criminal Appeal.

2. The case of the petitioner is that the 1st respondent registered Crime No.1 of 2012 against the petitioner for an offense under Section 5 of The Explosive Substances Act, 1908 and under Section 6(1)(A) of Indian Wireless Telegraph Act, 1933. The petitioner was convicted and sentenced for both the offenses and was directed to undergo a maximum sentence of 10 years Rigorous Imprisonment. This judgement was confirmed by this Court in Criminal Appeal No.709 of 2013 by judgment dt 26.09.2016.

3.The further case of the petitioner is that he was arrested and remanded to Judicial Custody in the above case on 19.03.2012 and he was granted bail by an order dt. 31.05.2012. According to the petitioner, a condition was imposed while granting Bail directing the petitioner to stay in the Special Camp. The petitioner was staying in the special camp at Chengalpattu from 31.05.2012 to 18.06.2013 and in the special camp at Tiruchirappalli from 19.06.2013 to 31.07.2013. The petitioner wants both these periods also to be taken into consideration for the purpose of set off under Section 428 of the Criminal Procedure Code, 1973 (hereinafter called as "Cr.P.C").

4.The 2nd respondent has filed a counter affidavit in this case and a stand has been taken to the effect that unless a specific order is passed in this regard by the Court, the respondents cannot consider the claim made by the petitioner.

5. Mr. V. Raghavachari, learned counsel appearing on behalf of the Petitioner submitted that even though the petitioner was released on Bail on 31.05.2012, by directing the petitioner to stay in the Special Camp, the petitioner continued to be under detention in the Special Camp throughout the proceedings before the Trial Court till the judgement was passed on 31.07.2013. The learned counsel therefore submitted that this period must be necessarily taken into consideration towards set

off under Section 428 of Cr.P.C.

6. The learned counsel to substantiate his submission relied upon the judgement of the Punjab and Haryana High Court in Kuldeep Singh vs. The State of Punjab and Anr. reported in 1988 SCC OnLine P&H 803. The relevant portions in the judgment are extracted hereunder:

"4. Learned counsel for the State has drawn my attention to. the observation made in the order of the Division Bench dated February 22, 1988 while reducing the sentence from life imprisonment to three years' detention in Borstal Institute, that the appellant had been in custody for the last one year and ten months. The point sought to be made is that their lordships were aware of the period that the appellant had been in custody in Borstal Institute and, therefore, may be deemed to have fixed the period of sentence of three years after excluding the aforesaid period, already spent by the appellant. The provisions of section 428 of the Code of Criminal Procedure are quite categorical.

5. The prisoner is entitled to set off of the period of his custody during investigation or trial of a case towards the sentence, which is ultimately imposed on him. Their lordships of the Division Bench must be deemed to be aware of the provisions of section 428 of the Code of Criminal Procedure. It follows that their lordships intended that the appellant shall be entitled to set off of the period referred to section 428 of the Code, besides remission in accordance with the normal provisions of law. The respondents are, therefore, directed to reckon the aforesaid period giving benefit of the period spent during investigation and trial of the case as also the remission earned by the petitioner and take further necessary action immediately. The petition is allowed."

7. The learned counsel also relied upon the judgement of the Delhi High Court in Sunil Ojha v. State of NCT of Delhi reported in 2007 SCC OnLine Del 586. The relevant portions in the judgment are extracted hereunder:

"8. The question that arises for consideration in the present case is: whether a juvenile can be denied the benefit of set-off of

his period of detention pending an inquiry under the said Act in respect of the ultimate order that is passed upon conclusion of the inquiry under Section 15 of the said Act? It is true that Section 428 of the Code refers to "sentence of imprisonment" and it is also true that the order passed in the present case directing the petitioner to be kept in a Place of Safety for two years is, strictly speaking, not a "sentence to imprisonment". Therefore, strictly speaking, Section 428 of the Code would not be applicable. However, the principles analogous to those involved in Section 428 of the Code could, in my view be applied to the present case.

9. As noted in the case of *State of Maharashtra v. Najakat Ali Mubarak Ali*, (2001) 6 SCC 311 : (2001 Cri LJ 2588), the ideology enshrined in Section 428 of the Code can be discerned by having a look at the Objects and Reasons for bringing about the provision. The Objects and Reasons are as under:-

"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 in a fraction of the period spent in jail as under-trial prisoner. Indeed, there may be 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 over crowded 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."

10. Reading the above Statement of Objects and Reasons, it becomes clear that the salutary provision of Section 428 was introduced by the Legislature into the statute book to alleviate the problems faced by persons who underwent long periods as under-trial prisoners. Similarly, where a juvenile in conflict with law is kept under detention pending an inquiry under the said Act, he should also be granted the same benefit while passing an order under Section 15 thereof. Though there is no statutory provision such as Section 428 of the Code which would be specifically and clearly applicable to the case of juveniles, in my view, principles analogous to the same can be invoked by the Juvenile Justice Board while passing an order under Section 15. An examination of the provisions contained in Section 15(1) of the Act would be necessary:-

"15. Order that may be passed regarding Juvenile.- (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit,-

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile.

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and placed under the

care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(g) make an order directing the juvenile to be sent to a special home for a period of three years;

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

11. The Board has ample power, if it is satisfied that having regard to the nature of the offence and the "circumstances of the case", it is expedient to reduce the period of stay in, inter alia, a Place of Safety. In my opinion, the principles analogous to those of Section 428 of the Code can be read into the expression "circumstances of the case" to enable the Board to reduce the period of stay that it may direct upon the completion of inquiry."

8. The learned Additional Public Prosecutor appearing for the respondent submitted that the period during which the petitioner has stayed in the Special Camp can never be taken into consideration for the purposes of set off under Section 428 of Cr.P.C. The learned Additional Public Prosecutor to substantiate his submissions, relied upon the judgment in Subbaiah Mani v. The Superintendent of Police reported in 2017 SCC OnLine Mad 14153. The relevant portions in the judgment are extracted hereunder:

"6. The learned counsel for the petitioner has relied on the judgment of a Division Bench of this Court in H.C.P. Nos. 1027 & 1028 of 1995 dated 21.12.1995 (Jayakumar @ Jeeva v. The State of Tamil Nadu). In the said case, under similar circumstances, the Division Bench of this Court has directed the Jail Authorities to count the period spent on by the petitioners therein in the Special Camp, in pursuance of the order made under Section 3(2)(e) of the Foreigners Act, be counted as setoff as provided in Section 428 Cr.P.C.

7. We had our own doubt about the said conclusion arrived at by the Division Bench of this Court. A plain reading of Section 428

Cr.P.C., would make it ipso facto clear that the period of detention, if any, undergone by the detenu during investigation, inquiry or trial of the same case before the date of such conviction, shall be given setoff. In our considered view, such detention order during the investigation, inquiry or trial should have been made by the jurisdictional Court in connection with the same case, in which, the detenu was ultimately convicted. But, in the instant case, after the detenus were released on bail by the jurisdictional Court, the Authority under the Foreigners Act, passed an order under Section 3 (2)(e) of the Act, keeping them in a Special Camp in order to prevent them from leaving India. This period can never be treated as a detention period, as provided in Section 428 Cr.P.C.

8. When we expressed this view, the learned counsel for the petitioner brought to our notice a judgment of a Full Bench Judgement of this Court, on the same issue. In *Sree Latha v. Secretary to Government* (2007 (2) MLJ 1320), after having considered the previous judgments, the Full Bench took the view that the said period spent in the Special Camp by the detenus in pursuance of the order made under Section 3 (2)(e) of the Act, cannot be treated as the detention period for the purpose of Section 428 Cr.P.C.

9. The same view has been taken by the Hon'ble Supreme Court in *Champalal v. State of Maharashtra* ((1982) 3 SCC 215 : AIR 1982 SC 790). In view of the law declared by the Full Bench as well as the Hon'ble Supreme Court, the plea of the petitioner that the period spent by the detenus in Special Camp, in pursuance of the orders made under Section 3(2)(e) of the Act, should be counted as the detention period for the purpose of Section 428 Cr.P.C., cannot be countenanced and rejected. We hold that the said period spent in the Special Camp is not the detention period in connection with the same case and therefore, the same cannot be counted for the purpose of Section 428 Cr.P.C. Thus, we do not find any merit in these Habeas Corpus Petitions."

9. The learned Additional Public Prosecutor also relied upon the judgement in K. Arulinbathevar alias Ayya v. State of Tamil Nadu and Ors. reported in 2017 4 MLJ (Crl.) 121. The relevant portions in the judgment are extracted hereunder:

"13. In this case, the petitioner was permitted to live with his family in the Refugee Camp at Coimbatore. The petitioner was involved in a criminal offence; that an FIR was registered against him as stated above and that he was released on bail. While granting bail to the petitioner, the Court has specifically stated that he should be lodged in a Special Camp and therefore, it became imperative for the State Government to pass the impugned order for lodging him in the Special Camp at Trichy. The contention of the learned counsel for the petitioner that the Special Camp in Trichy was established to house the LTTE cadres and sympathisers and therefore, the petitioner cannot be lodged there, cannot be countenanced. It is true that the said camp was established to house the LTTE cadres and sympathisers. It is common knowledge that LTTE operations have almost come to an end and therefore, it cannot be said that the space in the Special Camp in Trichy cannot be used for housing other foreigners who are involved in offences in this country. This can be best explained by a simple analogy. A building may be constructed by the Government for housing the District Munsif Court in a particular place. Subsequently, when a Combined Court Complex is built, the District Munsif Court will be shifted from the building which was constructed to house the said Court, to the Combined Court Complex. In such an event, can't the said building which was constructed for housing the District Munsif Court be used for housing the Consumer Court or any other Tribunal? Can it be said that since the building was built for housing District Munsif Court, it cannot be used for any other purpose? So too, though the Special Camp at Trichy was initially established for housing LTTE cadres and sympathisers, after the end of the ethnic conflict in Sri Lanka, there is a marked decline

in the activities of the LTTE in Tamil Nadu. Therefore, it is perfectly legitimate for the State to house other foreigners in the Special Camp at Trichy. At the risk of repetition, the Special Camp at Trichy, though located near the Central prison, Trichy, is not a prison. In fact, the State Government pays Rs. 100/- per head per day vide G.O. Ms. No. 491, Public (SC) Department dated 06.05.2015, to the inmates including the petitioner herein. The family members are permitted to meet the inmates freely during day hours. Therefore, the petitioner, having been involved in an offence here, cannot claim as a matter of right to be lodged in the Coimbatore Refugee camp."

10. This Court has carefully considered the submissions made on either side and the materials available on record.

11. The only issue that requires consideration in the present case is as to whether, the period spent by the petitioner in the Special Camp after he was released on bail and till he was convicted and sentenced in the main case, can be taken into consideration towards set off under Section 428 of Cr.P.C?

12. Section 428 of Cr.P.C., provides that where a 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. The provision for a set-off of the under-trial period did not exist in the previous Code. Its introduction in the Cr.P.C., was to remedy the unsatisfactory state of affairs in Prisons where convicts were being detained in Prison as under-trials for unduly long periods, many times for periods longer than the actual sentence of imprisonment that could be imposed on them on conviction. Section 428 of Cr.P.C., was introduced to remedy that situation by setting-off the period served as an under-trial prisoner from the period of sentence actually awarded.

13. The judgements relied upon by the learned counsel for the petitioner will not have any relevance to the facts of the present case since those cases pertained to the detention of the accused person in a Borstal School and Juvenile Home respectively, pending inquiry. The question was whether the period during which the accused was detained in the Borstal

School and Juvenile Home during inquiry can be taken into consideration towards set-off on the final conviction of the accused person. It was held that the same can be taken into consideration since it fell within the term "detention at the time of inquiry".

14. In the present case, the petitioner was granted bail and after executing sureties, he came out of the Prison. Since the petitioner was a Sri Lankan Refugee, the Court which granted bail thought it fit to impose a condition directing the petitioner to stay in the designated Special Camp.

15. The Special Camp was designated for the stay of Sri Lankan Refugees and the camp became a place of normal habitation for them. It is not as if only those who have committed an offense were asked to stay in the Camp. If that is the case, probably it can be construed as a detention and the Special Camp can be construed as a prison since it restricts the movement of the accused person detained in the Camp. However, in the case of Sri Lankan Refugees, the only place of stay was these Special Camps formed by virtue of the Executive Order passed under the Foreigners Act. This Court has consistently held that such a Special Camp is not a prison.

16. On the one hand the petitioner accepts that he was released on bail after furnishing sureties and on the other hand, the petitioner claims that he continued to be in detention in the Special Camp. Both these stands taken by the Petitioner cannot co-exist. The moment the petitioner came out of the prison after he was released on bail, the period thereafter can never fall within the parameters of Section 428 of Cr.P.C.

17. There are many instances where Courts while releasing accused person on Bail, considering the gravity of offense, directs the accused person to stay at a particular place and report daily before a particular Police Station. Such condition, virtually curtails the movement of the accused person beyond the place where he is asked to stay. If this Condition continues till the disposal of the case, by no stretch it can be held that this period can also be counted towards set-off under Section 428 of Cr.P.C., since the accused was confined/detained in a particular place.

18.The Court which granted bail to the petitioner, considering the fact that the petitioner was a Sri Lankan Refugee took into consideration the Special Camps provided for them and directed the petitioner to stay in that camp. By no stretch, this can be construed as a continued detention in a prison which is a sine qua non for claiming set off under Section 428 of Cr.P.C.

19. In view of the above discussion, the period during which the petitioner stayed in the Special Camp at Chengalpattu and Tiruchirappalli cannot be taken into consideration towards set-off under Section 428 of Cr.P.C. Therefore, the relief claimed by the Petitioner cannot be granted by this Court.

20. In the result, this criminal original petition is dismissed.

Sd/-
Asst.Registrar (CS I)

/true copy/
Sub Asst. Registrar

KP

To

1.State rep.by
The Inspector of Police,
Q-Branch Police (Crime Investigation),
Nagapattinam District.

2.The Superintendent of Prison,
Central Prison,
Puzhal,
Chennai District.

3.The Public Prosecutor,
High Court, Madras.

+1 cc to Mr.S.N.Arunkumar Advocate sr8127

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