

Vinita

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 101 OF 2023

Mr. Tenzin @ Elin Dorje, aged about 39 years, n/o Chouglan Sar, Leh, Ladakh, Jammu & Kashmir, (presently in custody at Central Jail, Colvale, Colvale, Bardez, Goa (through his next friend Mr. Rajendra Singh Dholi, aged about 41 years, C.Q. Furnished Apartments, behind Kadamba Depot, Porvorim, Bardez, Goa) Petitioner.

Versus

The State of Goa, through the Police Inspector, Pernem Police Station, Pernem, Goa.Respondent.

Mr. Ryan Da Menezes, Advocate for the petitioner.
Mr. Nikhil Vaze, Addl. Public Prosecutor for the respondent.

CORAM: PRAKASH D NAIK, J
DATED: 21st September 2023

JUDGMENT

1. The petitioner is seeking directions to grant set-off in accordance with Section 428 of Cr.P.C. of the period from date of his arrest for which the petitioner was incarcerated prior to his conviction against substantive sentence imposed against him after he was convicted vide judgment and order dated 20.10.2022 passed by learned Additional Sessions Judge, Panaji in Sessions Case no. 23/2016.

2. The petitioner was chargesheeted for the offences punishable under Sections 376, 323, 324 and 506 (ii) of the Indian Penal Code vide Sessions Case No 23/2016. Sessions Judge vide judgment and

order dated 26.10.2020 convicted the petitioner for the offence punishable under Section 376 of IPC and sentenced to suffer rigorous imprisonment for a period of ten years and fine of Rs.25,000/- in default of payment of fine to undergo further rigorous imprisonment for one year. Petitioner is convicted for the offence punishable under Sections 323, 324, 506(ii) and sentenced to rigorous imprisonment for a period of three months and fine of Rs.1,000/- in default payment of fine rigorous imprisonment for a period of 15 days. For the offence punishable under Section 324 of IPC, he is sentenced to suffer rigorous imprisonment for six months and pay fine of Rs.1,000/- and in default of payment of fine to undergo further Rigorous imprisonment for a period of one month. For the offence punishable under Section 506(ii) of IPC he is sentenced to pay fine of Rs.1,000/- and in default of payment of fine to undergo further Rigorous imprisonment for a period of 15 days. Substantive sentences were directed to run concurrently.

3. The judgment of the trial Court is silent about set-off to be given to the petitioner in accordance with Section 428 of Cr.P.C.

4. Learned Advocate Mr. R. Menezes appearing for the petitioner submitted as under:-

(i) Petitioner challenges the impugned order dated 26.10.2020 only to the extent of not granting set-off to the petitioner under Section 428 of Cr.P.C. of the period from the date of his initial arrest

for which he was incarcerated prior to his conviction against substantive sentence imposed upon him after he was convicted in the same case.

(ii) It was error on the part of the learned Judge not grant set-off to the petitioner in accordance with Section 428 of Cr.P.C.

(iii) Petitioner did not intend to challenge the impugned judgment of conviction on merits and the challenge is only to the extent of grant of set-off.

(iv) Section 428 of the Cr.P.C provides for set-off of period of incarceration undergone by a prisoners as an under trial prisoner, i.e prior to conviction against substantive sentence imposed upon him/her.

(v) Period of incarceration of the prisoner prior to conviction, from the date of initial arrest in the case must be set-off against substantive sentence imposed upon the prisoner after conviction for the offence alleged against the prisoner in the same case. Section 428 of Cr.P.C is mandatory and no discretion is conferred in respect of grant thereof. A convict is entitled to such set-off as a matter of right.

(vi) Petitioner was not released on bail during the trial and remained in custody throughout the trial till he was convicted and sentenced by the trial Court.

(vii) Petitioner was incarcerated in Sessions Case No.23/2016 and was not in custody in any other case. Petitioner had undergone

period of four years ten months and four days of imprisonment (if reckoned up to the date of his conviction or four years ten months and four days of imprisonment if reckoned up to the date when he was sentenced from the date of his initial arrest prior to his conviction by the trial Court in the same case). Petitioner is entitled to have period of incarceration from the date of his initial arrest, prior to his conviction, a set-off against term of substantive sentence which the trial Court has imposed upon him vide judgment and order dated 20.10.2020 and 26.10.2020, such set-off has been denied to the petitioner. Even if the trial Court has not referred to the factum of grant or refusal of set-off, since it is mandatory requirement to grant of set-off in accordance with Section 428 of Cr.P.C., jail authorities are required to calculate the set-off to which prisoner is entitled and release him after giving such benefit to him on completion of sentence of imprisonment.

(viii) Petitioner apprehends that since the judgment dated 20.10.2020/26.10.2020 does not expressly grant set-off under Section 428 of Code, officials of the jail where he is detained for undergoing the sentence would construe to mean that he is not entitled for grant of set-off of the period of incarceration undergone by him in the case prior to his conviction from the date of his initial arrest and he would be constrained to undergo period of ten years that he is sentenced to undergo and his release from prison on his

undergoing sentence would be delayed by a period equal to the period for which he was incarcerated prior to his conviction for the offence alleged against him vide impugned judgment.

(ix) Denial of the set-off of period of imprisonment undergone by the petitioner prior to his conviction against substantive sentence imposed upon him by the trial Court under Section 428 of the Code would have and impact upon consideration of the petitioner to be eligible to be considered for pre-mature release from the prison under Sections 432 and 433 of the Code and the provisions of Goa Prisons Rules, 2006, and/or even consideration of his case for premature release from the prison by State Sentence Review Board, or upon its recommendation by the Government.

(x) Denial of set-off under Section 428 of Cr.P.C. for which the petitioner was incarcerated prior to his conviction, from the date of his initial arrest, against the substantive sentence imposed upon him, after he was convicted, is arbitrary, illegal, unfair, unreasonable and contrary to law.

(xi) Grant of set-off under Section 428 of the Code, is not discretionary. It is abundantly clear from the language of Section 428 itself, that where an accused person is, on conviction, 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 on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, any, of the term of imprisonment imposed on him. Petitioner is entitled to grant of set-off of the period for which he was incarcerated prior to his conviction against substance sentence imposed upon him by the Court.

(xii) Since the petitioner was sentenced to substantive sentence of ten years , three months and six months for the offence under Section 376, 323 and 324 of IPC, he was entitled to have period of four years ten months and four days of imprisonment (reckoned up to the date on which he was sentenced i.e 26.10.2020) under gone by him prior to his conviction, from the date of his initial arrest, in Sessions Case No. 23/2016, set-off against the period of imprisonment to which he was sentenced upon his conviction, in the same case. Denial thereof is without in excess of power, authority, jurisdiction, a grave error on the part of the trial Court, apparent on the face of the record and or denial of a right under Section 428 of Cr.P.C.

(xiii) Denial of set-off under Section 428 of the Cr.P.C. of the period for which the petitioner was incarcerated prior to his conviction from the date of initial arrest against the substantive sentence imposed upon him after he was convicted, under Section 428 of Cr.P.C., is in

violation of the petitioner's fundamental rights under Articles 14 and 21 of the Constitution of India.

5. Learned Addl. Public Prosecutor Mr. N. Vaze, in fairness submitted that petitioner's grievance is genuine as he is entitled for set-off in accordance with Section 428 of Cr.P.C. It is mandatory to grant set-off to the convict of the period for which he was incarcerated prior to his conviction against substantive sentence imposed upon him by the Court. Judgment of the trial Court is silent with regard to grant of set-off to the petitioner although it is claimed that he was under incarceration prior to his conviction and continued to be in custody on the date of conviction and thereafter. It is mandatory to grant set-off of the period stated herein above.

6. The undisputed facts would indicate that petitioner was chargesheeted for the offence under Sections 376, 323, 324 and 506(ii) of the IPC. Trial Court gave a finding that the prosecution has established that accused have committed offence under Sections 376, 323 , 324 and 506(ii) of IPC. vide judgment and order dated 26.10.2020 the petitioner was sentenced to imprisonment for a period of ten years and directed to pay fine of Rs. 25,000/-. Similarly he was also convicted for the offences under Sections 323, 326, 506(ii) of IPC and sentenced to Rigorous imprisonment for three months, six months respectively and fine.

7. It is not in dispute that the petitioner was under incarceration

prior to his conviction and continued to be in custody till date. Petitioner is thus entitled for set-off of the period of incarceration from the date of his arrest which was prior to his conviction qua substantive sentence of imprisonment. It was mandatory for the trial Court to grant set-off to the petitioner. Surprisingly the trial Court judgment is silent in that regard. It would be incumbent upon all the trial Courts to pass orders with regard to entitlement of the set-off by the prisoner in accordance with Section 428 of Cr.P.C. in the event trial Court convicts the prisoner for any offence or offences.

8. Section 428 of Cr.P.C reads as follows:-

“Section 428 of Cr.P.C., 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 on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, any, of the term of imprisonment imposed on him. [Provided that in cases referred to in Section 433-A, such period of detention shall be set off against the period of fourteen years referred to in that section.]”

9. Detention contemplated by this provision is detention during investigation, inquiry or trial of the case in which accused person have been convicted. Proviso to Section 428 has been inserted w.e.f.

23.6.2006.

10. The Supreme Court in ***Boucher Pieren Andre Vs Superintendent, Central Jail Bihar, 1975 Criminal Law Journal 1822(SC)*** has considered the following question in the light of section 428 of Cr.P.C.

“Is section confined in its application only to cases where a person is convicted after the coming into force of the new code of Criminal Procedure, or does it also embrace cases where a person has been convicted before but his sentence is still running at the date when the new Cr.PC came into force?”

11. After examining language of the Section, the Apex Court in the aforesaid decision, observed that the applicability of Section 428 of Cr.P.C. was resisted only on the ground that it does not apply to a case where an accused person have been sentenced under the old Cr.P.C. But if the sentence imposed on the petitioner, though under the old Cr.P.C, is to be regarded, for the purposes of the new Code, as a sentence passed under the new Code and all the consequences and incidents are to be worked out on that basis, Section 428 of Cr.P.C. must clearly be held to be applicable to the case of the petitioner and his liability to undergo imprisonment must be restricted to the remainder of the term imposed on him, after setting off the period for which he was detained during the investigation, inquiry and trial of the case against him. Section 428 of Cr.P.C. does not seek to set

at naught the conviction already recorded against the accused person. The conviction remains intact and unaffected and so does the sentence already undergone. It is only the sentence, in so far as it yet remains to be undergone, that is reduced. The Section operates prospectively on the sentence which yet remains to be served and curtails it by setting off the period of detention undergone by the accused person during the investigation, inquiry or trial of the case. Any argument based on the objection against giving retrospective operation is, therefore, irrelevant.

12. Learned Advocate Mr. Menezes, referred to the decision of this Court in the case of ***Rajaram Kashinath Charoskar Vs State of Maharashtra 2009 Cri. LJ 97***, wherein the prisoner had claimed set-off as contemplated by Section 428 of Cr.P.C. The petitioner was arrested in connection with offence punishable under Section 302 read with Section 201 of IPC, on 30.2.1992. He was tried before the Court of Sessions and convicted vide judgment and order dated 20.10.1993 for the offence punishable under Section 302 of IPC and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.20,000/- and in default of payment of fine, to suffer rigorous imprisonment for three months. The trial Court however, observed that accused is under trial prisoner but since he is sentenced for life imprisonment, no set-off is given under Section 428 of Cr.P.C. Appeal challenging the judgment of conviction preferred by the said prisoner

was dismissed by the High Court. However, High Court did not consider the aspect of set-off while dismissing the appeal. The Division bench held that person who is sentenced for life imprisonment is a person sentenced to “imprisonment for a term’ as contemplated under Section 428 of Cr.P.C. and, therefore, such a person is entitled to claim that period of detention undergone by him during the investigation, inquiry or trial before the date of conviction shall be set-off against the life imprisonment imposed upon him on conviction. The liability of such a person to undergo imprisonment for life has to be restricted to the remainder period only and that though such person was convicted and sentenced to life imprisonment prior to 23.6.2006, such a period is entitled to claim the benefit of provision of Section 428. Therefore, the period of detention of such person, prior to conviction, shall be set-off against the period of 14 years, referred to in Section 433A of Cr.P.C. Petitioner therein was therefore entitled to claim set-off, contemplated by Section 428 of the Code, though he is life convict and though the petitioner was so convicted and sentenced to life imprisonment on 20.10.1993 i.e before 23.6.2006(the day on which the aforesaid proviso came to be inserted into the Section 428 of the Code.) It was also observed that trial Court while convicting the accused had observed that no set-off is given under Section 428 of Cr.P.C. but there was not impediment in granting prisoner set-off

under Section 428 of Code. Another question dealt by Division Bench is that where specific order of learned Sessions Judge directing that no set-off be granted under Section 428 of Cr.P.C. to the prisoner, which direction has not been interfered with in the appeal by the High Court, where petitioner is entitled to claim set-off under Section 428 read with Section 433A of the Cr.P.C. The Division Bench considered the scheme of the Code, jurisdiction of the Court and that of the State Government in respect of punishment imposed upon convict is concerned. Court referred to Chapter 32 of Cr.P.C. which deals with execution, suspension, remission, commutation of sentence and observed that prior to commute a sentence as also to grant set-off while calculating total period of sentence is an executive power and not judicial power vest exclusively with the Executive Government and not with the judicial. It is not open for the judiciary to either grant or not to grant set-off as also either to commute or not to commute a sentence. It is exclusively a judicial function to award appropriate punishment to a person who is found guilty of an offence but once such a punishment is awarded, the judicial function comes to an end. Only thereafter issues relating to execution, suspension, remission and commutation of such a sentence arise. These issues that arise subsequent to award of sentence fall in the executive function and not judicial function. After concluding that it is not a judicial but it is a executive function of giving effect to a judicial

verdict finding a person guilty and awarding him appropriate punishment, therefore, it will become clear that at the time of delivery of the judgment holding the prisoner therein guilty and awarding him life imprisonment, the trial Court had no occasion to deal with the set-off to be awarded to the convict and or commutation of the sentence to be awarded to him. Same was the situation when the High Court tried, entertained and decided the appeal of the petitioner. When both judgments were delivered firstly by Sessions Judge and consequently by High Court, Courts were fully justified in treating the punishment so awarded of imprisonment for life to the petitioner as a punishment for the whole of the remaining period of the prisoner's natural life. Thus, neither the judgment delivered by the trial Court nor by the appellate Court can be read to mean that petitioner cannot be granted set-off to which he may otherwise entitled to under the said code. It was not for the judiciary to direct grant or otherwise for such a set-off to the petitioner at that stage. It was within the domain of the Executive Government to take such decision. It was open for the Executive Government in the light of its policy decision reflected by relevant Government resolution and/or circulars to decide the issue as to whether the petitioner is entitled to set-off or not. In taking such decision, observation of the trial Court or the High Court in appeal cannot operate as an hurdle much less prohibition. Petitioner was entitled to claim commutation of his

sentence as also set-off, if otherwise found entitled in law inspite of orders of the Court. An occasion to try, entertain and decide the claim of a convict for set-off under Section 428 of the Code will arise only when the imprisonment for life awarded to such convict is to be commuted. Such occasion cannot arise when such convict is convicted either by Sessions Judge or when sustainability of such conviction and sentence is examined by the High Court in an appeal. In other words, an occasion to operate provisions of Section 428 read with Section 433-A of the Code arises only after the convict is convicted and not at the time when the convict is being convicted or being sentenced by Court. Issue as referred in the aforesaid decision has arisen in the light of the fact that the prisoner was convicted for offence under Section 302 of IPC and was sentenced to suffer imprisonment for life. Hence, the question whether he was entitled for set-off was under consideration.

13. In the present case, accused has been sentenced to suffer imprisonment for ten years. He was in custody prior to his conviction and continued to be in custody even on the date of conviction and thereafter. In accordance with Section 428 Cr.P.C., petitioner is entitled to set-off and in these circumstances, the trial Court ought to have passed an order about set-off to be granted to him. Even, if the trial Court has not expressed any opinion above the entitlement of set-off, considering the mandatory nature of Section 428 of Cr.P.C.

and in the light of the sentence imposed upon the petitioner, it would be function of the Executive to grant set-off to the prisoner. Jail officials are therefore required to consider this aspect by calling for report from the concerned authorities as to period of incarceration undergone by him prior to conviction from the date of his initial arrest. In the cases where imprisonment of life is imposed it is not possible for trial Court at the stage of delivering judgment of conviction to calculate the set-off and the trial Court would not specify the period of set-off although the convict is entitled for set-off while applying benefit of Section 433A of Cr.P.C.

14. In the case of ***Clint Vs State of Maharashtra, 2019 SCC online 1732*** petitioner therein had preferred an petition under Articles 226 ad 227 of the Constitution of India directing prisons authorities to grant the petitioner set-off period that is spent in detention as under trial prisoner under section 428 of Cr.P.C. Convict was sentenced to death penalty. The judgment of conviction was challenged before the Apex Court. Appeal was partly allowed. Sentence was commuted to life imprisonment. As the trial Court had awarded death sentence there was no question of mentioning the entitlement of accused of set-off as provided under Section 428 of the Code. There was no mention of such entitlement even in order of High Court. It was observed that, in Section 433A of Cr.P.C. it is made clear that when death sentence is commuted to make it life

imprisonment the period of actual imprisonment shall not be less than 14 years in any case. It was further observed that State had issued guidelines and created categories of the prisoners convicted for different offences for undergoing life imprisonment. When the time comes State considers the matter and places the prisoner in a particular category due to which the prisoner is required to undergo the imprisonment sentence for a particular period and the period is between 18 years and 26 years. This period includes remission period. It is expected not to interfere in the power of State. The petitioner therein will have to undergo actual imprisonment for minimum period of 14 years and when is put in particular category by the State, the period for which he was behind the bars as under trial prisoner needs to be calculated and he needs to be given set-off in the period of imprisonment for which he will be kept behind bars as per the guidelines. In any case entitlement of convict mentioned in Section 428 of Cr.P.C., cannot be taken away and so set-off in respect of that period needs to be given to the convict. Office was directed to calculate exact period for which convict was behind the bars as under trial prisoner and inform it to jail.

15. High Court of ***Manipur at Imphal in the case of Ksh. Kennedy Singh and others Vs State of Manipur, 2022 Cr. L. J. 2448***, was considering the prayer of petitioners for set-off of the period of detention undergone by them prior to their conviction and

sentencing, under Section 428 Cr.P.C. They were sentenced to imprisonment for life. In the appeal the sentence was reduced to ten years rigorous imprisonment. The contention of the prisoners were that they have completed the sentence. In the judgment of the trial Court and the High Court there was no reference about benefit of Section 428 Cr.P.C. The Court considered whether such an observation is necessary at all in the light of the statutory scheme and whether the period of detention undergone by a person during the investigation, inquiry or trial of the same case, which would be in the nature of simple imprisonment, can be set-off against the rigorous imprisonment. By referring to Section 428 along with proviso to the said Section it was observed that in the light of proviso which was inserted on statute book on 23.6.2006, it would be necessary to take note of the provisions of Section 433A of Cr.P.C. This provision deals with restriction on the power of remission or commutation in certain cases. Whereas a sentence of life imprisonment is imposed upon conviction for an offence for which death is one of the punishments provided by law, or where a death sentence has been commuted into one of life imprisonment, such person shall not be released from prison unless he has served at least 14 years of imprisonment. The statutory scheme is therefore, to the effect that even in cases of life imprisonment, which would extend to at least 14 years of imprisonment, the benefit of set-off under Section 428 Cr.P.C. is

available. Life imprisonment is invariably rigorous imprisonment. Even a convict sentenced to undergo a term of rigorous imprisonment would be entitled to seek set-off of the pre-conviction detention suffered by him in relation to the same case, which would be in the nature of simple imprisonment. There can be no doubt that the pre-conviction period of detention suffered, even if it is in the nature of simple imprisonment, will be liable to be set-off against a sentence of rigorous imprisonment. The operation of Section 428 Cr.P.C. would be automatic unless the benefit thereof is specifically denied in the judgment. It would not be necessary for the authorities to insist upon an observation in the judgment of conviction/order of sentence before extending this statutory benefit to a convict who is otherwise eligible for the same.

16. This Court in the case of ***Sham Gawas Vs State of Goa in judgment in Stamp Number Main No. 817/2020/F dated 24.6.2021*** referred to the decision in the case of Clint Vs Statement of Maharashtra and extended the benefit of Section 428 of Cr.P.C, to the prisoner who was convicted under Section 302 of IPC whose grievance was that he has not given benefit of set-off under Section 428 of Cr.P.C. Relying on the decision in the case of ***Clint Vs. Sate of Maharashtra*** it was directed that the petitioner will be entitled to the benefit of Section 428 of Cr.P.C. which will obviously arise if and when the State considers the case of the petitioner for pre-

mature release. Similarly it will be for the prison authorities to calculate the precise period spent by the petitioner in detention prior to his conviction.

17. In the present case, the petitioner has been sentenced to suffer imprisonment for ten years. Plain reading of Section 428 of Cr.P.C. make it clear that period of incarceration of prisoner prior to his conviction from the date of initial arrest in the case must be set-off against the substantive sentence imposed upon prisoner after conviction for the offence alleged against him in the same case. Provision of Section 428 is mandatory. In the case where the prisoner is sentenced to imprisonment for life, in the light of proviso to Section 428 and for considering the applicability of Section 433-A for calculating the period or in the light of the guidelines issued by the government in that regard, the set-off would be required, which can be calculated at the appropriate stage. At the time of passing judgment of conviction sentencing the prisoner to life imprisonment the trial Court would not be in position to calculate the period of set-off and it is expected that the Executive shall calculate the said period at appropriate stage in the light of proviso to Section 428 of Cr.P.C. In other cases trial Courts should specify that the accused is entitled for set-off in accordance with Section 428 Cr.P.C. by specifying the period of set-off. If this calculation is set out in judgment by considering the details of period of incarceration during investigation

and trial, it would be beneficial to the convict and for the jail authorities to calculate the period of prisoner while considering the release of the prisoner having undergone entire sentence of imprisonment. Pre-conviction period of detention suffered, even if it is in the nature of simple imprisonment would still be liable to set-off against a sentence of rigorous imprisonment.

O R D E R

- (i) Criminal Writ Petition is allowed.
- (ii) Judgment and order date 20.10.2020 and 26.10.2020 in Session Case No.23/2016 passed by the Additional Sessions Judge, North Goa, Panaji is modified to the extent that the petitioner is entitled to set-off under Section 428 of Cr.P.C. of the period from the date of his initial arrest for which petitioner was incarcerated prior to his conviction against substantive sentence imposed upon him after he was convicted in the same case.
- (iii) Respondent is directed to grant set-off to the petitioner under Section 428 of Cr.P.C.
- (iv) The trial Courts shall specify in the judgment of conviction the period of set-off if any under Section 428 of Cr.P.C. of the period from the date of his initial arrest till the date for which the prisoner is incarcerated prior to his conviction against substantive sentence imposed upon him by the Court, except in cases where the sentence imposed is imprisonment for life or death.

(v) In the event, trial Court has not specified the entitlement of set-off to be given to the prisoner, the jail authorities shall ascertain period of incarceration prior to conviction and whether the prisoner is entitled for set-off.

(vi) Criminal Writ Petition stands disposed of.

PRAKASH D. NAIK, J.

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