CASE NO.:
Appeal (crl.) 617 of 2001

PETITIONER:
STATE OF MAHARASHTRA & ANR.

Vs.

RESPONDENT:
NAJAKAT ALIA MUBARAK ALI

DATE OF JUDGMENT: 09/05/2001

BENCH:
R.P. Sethi

JUDGMENT:

SETHI,J.
L...I...T.....T.....T.....T.....T.....T.....T..J

Despite perusing the lucid judgment of Thomas, J. from different angles and being aware of its far reaching effects in the country, so far as the under trial prisoners are concerned, I could not persuade myself to agree with the interpretation given regarding the scope and implications of Section 428 of the Code of Criminal Procedure, (hereinafter referred to as 'the Code').

Section 428 of the Code was brought on the statute book for the first time in 1973. It was incorporated in the light of the proposal put forward by the Joint Select Committee appointed for that purpose. The Committee had noted, with distress, that in many cases accused persons were kept in prison for very long period as under-trial prisoners and in some cases the sentence of imprisonment, ultimately awarded, was a fraction of the period spent in jail as under-trial prisoners. Despite the fact that sometimes courts had been taking into account the period of detention undergone as under-trial prisoners while passing sentence and occasionally the sentence of imprisonment restricted to the period already undergone. But that was not always the case as in many cases the accused persons were made to suffer jail life for a period out of proportion to the gravity of offence or even the punishment provided under the statute. The Committee noted with concern that a large number of persons in the over-crowded jails of the country were under-trial prisoners. The Section was sought to remedy the said unsatisfactory state of affairs by providing for setting off the period of detention as an under-trial prisoners against the sentence of imprisonment imposed on the accused. The purpose of incorporating Section 428 was that period of detention undergone by the accused be given set off against the sentence of imprisonment imposed upon him in the same case. Before the incorporation of the aforesaid section, the accused, upon conviction, had to undergo the awarded sentence of imprisonment notwithstanding the length of period spent by him in detention during investigation, inquiry or trial of

the case. Section 428 of the Code is preceded by Section 427 which provides that when any person already undergoing sentence of imprisonment is sentenced on a subsequent conviction of imprisonment, such imprisonment shall commence at the expiration of the commencement to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. (underlining supplied) Section 427 of the Code thus authorises a court of law to direct the sentence awarded by it to run concurrently, obviously keeping in view the facts and circumstances pertaining to the case or the accused. His detention pending investigation, inquiry and trial in that case or some other cases being relevant consideration while directing the sentences to run consecutively or concurrently. A plain reading of Section 428 of the Code makes it clear that the period of detention which the section permits to be set off against the term of imprisonment, imposed on the accused upon conviction, must be during the investigation, inquiry or trial in connection with the same case in which he has been convicted. Dealing with the nature of detention for the purposes of the section, this Court in Govt. of Andhra Pradesh & Anr. v. Anne Venkateswara Rao, etc. [AIR 1977 SC 1096 = (1977) 3 SCC 298] held: "Section 428 provides 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 a "set off", it does not equate an "undertrial detention or remand detention with imprisonment on conviction". The provision as to set off expresses a legislative policy; this does not mean that it does away with the difference in the two kinds of detention and puts them on the same footing for all purposes."

In Champalal Poonjaji Shah v. State of Maharashtra[AIR 1982 SC 791], where the petitioner was shown to have been detained firstly under the provisions of MISA and later under the provisions of COFEPOSA and after he was convicted by a Magistrate and his conviction was set aside by the High Court, the State filed an appeal by special leave, which was allowed by this Court on August 12, 1981 (reported in AIR 1981 SC 1675) by setting aside the Judgment of acquittal passed by the High Court and restoring that of the trial magistrate convicting the accused under different heads of charges and sentencing him to suffer imprisonment for various terms ranging from two years to four years. Later in the review petition filed, it was submitted on behalf of the accused that the total of the three periods of detention should be set off against the imprisonment imposed upon him. Rejecting the contention, the Court held:

"We are unable to agree with the submission of Shri Jethmalani. In the very case cited by the learned counsel, the Court negatived the contention that the expression 'period of detention' in Sec.428 Code of Criminal Procedure included the detention under the Prevention Detention Act or the Maintenance of Internal Security Act. It was observed (para 7):

"It is true that the section speaks of the period of detention undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section

makes it 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, enquiry or trial in connection with the 'same case' in which he has been convicted. We therefore agree with the High Court that the period during which the Writ Petitioners were in preventive detention cannot be set off under S.428 against the term of imprisonment imposed on them"

After holding that the period during which the petitioners therein were in preventive detention could not be 'set off' under Section 428 Code of Criminal Procedure against the term of imprisonment imposed on them, the Court went on to consider whether the period during which the petitioners were in preventive detention could for any reason be considered as period during which the petitioners were in detention as under-trial prisoners or prisoners serving out a sentence on conviction. In the case of prisoner A.V. Rao, the Court held that the period commencing from the date when he would have normally been arrested pursuant to the First Information Report registered against him should be reckoned as period of detention as an under-trial prisoner. In the case of another prisoner Krishnaiah it was held that the period during which he was in preventive detention subsequent to the conviction and sentence imposed upon him should be treated as detention pursuant to conviction and sentence. The case before us is altogether different. The petitioner had been acquitted by the High Court before any of the orders of detention were made against him. There can be no question of the detention being considered as detention pursuant to conviction; nor can the detention be treated as that of an undertrial. It is only in circumstances where the prisoner would have unquestionably been in detention in connection with a criminal case if he had not been preventively detained, his preventive detention might be reckoned as detention as an undertrial prisoner or detention pursuant to conviction, for the purposes of S.428 Criminal P.C."

A perusal of the section unambiguously indicates that only such accused is entitled to its benefit of that period of detention which he has undergone during the investigation, enquiry or trial of the same case. It does not contemplate of the benefit of set-off of the period of detention during investigation, inquiry or trial in any other case. The purpose and object of the section, as pointed out by Brother Thomas,J., is aimed at providing amelioration to a prisoner in a case where he has been in detention for no fault of his. The section, however, does not intend to give any benefit or bonus to an accused guilty of commission of more than one crime by treating the period of detention during investigation, inquiry and trial in one case as that period in the other cases also for the purposes of set-off in the sentence. Such an entitlement requires the judicial determination which can be adjudicated by a court awarding the sentence in exercise of its powers under Section 427 of the Code. The words "period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case" are important to indicate the paramount concern and intention of the legislature to protect the interests of under-trial prisoners by giving them the set-off of that period in "that case", at the conclusion of the trial. The Section makes it 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.

By introducing the provision of set off, the legislature intended to mitigate, to a great extent, the hardship caused to the accused persons by reason of their being unable to come out on bail during the trial period. While interpreting Section 428 of the Code, the underlying object of the Section cannot be lost sight of. Any set off claimed under Section 428 has necessarily to be within the terms of the Section and not beyond it. No accused person can claim that irrespective of the terms of Section 428 of the Code, he is entitled to the benefit of set-off in each and every case. A bare reading of the Section indicates that an accused person who has been convicted and sentenced to imprisonment for a term is entitled to claim set off of the period of detention undergone by him during the investigation, inquiry or trial of the same case against the term of imprisonment imposed on him on such conviction. The section has imposed some restrictions for a convicted person claiming the benefit of set off which are as under:-

(i) The imprisonment should be for a term.

(ii) The imprisonment should not be one awarded in default of payment of fine.

(iii) The period of detention undergone by the accused person during the investigation, inquiry or trial should relate to the same case in which he is convicted and sentenced to undergo imprisonment for a term.

The dictionary meaning of the word "same" is identical; referring to a person or thing just mentioned; the same thing as previously mentioned. It generally refers to the last preceding antecedents; one and the same; not distinct. Generally speaking the "same case" would thus mean "same transaction" for which the accused has been tried. Two different criminal cases, therefore, cannot be treated to be the "the same case" in relation to an accused for the purposes of determining the applicability of Section 428 of the Code.

The accused tried for various offences in one trial can be held to be entitled to the benefit of Section 428 of the Code being tried for the "same case". The words "same case" appearing in the section are ejusdem generis to the preceding words "investigation, enquiry or trial". If the period of detention relating to investigation, enquiry or trial is in a different case that would not ipso facto entitle the accused to claim the benefit of Section 428 but that may permit him to persuade the court to pass an appropriate orders in terms of Section 427, keeping in view the period of his under-trial detention in other cases as well. It is the need of the time that the court convicting the accused should develop a healthy practice of specifying in the order the total period of pre-conviction detentions that he has undergone in that case or in some other case for the purposes of awarding the sentence upon conviction.

In Shabbu & Anr. v. State of U.P. & Anr. [1982 Crl.L.J. 1757] a Full Bench of the Allahabad High Court

held:

"It is thus obvious that Section 428 Cr.P.C., is intended to relieve the anguish of undertrials for their prolonged detention in jail during the investigation, inquiry or trial of a case. Its object is to confer a special benefit upon a convict whereby his liability to undergo the imprisonment, ultimately imposed upon him in a case, stands reduced by the period during which he has remained in jail as an under-trial prisoner in the same case. It simply aims at setting off or crediting the period of pre- conviction detention of the accused of a case towards the sentence ultimately awarded to him after his conviction in that very case."

After referring to the judgments of this Court in Mr.Boucher Pierre Andre v. Superintendent Central Jail Tihar, [AIR 1975 SC 164], Suraj Bhan v. Om Prakash [air 1976 sc 648], Govt. of A.P. v. A.V.Rao [AIR 1977 SC 1096], the earlier judgment of that Court in Nasim v. State of U.P. [1978 All LJ 1284], the judgment of the Delhi High Court in K.C. Das v. State[1979 Crl.LJ 362], of Bombay High Court in Jaswant Lal Harjivan Das Dholkia v. State [1979 Cri.LJ 971], Mohan Lal v. State of U.P. [1979 Luck LJ 272], the Full Bench further held that under Section 428 the period of detention as an under-trial of an accused in a particular case can be set off only towards the sentence ultimately awarded to him in that very case. The Court further held:

"Whether or not the detention of a person in one case should also be treated to be his detention for the purposes of any other case, wherein he is wanted, is a question to be decided upon the facts and circumstances of each case. No set formula can be laid down in that behalf."

Dealing with the scope and object of Section 428 this Court in Raghbir Singh v. State of Haryana [1984 (4) SCC 348] held: "There was no provision corresponding to Section 428 of the Code in the Code of Criminal Procedure, 1898 which was repealed and replaced by the present Code. It was introduced with the object of remedying the unsatisfactory state of affairs that was prevailing when the former Code was in force. It was then found that many persons were being detained in prison at the pre-conviction stage for unduly long periods, many times for periods longer than the actual sentence of imprisonment that could be imposed on them on conviction. In order to remedy the above situation, Section 428 of the Code was enacted. It provides for the setting off of the period of detention as an under-trial prisoner against the sentence of imprisonment imposed on him. Hence in order to secure the benefit of Section 428 of the Code, the prisoner should show that he had been detained in prison for the purpose of investigation, inquiry or trial of the case in which he is later on convicted and sentenced. It follows that if a person is undergoing the sentence of imprisonment imposed by a court of law on being convicted of an offence in one case during the period of investigation, inquiry or trial of some other case, he cannot claim that the period occupied by such investigation, inquiry or trial should be set off against the sentence of imprisonment to be imposed in the latter case even though he was under detention during such period. In such a case the period of

detention is really a part of the period of imprisonment which he is undergoing having been sentenced earlier for another offence. It is not the period of detention undergone by him during the investigation, inquiry or trial of the same case in which he is later on convicted and sentenced to undergo imprisonment. He cannot claim a double benefit under Section 428 of the Code i.e. the same period being counted as part of the period of imprisonment imposed for committing the former offence and also being set off against the period of imprisonment imposed for committing the latter offence as well. The instruction issued by the High Court in this regard is unexceptionable. The stand of the State Government has, therefore, to be upheld."

After going through the scheme of the Code and the object for which Section 428 was incorporated, I have reached the conclusion that the law laid down by this Court in Raghubir Singh's case(supra) does not require any review or a new interpretation. Taking any other view would amount to legislating and amending the plain meanings of the section. Giving a contrary interpretation may, in some cases, be against the public policy. Any person accused of a heinous crime, in that even, be at liberty to commit minor offences and being under trial prisoner in the main case, eventually may not get any imprisonment of law for the minor offences committed by him. It cannot be the object of civilised criminal jurisprudence to encourage the repetition of crime by adoption of an approach of liberality. The commercial approach of sale of commodities providing for purchasing of one expensive item and getting three free with it, cannot be imported into criminal justice system. The views of Guwahati High Court in Lalrinfela Vs. State of Mizoram and Ors. (1982 Crl.L.J 1793), Andhra Pradesh High Court in Gedala Ramulu Naidu Vs. State of A.P. and Anr. (1982 Crl. Law Journal 2186) and Madras High Court in Chinnasamy Vs. State of Tamil Nadu and Ors. (1984 Crl. Law Journal 447) would amount to giving bonus to a person accused of a heinous crime to have the minor offences committed with it virtually without any punishment of law. Delhi High Court in K.C. Das Vs. The State (1979 Crl. Law Journal 362) is shown to have adopted an approach which apparently is contradictory in terms. After holding:

"The words "of the same case" are important. The section speaks of the "period of detention" undergone by the accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, inquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment impugned 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 Court by referring to an illustration formulated by itself in para 3 of the judgment, posed a question to itself, an answered the same, observing:

"Will it not be true to say that the accused is an undertrial prisoner in the second case in our illustration. If it is so he will be entitled to set off his pre-conviction period against the term of imprisonment imposed on him in the second case as in the first. We see no ground to deny him the benefit in the second case."

For reaching at this conclusion the reliance was placed upon the judgment of this Court in Govt. of Andhra Pradesh and Anr. Vs. Anne Venkateswara Rao. etc. (supra). In that case, this court had nowhere held that the set off contemplated under Section 428 of the Code can be claimed by a convicted person, irrespective of his detention in the same case or in some other case.

The object of criminal justice system is to reform the criminal but not to encourage him for the repetition of crime. Penology has a twin object, i.e. (i) punishing the criminal to avoid repetition of crime and (ii) to endeavour for his reform wherever possible. The increasing crime in the country has seriously to be taken note of. Crime is an act of warfare against community touching new depths of lawlessness. The object of imposing deterrent sentences is to protect the community against callous criminals; to administer as clearly as possible to others tempted to follow into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow and to deter criminals from repeating their criminal acts in future. Fazal Ali,J. in Maru Ram Vs. Union of India [1981 (1) SCC 106) rightly observed:

"The question, therefore, is - should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes is the holdy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible."

Discretion of treating under-trial detention period may be relevant consideration for the Court while passing orders in terms of Section 427 of the Code but the accused cannot be permitted to claim set off of the under-trial period undergone by him in connection with other cases. Powers of the Court to impose sentences should not be allowed to be regulated at the instance or discretion of the accused.

The fall out of the interpretation giving the benefit of detention during investigation, inquiry and trial in one case, in the other case, may also tempt the investigating agencies not to arrest the accused for the commission of the second offence pending conclusion of the trial and passing of sentence in the first case. After conviction and sentence in a criminal case, if arrested in the second case, the accused shall not be entitled to claim the benefit of Section 428 of the Code because the sentence, upon conviction, can obviously be not equated with the period of detention contemplated under Section 428 of the Code. As such by adopting such a recourse, the courts would not, in any case, advance the interests of justice but actually and factually frustrate its purpose defeating the concept of speedy trial in criminal cases.

Facts of this case are that the respondent was arrested on 29th November, 1995 in connection with CR 707/95 registered at Khar Police Station, Mumbai. During the investigation it transpired that he was also involved in the offences registered vide CR 737/95 on 29th November, 1995 Santacruz Police Station. He was shown arrested in both crime numbers. After being chargesheeted in both the cases,

he was tried separately. In one of the cases he was convicted and sentenced under Sections 395 and 397 of IPC on 3.4.1998. The learned Judge held that the accused was entitled to set off under Section 428 of Cr.P.C. for the period of custody already undergone. He was convicted in the second case for the offences punishable under Section 392, 395 of IPC and held entitled to set off under Section 428 of Cr.P.C. The respondent prayed for his release as according to him, he had already served sentences. Relying upon the Government Resolution dated 7th September, 1974 the Jail Authorities refused to release the respondent on the ground that he could not be given set off in the second case as he had been given set off in the first case. The accused filed a petition in the High Court which was allowed by impugned order, holding that the convict was entitled to benefit of Section 428 of the Code in both the cases for the period of detention undergone by him during investigation, inquiry and trial.

In the light of the view I have taken the impugned judgment of the High Court cannot be sustained and is liable to be set aside. Allowing the appeal filed by the State the judgment impugned is set aside holding that the respondent is not entitled to the benefit of set off in the sentence awarded to him in the second case.