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

PETITIONER:
STATE OF MAHARASHTRA AND ANR.

Vs.

RESPONDENT:
NAJAKAT ALIA MUBARAK ALI

DATE OF JUDGMENT: 09/05/2001

BENCH:
K.T. Thomas

JUDGMENT:

THOMAS, J.

Leave granted.
L...I...T.....T.....T.....T.....T.....T.....T..J

An accused has been convicted and sentenced to imprisonment in two criminal cases. As he was arrested on the same day in connection with both the cases he remained in jail as an under-trial prisoner during the same period in both cases. The question mooted in this appeal is this: Is it permissible for him to claim the benefit of set off envisaged in Section 428 of the Code of Criminal Procedure (for short the Code) in both cases? As the High Court of Bombay has answered the question in the affirmative by the impugned judgment this appeal is filed by the State of Maharashtra in challenge of the said view of the High Court.

A two Judge Bench of this Court has made observations in Raghbir Singh vs. State of Haryana {1984(4) SCC 348} that on the fact situation in the said case the accused cannot claim a double benefit. In other words, learned Judges held that the accused can have the benefit of set off in one of those cases but not in both. When the said decision was cited before the High Court, the learned Single Judge who rendered the impugned judgment has stated that on the facts in the case of Raghbir Singh (supra) the question in issue involved here never arose. Learned Judge expressed the view that the accused is entitled to the benefit of set off in the second case as well where he was in custody during the course of the trial. When the special leave petition in this case came up for consideration on 20.1.2000, we felt that since Raghbir Singh was decided by a two Judge Bench it would be appropriate that this matter is heard by a larger Bench so that a fresh look can be made on Section 428 of the Code.

As the accused respondent was benefited by the decision of the High Court he would have been released from jail. That might be the reason why he did not enter appearance in this appeal despite notice served on him. So we appointed Ms. Aparna Bhatt, Advocate, as amicus curiae. She

presented the case for the accused very effectively after looking up all the decisions pertaining to the subject. We are indeed immensely grateful to her and we record our appreciation for the help rendered by her.

The facts out of which the aforesaid question has winched to the fore can be stated briefly thus: Respondent accused was tried in two cases. One was numbered S.C.230 of 1995 and the other as S.C.313 of 1996. He was arrested on 21.9.1995 in connection with both cases. The Sessions Judge who convicted him in S.C. 230 of 1995 on 3.4.1998, while sentencing him, directed that the accused would be entitled to the set off under Section 428 of the Code.

Subsequently a Sessions Court (we are not sure whether the same Sessions Court or a different one) convicted him in S.C.323 of 1998 on 23.7.1998 and sentenced him to certain terms of imprisonment. The Sessions Judge concerned observed therein that the accused is entitled to the set off under Section 428 of the Code.

On 14.9.1998 the respondent accused sent an intimation to the jail authorities that he is entitled to be released from jail since he has already served the sentences imposed on him in both cases. But the jail authorities refused to release him on the premise that he could not claim the benefit of set off in the second case as he had been given set off in the first case. The jail authorities did so on the strength of a Resolution dated 7.9.1974 adopted by the Government of Maharashtra. That resolution reads thus:

If a prisoner is convicted in different cases, and different set off period is granted by different courts then in that case maximum period of set off in one case should be granted to prisoners, as other set off period will be merged in the set off which is the maximum.

When the prisoner challenged the decision of the jail authorities before the High Court learned Single Judge observed that the construction placed by the authorities on the said Government Resolution is completely contrary to the interpretation of Section 428 of the Code and the spirit of the section itself. Learned Single Judge after ordering the prisoner to be released forthwith from jail, directed the Government and the jail authorities to review the cases of all persons who continue to be in custody based on the Government Resolution dated 7th September, 1994 within a period of two months and to take steps to see that they are released within the said period of two months (if not earlier released) based on the interpretation to Section 428 as now given.

The respondent prisoner was released by the jail authorities before the Government of Maharashtra took up the matter to this Court. The State felt that the High Court has gone wrong in giving the benefit of Section 428 of the Code to the prisoner in two cases.

In Raghbir Singh vs. State of Haryana (supra) learned Judges considered a case in which an accused was convicted and sentenced to imprisonment for 7 years on 1.2.1980 as per the judgment rendered by a Sessions Judge, Karnal. That accused was in judicial custody from 11.1.1980 in connection with another case which was pending before a Metropolitan

Magistrate, Delhi. That second case also ended in conviction and the Metropolitan Magistrate sentenced him to rigorous imprisonment for one year on 16.2.1981. That accused claimed set off from 11.1.1980 till the dates of conviction in each cases. In that case the State conceded the claim of the accused in respect of the period between 11.1.1980 to 1.2.1980. But the State contended that the accused could not get set off from 1.2.1980 till 16.2.1981 for the second case. The said contention was based on a departmental instructions issued by a State Government on 29.11.1975 to the effect that the period of detention undergone by a convict in execution of a sentence in one case should not be set off against the term of imprisonment imposed on him in another case. This Court upheld the said contention and the two Judge Bench made the following observation:

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.

As the said view is now sought to be reconsidered we shall examine the position by reading Section 428 of the Code once again. The Section is extracted below:

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, if any, of the term of imprisonment imposed on him.

The placement of that section just below Section 427 of the Code tempts us to have a peep into the preceding section, which deals with instances wherein one person is sentenced in a case when he has already been undergoing the sentence in another case. The first sub-section of Section 427 says that the sentence in the second conviction shall commence at the expiration of the imprisonment to which the accused has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence. The second sub-section to Section 427 of the Code says that 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.

Thus, the sentence of life imprisonment imposed on the same person in two different convictions would converge into

one and thereafter it would flow through one stream alone. Even if the sentence in one of those two cases is not imprisonment life but only a lessor term the convergence will take place and the post convergence flow would be through the same channel. In all other cases, it is left to the court to decide whether the sentences in two different convictions should merge into one period or not. If no order is passed by the court the two sentences would run one after the other. No doubt Section 427 is intended to provide amelioration to the prisoner. When such amelioration is a statutory operation in cases falling under the second sub-section it is a matter of choice for the court when the cases fall within the first sub-section. Nonetheless, the entire section is aimed at providing amelioration to a prisoner. Thus a penumbra of the succeeding section can be glimpsed through the former provision.

The purpose of Section 428 of the Code is also for advancing amelioration to the prisoner. We may point out that the section does not contain any indication that if the prisoner was in jail as an under-trial prisoner in a second case the benefit envisaged in the section would be denied to him in respect of the second case. However, learned counsel for the appellant contended that the words of the same case in the section would afford sufficient indication that the benefit is intended to cover only for one case and not more than that. It must be remembered that the ideology enshrined in Section 428 was introduced for the first time only in the Code of Criminal Procedure, 1973. For understanding the contours of the legislative measure involved in that section, it is advantageous to have a look at the Objects and Reasons for bringing the above legislative provision. We therefore extract the same here:

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 is a fraction of the period spent in jail as under-trial prisoner. Indeed, there may 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 overcrowded 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.

(emphasis supplied)

The purpose is therefore clear that the convicted person is given the right to reckon the period of his sentence of imprisonment from the date he was in jail as an under-trial prisoner. In other words, the period of his being in jail as an under-trial prisoner would be added as a part of the

period of imprisonment to which he is sentenced. We may now decipher the two requisites postulated in Section 428 of the Code.

(1) During the stage of investigation, inquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case.

If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, inquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words if any in the section amplifies that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, inquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him.

In the above context it is apposite to point out that very often it happens when an accused is convicted in one case under different counts of offences and sentenced to different terms of imprisonment under each such count, all such sentences are directed to run concurrently. The idea behind it is that the imprisonment to be suffered by him for one count of offence will, in fact and in effect be imprisonment for other count as well.

Reading Section 428 of the Code in the above perspective, the words of the same case are not to be understood as suggesting that the set off is allowable only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words of the same case were used to refer to the pre-sentence period of detention undergone by him. Nothing more can be made out of the collocation of those words.

Various High Courts have expressed on this question. A Division Bench of Delhi High Court has dissented from a contrary view taken by a Single Judge of that High Court and held in K.C. Das vs. The State (1979 Criminal Law Journal 362) that the statute does not make any distinction between the first case and the second case for application of Section 428 of the Code. A Division Bench of the High Court of Gauhati in Lalrinfela vs. State of Mizoram and ors. (1982 Criminal Law Journal 1793) has adopted the same view. Lahiri and Hansaria, JJ, said in the said decision that if the accused is simultaneously arrested and detained in two or more cases and on conviction obtains set off for the

period of his detention in the first case he is not ineligible to obtain set off for the period in the subsequent cases; in each case the court is to count the number of days the accused was in such detention separately and the liability to undergo imprisonment on conviction should be restricted to the remainder of the terms of the imprisonment imposed on him in that case.

A Division Bench of the Andhra Pradesh High Court in Gedala Ramulu Naidu vs. State of A.P. and anr. (1982 Criminal Law Journal 2186) and a Division Bench of the Madras High Court in Chinnasamy vs. State of Tamil Nadu and ors. (1984 Criminal Law Journal 447) have also adopted the same view in tune with the interpretation given by us. While speaking for the Division Bench of the Madras High Natarajan, J (as he then was) has made a survey of most of the decisions thus far rendered by different High Courts and opted to flow with the view adopted by all the other High Courts almost uniformly.

We have no reason to think that the High Courts mentioned above have gone wrong in taking the view that Section 428 of the Code permits the accused to have the period undergone by him in jail as an under-trial prisoner set off against the period of sentence imposed on him irrespective of whether he was in jail in connection with the same case during that period. We therefore, respectfully dissent from the view expressed by the two Judge Bench of this Court in Raghbir Singh vs. State of Haryana (supra).

In the result we dismiss this appeal.