Boucher Pierre Andre

Vs

Superintendent, Central Jail, Tihar, New Delhi and Another

Writ Petition No. 505 of 1974

(Y. V. Chndrachud, P. N. Bhagwati JJ)

21.11.1974

JUDGMENT

BHAGWATI, J. -

1. The petitioner was arrested on November 10, 1971 in connection with an offence of theft which took place in the night between October 31, 1971 and November 1, 1971 in Rajasthan Emporium at Ashoka Hotel, New Delhi. He was tried by the Additional Sessions Judge, Delhi and by an order dated July 16, 1973 he was convicted of the offence under Section 380 of the Indian Penal Code and sentenced to rigorous imprisonment for four years and a fine of Rs. 10,000 and in default of payment of fine, further rigorous imprisonment of one year. An appeal preferred by him to the High Court of Delhi failed and his conviction was confirmed but the substantive sentence of imprisonment was reduced to two years though the fine was enhanced to Rs. 15,000 with one year's rigorous imprisonment in default. The order of the High Court in appeal was passed on April 4, 1974. The petitioner did not pay the amount of fine and he was, therefore, liable under the order of the High Court to serve a maximum sentence of imprisonment for three years. Since the petitioner was continuing under detention from November 10, 1971 during the investigation, enquiry and trial of the case against him, the petitioner contended that by reason of Section 428 of the new Code of Criminal Procedure, which came into force from April 1, 1974, the period of detention from November 10, 1971 upto July 16, 1973 was liable to be set-off against the term of imprisonment imposed upon him and he could be required to undergo imprisonment only for the remainder of the term which, after taking into account the remission granted on account of good behaviour, expired on August 12, 1974. The petitioner claimed that he was, therefore, entitled to be freed on August 12, 1974 and his detention in jail since that date was illegal. The petitioner filed an application for a writ of habeas corpus in the High Court of Delhi challenging the validity of his detention since August 12, 1974 but the High Court took the view that since the conviction of the petitioner by the Sessions Court had taken place prior to the coming into force of the new Code of Criminal Procedure, Section 428 had no application and the petitioner was bound to suffer imprisonment for the full term of three years calculated from the date of conviction, namely, July 16, 1973. The habeas corpus application in the High Court having failed, the petitioner preferred the present writ petition directly in this Court under Article 32 of the Constitution. This writ petition also claimed the same relief and the ground was also the same, namely, that by reason of Section 428, the term of imprisonment imposed on the petitioner came to an end on August 12, 1974 and his detention since that date was contrary to law.

2. The question which arises for determination in this petition is a narrow one and it rests on the true interpretation of Section 428. Is this 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 Code of Criminal Procedure came into force ? It is only if the latter interpretation is accepted that the petitioner would be entitled to claim the benefit of the section and hence it becomes necessary to arrive at its proper construction. Section 428 reads as follows :

Where an accused 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, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, if the term of imprisonment imposed on him.

This section, on a plain natural construction of its language, posits for its applicability a fact situation which is described by the clause "where an accused person has, on conviction, been sentenced to imprisonment for a term". There is nothing in this clause which suggests, either expressly or by necessary implication, that the conviction and sentence must be after the coming into force of the new Code of Criminal Procedure. The language of the clause is neutral. It does not refer to any particular point of time when the accused person should have been convicted and sentenced. It merely indicates a fact situation which must exist in order to attract the applicability of the section and this fact situation would be satisfied equally whether an accused person has been convicted and sentenced before or after the coming into force of the new Code of Criminal Procedure. Even where an accused person has been convicted prior to the coming into force of the new Code of Criminal Procedure but his sentence is still running, it would not be inappropriate to say that the "accused person has, on conviction, been sentenced to imprisonment for a term". Therefore, where an accused person has been convicted and he is still serving his sentence at the date when the new Code of Criminal Procedure came into force, Section 428 would apply and he would be entitled to claim that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term. Of course, if the term of the sentence has already run out, no question of set-off can arise. It is only where the sentence is still running that the section can operate to restrict the term. This construction of the section does not offend against the principle which requires that unless the legislative intent is clear and compulsive, no retrospective operation should be given to a statute. On this interpretation, the section is not given any retrospective effect. It 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 is 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 in the objection against giving retrospective operation is, therefore, irrelevant.

3. We reach the same conclusion also by a different process of reasoning. Sub-section (1) of Section 484 repeals the old Code of Criminal Procedure. But sub-section (2), clause (b), provides that notwithstanding such repeal, all sentences passed under the old Code of Criminal Procedure and which are in force immediately before the commencement of the new Code of Criminal Procedure shall be deemed to have been passed under the corresponding provisions of the new Code. The sentence of imprisonment and fine passed against the petitioner under the provisions of the old Code of Criminal Procedure must, therefore, be deemed to have been passed under the corresponding provisions of the new Code of Criminal Procedure. It is now well settled law that where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion. To

quote the words of Lord Asquith in East End Dwellings Co. Ltd. v. Finsbury Borough Council (1952 AC 109, 132) :

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

We must, therefore, imagine the sentence imposed upon the petitioner as on imposed under the new Code of Criminal Procedure and then give effect to all the consequences and incidents which would inevitably flow from or accompany a sentence imposed under the new Code of Criminal Procedure. Now, there was no dispute before us that Section 428 would be clearly applicable where an accused person has been sentenced in imprisonment under the new Code of Criminal Procedure. The applicability of Section 428 was resisted only on the ground that it does not apply to a case where an accused person has been sentenced under the old Code of Criminal Procedure. But if the sentence imposed on the petitioner, though under the old Code of Criminal Procedure, 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 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.

4. The State, however, raised one further contention to defeat the claim of the petitioner to the benefit of Section 428. That contention was that even if, on the construction accepted by us, Section 428 were applicable to a case where an accused person has been convicted under the old Code of Criminal Procedure and is still serving his sentence at the date when the new Code of Criminal Procedure came into force, it would not avail the petitioner, because the set off provided by the section is only against the substantive term of imprisonment imposed on an accused person and not against a sentence of imprisonment is default of payment of fine. The only substantive sentence of imprisonment passed against the petitioner was for a term of two years and if the period of his detention during investigation, inquiry and trial of the case were set-off against this term of two years, no part of it would remain to be served after the coming into force of the new Code but the term of one year's imprisonment in default of payment of fine would then begin and continue until April 1, 1975, subject to remission and the petitioner court not, therefore, be entitled to claim that his detention was illegal in view of Section 428. This contention urged on behalf of the State is also without force. The distinction which it seeks to make between a substantive sentence of imprisonment and a sentence of imprisonment in default of payment of fine, for the purpose of applicability of Section 428, is wholly unfounded. When an accused person is sentenced to imprisonment for a term in default of payment of fine, it is as much a sentence of imprisonment imposed upon him as a substantive sentence of imprisonment. It is true that where an accused person is sentenced to imprisonment for a term in default of payment of fine, he can avoid undergoing such imprisonment by making payment of the fine, but if he does not, he would have to undergo such imprisonment and that would be for the full term specified in the sentence. No distinction can be made in principle between a substantive sentence of imprisonment and a sentence of imprisonment in default of payment of fine and both must be held to be within the scope and intendment of Section 428. The object of enactment of Section 428 is, as pointed out by the Joint Committee of Parliament while recommending its introduction :

. . . 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, some times courts do take into account the period of detention undergone a under-trial prisoner when passing sentence and occassionally 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.

We fail to see how, having regard to this object of Section 428, any differentiation can be made between a substantive sentence of imprisonment and a sentence of imprisonment in default of payment of fine. The nature of the mischief arising by reason of the accused person being 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" would be the same in both cases and it is impossible to imagine that the Legislature should heave sought to remedy this mischief in one case and leave it untouched in the other. Therefore, even if two constructions of Section 428 were possible, we should adopt that which suppresses the mischief and advances the remedy and carries out the object of the Legislature as fully and effectually as possible. We accordingly take the view that Section 428 applies not only in relation to a substantive sentence of imprisonment but also in relation to a sentence of imprisonment in default of payment of fine. The period for which an accused person has been detained during investigation, inquiry or trial of the case in liable to be set-off not only against the term of substantive imprisonment but also against the term of imprisonment in default of payment of fine. The set off, however, does not absolve the accused person from the liability to pay the fine imposed on him. Section 421 of the new Code provides that even if the accused person has undergone the whole of the imprisonment in default of payment of fine, the Court passing the sentence can issue a warrant for the recovery of the fine if, for special reasons to be recorded in writing, it considers in necessary so to do or it has made an order for payment of expenses or compensation out of the fine under Section 357.

5. Lastly, it was contended on behalf of the State that, so far as the present case is concerned, the High Court, in appeal, reduced the sentence of imprisonment imposed on the petitioner from four years to two years, taking into account the fact that the petitioner had already been in detention from November 10, 1971 upto July 16, 1973 during the investigation, inquiry and trial of the case against him and the petitioner had, therefore, already obtained the benefit which was intended to be provided by Section 428 and he could not claim it over again by seeking to set off his pre-conviction period of detention against the reduced term of imprisonment imposed on him. This argument is also without substance. Section 428 is absolute in its terms. It provides for set off of the pre-conviction detention of an accused person against the term of imprisonment imposed on him on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into account by the Court while imposing the term of imprisonment. It does not say that where the pre-conviction detention of an accused person has already been taken into account by the Court while imposing the term of imprisonment on conviction, no set-off of such pre-conviction detention shall be permitted, and if the Legislature has not introduced any such exception, we cannot read it into the section by a process of judicial construction. To read such an exception into the section would be to do violence to the language of the section and to read words which are not there. That is clearly impermissible according to well recognised canons of construction. It is quite understandable that the Legislature has not introduced any such exception, because very often the factors which weigh

with the Court in imposing a particular term of imprisonment are not articulated and in many cases it would be a matter of speculation whether and to what extent the fact that an accused person was in detention prior to his conviction must have weighed with the Court in imposing a sentence of imprisonment.

6. We may point out that there are two decisions, one of the Andhra Pradesh High Court in Biddika Jogannadham v. Superintendent, Central Jail, Vishakhapatnam (W.P. No. 3711 of 1974, decided on September 24, 1974 (APHC)) and the other of the Bombay High Court in Narayanan Nambeesan v. State of Maharashtra (76 Bom LR 690), where the same view in regard to the interpretation of Section 428, which has found favour with us, has been taken. The Delhi High Court had, however, taken a different view in the case of this very petitioner in Boucher Pierre Andre v. The Superintendent, Central Jail, Tihar, New Delhi (Cri. Writ No. 21 of 1974, decided on September 27, 1974 (Delhi HC). The decision of the Delhi High Court must be regarded as incorrect and it must be overruled.

7. We are, therefore, of the view that the detention of the petitioner in jail since August 12, 1974 is illegal and we accordingly direct that he should be set at liberty forthwith.

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