Government of Andhra Pradesh and Another

Vs

Anne Venkatesware and Others

Criminal Appeal Nos. 418-419 And 484-485 f 1976

(P.N. Bhagwati, A.C. Gupta JJ )

17.02.1977

JUDGMENT

GUPTA, J. –

1. These are a group of four appeals from a common judgment of the Andhra Pradesh High Court partly allowing two writ petitions, writ petition 1865 of 1976 filed by A. V. Rao, and writ petition, 1870 of 1976 made by N. V. Krishnaiah. The High Court rejected the petitioners' prayer for setting off under Section 428 of the Code of Criminal Procedure, 1973 the periods during which they were in preventive detention against the terms of imprisonment imposed on them on their conviction in a sessions trial, but accepted their contention that they were entitled to the benefit of the remission system under the Prisons Act, 1894 for the period during which they were in jail as undertrial prisoners before their conviction : Criminal Appeals 418 and 419 of 1976 by State of Andhra Pradesh are directed against the part of the High Court's Judgment granting the writ petitioners the benefit of the remission system under the Prisons Act treating for this purpose the period of undertrial detention on the same footing as a term of imprisonment on conviction. Appeal 418 arises out of writ petition 1870 of 1976 filed by A. V. Rao and Appeal 419 is from writ petition 1870 of 1976 made by N. V. Krishnaiah. The writ petitioners have also filed appeals against the part of the Judgment disallowing their prayer for set off under Section 428 of the Code of Criminal Procedure. Criminal Appeals 484 and 485 of 1976 are by A. V. Rao and N. V. Krishnaiah respectively. All the four appeals are on certificate of fitness granted by the High Court.

2. The relevant facts are as follows. A. V. Rao, appellant in appeal 484 of 1976 and respondent in appeal 418 of 1976, was in detention under the Preventive Detention Act when on December 18, 1969 a first information report was filed naming him among others as an accused in a case involving offences under Sections 121A and 120B read with Section 395, and Section 120B read with Section 447 of the Indian Penal Code, which gave rise to sessions cases 106 of 1970 and 6 of 1971 on the file of the Additional Sessions Judge, Hyderabad. The detention order under the preventive detention law was revoked by the State Government on April 11, 1970 and Rao was released on the next day, April 12. He was then produced before the magistrate in connection with the sessions cases on April 13, 1970 : there is some doubt about this date because the record at some places mentions the date as April 18, but the discrepancy is not of any significance on the question arising for decision in the appeals. On April 10, 1972 Rao was convicted along with others and sentenced to various terms of imprisonment for the offences charged against him; the maximum sentence was rigorous imprisonment for four years. The sentences were directed to run concurrently. His appeal against the order of conviction was dismissed by the High Court on November 28, 1975. He filed writ petition 1865 of 1976 asking for an order of the Government of Andhra Pradesh to set of under Section 428 of the code of Criminal Procedure, 1973 the time between December 19, 1969 and

April 13, 1970 against his term of imprisonment treating the said period as the period of detention undergone by him as undertrial prisoner, and to take into account the entire period during which he was in detention for the purpose of remission of his sentence under the Prisons Act. The petitioner further claimed that had he been free at the time when the F. I. R. was lodged on December 18, 1969, he would have surrendered immediately and would have been produced before the court for remand on the next day as some of the co-accused in the case had been, it was submitted that if the "concerned authority" who could but did not "take immediate and necessary steps to produce the petitioner" before the magistrate, the petitioner should not be made to suffer.

3. The facts of N. V. Krishnaiah's case are similar. Krishnaiah, appellant in appeal 485 and respondent in appeal 419, was also an accused in the sessions cases 106 of 1970 and 6 of 1971 with A. V. Rao and others. He however was not in detention when the F. I. R. was lodged. He was arrested in connection with the sessions cases on December 19, 1969 and was in detention on remand from December 21, 1969 to April 9, 1972. He was also convicted by the Additional Sessions Judge on April 10, 1972 and the maximum sentence in his case too was rigorous imprisonment for four years. He also preferred an appeal to the High Court against the order of conviction. The High Court granted him bail and was released on bail on April 29, 1972. He was arrested under the Maintenance of Internal Security Act, 1971 on June 25, 1975. The High Court dismissed the appeal on November 28, 1975. A warrant of arrest issued by the Additional Sessions Judge on December 1, 1975 was served on him on December 30, 1975, on which date the detention order under the Maintenance of Internal Security Act was also revoked. On these facts Krishnaiah in his writ petition sought an order on the State of Andhra Pradesh to treat the "period from June 26, 1975 to November 28, 1975 as remand period" and to set off under Section 428 of the Code of Criminal Procedure this period during which he was under preventive detention against the term of imprisonment imposed on him on conviction in the sessions cases. It was also contended that the warrant issued by the Additional Session Judge on December 1, 1975 should have been served on him immediately, that it was no fault of his that "the concerned authority" chose to serve the warrant on December 30, 1975, and that during this period of one month he should be deemed to have been serving the sentence imposed on him. A further prayer was made that the entire period during which he was under detention be taken into account for remission of his sentence under the Prisons Act.

4. The question for consideration in appeals 418 and 419 of 1976 preferred by the State of Andhra Pradesh is, whether the period of detention undergone by the two writ petitioners in connection with the sessions cases before their conviction could be treated as a part of the period of imprisonment on conviction so as to entitle them to remission of their sentences under the Prisons Act. The Prisons Act, as its preamble shows, is an Act to "amend the law relating to prisons" and to "provide rules for the regulating of such prisons". Section 3 (5) of the Act defines "remission system" as the "rules for the time being in force regulating the award of marks to, and the consequent shortening of sentence of, prisoners in jail". Section 59 of the Prisons Act provides that the State Government may make rules consistent with the Act in respect of the various matters specified in clause (1) to (28) of the section; under clause (5) of Section 59 the State Government is authorised to make rules "for the award of marks and the shortening of sentences". In their writ petitions both the petitioners speak of remission under the "prison rules" without specifying any rule under which relief is sought. The High Court viewed the question in this way :

> Section 428 Cr. P. C. clearly ordains that the remand detention shall be set off against the term of imprisonment imposed on the accused person on conviction. The section further clarifies that 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. In other words, the statute equate the undertrial detention or remand detention with imprisonment on conviction. The provisions, in so many words, treats the remand detention as part of the period of imprisonment after conviction. If remissions are given for imprisonment after conviction, there is no plausible or understandable reasons why it should be denied to the remand period when the statute equates both of them.
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> The High Court accordingly held that all the remissions that are available or permissible to the two petitioners in regard to imprisonment on conviction are available to them even in respect of the remand period and directed the authorities "to work out these remissions and give the benefit to the petitioners".

5. We do not consider the view taken by the High Court on this point as correct. Section 428 of the Code of Criminal Procedure, 1973 is in these terms :

> 428. 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, 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.
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> 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 of 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. The basis of the High Court's decisions does not, therefore, seem to be right.

6. Apart from that, the Prisons Act does not confer any right upon there prisoner to claim remission. It was pointed out in G. V. Godse v. State of Maharashtra (1961) 3 SCR 440,446 : AIR 1961 SC 600 : (1961) 1 Cri LJ 736) that ". . . the Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act". It was explained that the rules under the Prisons Act do not substitute a lesser sentence for a sentence awarded by the court. The rules enable a prisoner to earn remissions but, as held in G. V. Godse's case, the question of remission is exclusively within the province of the appropriate Government. If the Government decides to remit the punishment to which a person has been sentenced, the remission may be worked out according to the rule framed under the Prisons Act. This being the position, appeals 418 and 419 of 1976 must succeed.

7. The remaining two appeals, 484 and 485 of 1976, preferred respectively by Rao and Krishnaiah, may now be taken up for consideration. The claim in both these appeals is that the period of detention undergone by each appellant under the preventive detention law should be set off under

Section 428 of the Code of Criminal Procedure against the term of imprisonment imposed on them on their conviction in the aforesaid sessions cases. The argument is that the expression "period of detention" in Section 428 includes detention under the Preventive Detention Act or the Maintenance of Internal Security Act. It is true that the 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 of against the term of imprisonment imposed on 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 Section 428 against the term of imprisonment imposed on them.

8. There is however substance in the other point raised by the writ petitioners regarding the computation of the period during which the writ petitioner in each case should be held to have suffered imprisonment on conviction. In A. V. Rao's case (W. P. 1865/76), he was already in detention under the Preventive Detention Act when the First Information Report was lodged on December 18, 1969 in connection with the sessions cases. Some of the co-accused in these cases were arrested and produced before the magistrate for remand on December 19, 1969, but Rao was produced before the magistrate sometime in April, 1970 after he was released from preventive detention. It was argued that he also could have been produced before the magistrate on December 19, 1969. On behalf of the respondent, State of Andhra Pradesh it was contended that as Rao was already in detention under the Preventive Detention Act, it was not possible to produce him before the magistrate for remand until the period of preventive detention was over. We do not find any justification in law for the position taken up by the State. Rao being already in custody, the authorities could have easily produced him before the magistrate when the First Information Report was lodged. Nothing has been pointed out to us either in the preventive detention law or the Code of Criminal Procedure which can be said to be a bar to such a course. That being so we think that the claim that the entire period from December 19, 1969, when many of the co-accused were produced before the magistrate, to April 18, 1970 should be treated as part of the period during which Rao was under detention as an undertrial prisoner, must be accepted as valid. A. V. Rao's appeal 484 of 1976 is allowed to this extent.

9. In the case of N. V. Krishnaiah, the Additional Sessions Judge, Hyderabad issued a warrant on December 1, 1975 after his appeal against conviction was dismissed by the High Court on November 28 1975. The warrant, however, was served on him only on December 30, 1975 on which date the order under Maintenance of Internal Security Act was revoked. It is claimed that the warrant could have been served immediately on the dismissal of the appeal on November 28, 1975 and the accused was not responsible if the authority concerned chose to serve the warrant on him on December 39, 1975. In this case also, the argument on behalf of the State of Andhra Pradesh is that it was not possible to forward Krishnaiah to jail consequent on his conviction in the sessions cases until the period of his detention under the Magistrate of Internal Security Act was over. We do not see why that should be so. Section 418 requires the court passing the sentence to "forthwith forward a warrant to the jail or other place in which he (accused) is, or is to be, confined, and, unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant". Section 418 thus does not exclude a case where the warrant concerns an accused who is already in detention. On behalf of the State it was sought to be argued that if the warrant was served on Krishnaiah immediately after his conviction was upheld by the High Court in appeal, the position would have been anomalous, because then he would have been in detention both under the

preventive detention law and as a convicted accused in a criminal case. We have not been referred to any provision either in the Code of Criminal Procedure or in the Maintenance of Internal Security Act which requires the service of the warrant to be delayed until after the period of preventive detention is over. As regards the alleged anomaly of a man having to suffer two kinds of detention at the same time, one preventive and the other punitive, we do not find this to be a valid objection. The position is not different from the case where a man is sentenced on different counts to a term of rigorous imprisonment and another term of simple imprisonment, and the sentences are directed to run concurrently. Counsel for the State referred us to the decision in Horadhan Saha v. State of West Bengal (1975) 3 SCC 198 : 1974 SCC (Cri) 816) in support of his contention. In our opinion this case does not help him at all. What was held in this case was, inter alia, that the nature of preventive detention is entirely different from, punitive detention, and there is no bar to a man being detained under the preventive detention law when a criminal proceeding for the offences on which the preventive detention is based is pending. If that be so, there can be no bar to the preventive and punitive detentions continuing simultaneously. We therefore allow appeal 485 of 1976 to the extent that Krishnaiah should be taken to have been serving the sentence imposed on him from December 1, 1975.

10. In the result the criminal appeals 418 and 419 of 1976 by the State of Andhra Pradesh are allowed, and the appeals 484 and 485 of 1976 preferred respectively by A. V. Rao and N. V. Krishnaiah are allowed to the extent indicate above.

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