

SUPREME COURT OF INDIA

Sharad Hiru Kolambe

Vs.

State of Maharashtra and Others

CrI.A.No.1209 of 2018

(Abhay Manohar Sapre and Uday Umesh Lalit,JJ.,)

20.09.2018

JUDGMENT

Uday Umesh Lalit,J.,

1. Delay in filing Special Leave Petition condoned.

Leave granted.

2. This appeal challenges the decision dated 17.12.2013 passed by the High Court of Bombay in Criminal Appeal No.906 of 2006 affirming the conviction and sentence of the appellant (original accused No.6) for offences punishable under the Indian Penal Code (IPC, for short) as well as the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as the MCOC Act). Since the emphasis in the present appeal was placed on the nature of default sentences passed against the appellant, we confine ourselves to bare outline of facts. The appellant along with other co-accused was tried and convicted by the Special Judge [the MCOC Act] Thane in M.C.O.C. Special Case No.3 of 2002 vide judgment dated 20.10.2005. The relevant portion of the order of sentence passed by the Special Judge reads as under:-

"Accused Nos.1 to 6 namely, Sanjay Kisan Mohite, Sudish Maniken, Maniken Nair, Pramod Shankar Jadhav, Santosh Manohar Deshmukh, Chandrakant Balkrishna Shegde and Sharad Hiru Kolambe are convicted for offence punishable under Section 364A of Indian Penal Code read with Section 34 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay fine of Rs.1,000/- each.

In default to suffer imprisonment for three months. The accused Nos.1 to 6 are convicted for offence punishable under Section 395 of Indian Penal Code and sentenced to suffer imprisonment for seven years and to pay fine of Rs.1,000/- each.

In default, to suffer imprisonment for three months. The accused Nos.1 to 6 are convicted for offence punishable under Section 397 of Indian Penal Code and sentenced to suffer imprisonment for seven years and to pay fine of Rs.1,000/- each.

In default, to suffer imprisonment for three months. The accused Nos.1 to 6 are convicted for offence punishable under Section 387 of Indian Penal code read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for five years and to pay fine of Rs.1,000/- each.

In default, to suffer imprisonment for three months. The accused Nos.1 to 6 are convicted for offence punishable under Section 342 of Indian Penal Code read with Section 34 of the Indian Penal code and sentenced to suffer imprisonment for one year. The accused Nos.1 to 6 are convicted for offence punishable under Section 3(1)(ii) of Maharashtra Control of Organised Crime Act and sentenced to suffer imprisonment for ten years and to pay fine of Rs.5,00,000/- (Rupees Five lacs) each.

In default, to suffer imprisonment for three years. The accused Nos.1 to 6 are convicted for offence punishable under Section 3(2) of Maharashtra Control of Organised Crime Act and sentenced to suffer imprisonment for ten years and to pay fine of Rs.5,00,000/- (Rupees Five Lacs) each.

In default, to suffer imprisonment for three years. The accused Nos.1 to 6 are convicted for offence punishable under Section 3(4) of Maharashtra Control of Organised Crime Act and sentenced to suffer imprisonment for ten years and to pay fine of Rs.5,00,000/- (Rupees Five Lacs) each.

In default, to suffer imprisonment for three years. All the sentences shall run concurrently. The accused persons are entitled for set off under Section 428 of the Criminal P.C. for pretrial detention period. Accused No.7 Avinash Shrikrishna Dugad and accused No.8 Tanaji Nanu Birade are acquitted of all the offences. Their bail bonds stand cancelled."

3. The decision so rendered by the Special Judge was questioned by all the convicted accused by filing criminal appeals in the High Court of Bombay. The High Court by its judgment and order under appeal set aside the conviction and sentence of original accused No.5. It, however, dismissed all the other appeals. The conviction and sentence in so far as the appellant is concerned thus stood affirmed.

4. It may be mentioned that the appellant was arrested on 26.08.2001 and was never released during the trial as well as during the pendency of the appeal. He thus completed 14 years of actual sentence on 25.08.2015.

By order dated 04.03.2017 passed by the Government of Maharashtra in exercise of powers conferred under Sections 432 and 433 of Criminal Procedure Code (hereinafter referred to as

the Code), the appellant was directed to be released on completion of 14 years of actual sentence. However, since the appellant has not paid the amount of fine as directed, he is presently undergoing the sentence in default as awarded by the Courts below. It must further be mentioned that on 03.06.2017, the District Probation Officer, District Women and Child Welfare Department, Raigad, Alibaug submitted a Home Inquiry Report wherein it was noted that the appellant's family was in a state of starvation.

5. In the aforesaid factual context, Mr. Colin Gonsalves, learned Senior Counsel appearing for the appellant advanced following submissions:-

a. The cumulative fine imposed upon the appellant under various counts of punishment was Rs.15,04,000/- and the default sentence in case of non-payment was cumulatively 10 years. For a person whose family was reduced to a state of starvation, it was impossible to deposit payment of fine as directed. Resultantly, the appellant would have to suffer default sentence of 10 years. Though the substantive sentence stood remitted and the appellant was directed to be released on completion of 14 years of actual sentence, the appellant would still be inside till he completes 24 years.

b. Since the trial court had directed "all sentences shall run concurrently", all default sentences must also run concurrently inter se. Thus the maximum default sentence would be 3 years and not 10 years.

c. In the present case the default sentences so directed would be unconscionable and excessive. He thus submitted that either default sentences be directed to run concurrently or the default sentences be reduced to the one already undergone and the appellant be set at liberty. The learned Senior Counsel relied on the decisions of this court rendered in *Palaniappa Gounder v. State of Tamil Nadu and Others*¹, *Shantilal v. State of M.P.*² and *Shahejadjkhan Mahebubkhan Pathan v. State of Gujarat*³ in which this Court after considering the standing of the person, nature of crime and the financial capacity had reduced the quantum of default sentence.

6. Mr. Nishant R. Katneshwarkar, learned Counsel appearing for State of Maharashtra however relied upon certain observations made by this Court in *V.K. Bansal v. State of Haryana and Another*⁴ and a decision of the Full Bench of Madras High Court in case of *Donatus Tony Ikwanusi v. The Investigating Officer, NCB*⁵ to submit that default sentences for nonpayment of fine could not be ordered to run concurrently. The learned Counsel however fairly submitted that considering the financial capacity of the appellant, the quantum of default sentences under each of the counts could certainly be reduced as this Court may deem appropriate.

7. Sections 63 and 64 of the IPC; Sections 30, 31, 421, 427, 428 and 429 of the Code which provisions have bearing on the present controversy, are quoted hereunder:-

Indian Penal Code

"63. Amount of fine.- Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. Sentence of imprisonment for non-payment of fine.- In every case, of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, in which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence."

Code of Criminal Procedure

"30. Sentence of imprisonment in default of fine.

(1) The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law:

Provided that the term-

(a) is not in excess of the powers of the Magistrate under Section 29;

(b) shall not, where imprisonment has been awarded as part of the substantive sentence, exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this Section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Section 29.

31. Sentence in cases of conviction of several offences at one trial.

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of Section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that-

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this Section shall be deemed to be a single sentence.

427. Sentence on offender already sentenced for another offence.

(1) When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence:

Provided that where a person who has been sentenced to imprisonment by an order under Section 122 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

(2) 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.

428. Period of detention undergone by the accused to be set off against the sentence or 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.

429. Saving.

(1) Nothing in Section 426 or Section 427 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment and the person undergoing the sentence is after its execution to undergo a further substantive sentence or further substantive sentences of imprisonment, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences."

8. Section 3 of the MCOC Act is also quoted, under three counts of which the appellant was convicted and sentenced:-

"3. Punishment for organised crime-

(1) Whoever commits an offence of organised crime shall.-

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees one lac;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(2) Whoever conspires or attempts to commit or advocates, abets or knowingly facilitates the commission of an organised crime or any act preparatory to organised crime, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(3) Whoever harbours or conceals or attempts to harbour or conceal, any member of an organised crime syndicate; shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(4) Any person who is a member of an organised crime syndicate shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to a fine, subject to a minimum fine of rupees five lacs.

(5) Whoever holds any property derived or obtained from commission of an organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with a term which, shall not be less than three years but which may

extend to imprisonment for life and shall also be liable to fine, subject to a minimum fine of rupees two lacs."

9. Section 63 of IPC generally lays down that fine should not be excessive wherever no sum is expressed to which the fine may extend. Naturally, in cases where the concerned provision itself indicates a sum to which the fine may extend, or prescribes a minimum quantum of fine, such element may not apply. In cases covered by Section 64 of IPC the Court is competent to impose sentence of "imprisonment for non-payment of fine" and such sentence for non-payment of fine "shall be in excess of any imprisonment" to which the offender may have been sentenced or to which he may be liable under commutation of a sentence. Sections 30 and 429(2) of the Code also touch upon the principle that default sentence shall be in addition to substantive sentence. In terms of said Section 30(2) the default sentence awarded by a Magistrate is not to be counted while considering the maximum punishment that can be substantively awarded by the Magistrate, while under Section 429(2), in cases where two or more substantive sentences are to be undergone one after the other, the default sentence, if awarded, would not begin to run till the substantive sentences are over. Similarly, under Section 428 of the Code, the period undergone during investigation, inquiry or trial has to be set off against substantive sentence but not against default sentence. The idea is thus clear, that default sentence is not to be merged with or allowed to run concurrently with a substantive sentence. Thus, the sentence of imprisonment for non-payment of fine would be in excess of or in addition to the substantive sentence to which an offender may have been sentenced or to which he may be liable under commutation of a sentence.

10. There are two provisions in the Code namely Sections 31 and 427 which speak of consecutive and concurrent running of sentences. Section 31 deals with cases where a person is convicted at one trial of two or more offences. The reading of Section 31 makes it clear that unless the Court directs that punishments for such two or more offences at same trial should run concurrently, the normal principle is that the punishments would commence one after the expiration of the other. The provision thus gives discretion to the Court to direct running of such punishments either concurrently or consecutively. Similar discretion is available in Section 427 which deals with cases where a person already undergoing a sentence is later imposed sentence in respect of an offence tried at subsequent trial. These two provisions namely Sections 31 and 427 thus deal with discretion available to the Court to specify whether the substantive sentences should run concurrently or consecutively. In the context of exercise of power under Section 427 of the Code, our attention was invited by the learned Counsel appearing for State of Maharashtra to certain observations made by this Court in V.K. Bansal (supra). Even while granting the benefit of concurrent running of the substantive sentences in respect of offences arising out of distinct transactions, this Court made certain observations regarding nonapplicability of such benefit to sentences in default of fine, in para 18 as under :-

"...We make it clear that the direction regarding concurrent running of sentence shall be limited to the substantive sentence only. The sentence which the appellant has been directed to undergo in default of payment of 14 fine/compensation shall not be affected by this direction. We do so because the provisions of Section 427 CrPC do

not, in our opinion, permit a direction for the concurrent running of the substantive sentences with sentences awarded in default of payment of fine/compensation."

11. As against Sections 31 and 427 of the Code which deal with substantive sentences and empower the courts in certain cases to direct concurrent running of more than one sentences, no such specification is available in Section 64 of IPC and in Section 30 of the Code or in any other provision dealing with power to impose sentence of "imprisonment for nonpayment of fine" or in connection with default sentence as is normally known. Is such non specification accidental or is there any idea behind not allowing concurrent running of default sentences?

12. Insofar as the nature and extent the power to impose fine is concerned, Section 63 of the IPC provides some guidelines and states that wherever no sum is expressed to which a fine could extend, the amount should not be excessive. It follows that if the law in question or the concerned provision stipulates the quantum or minimum amount of fine, the Courts must be guided by such specification. In *Shantilal* (supra) this Court considered the nature of imposition of fine and what attending circumstances ought to be taken into account by the Court while directing imprisonment for nonpayment of fine. Para 31 of the said decision is as under;

"31. The next submission of the learned Counsel for the appellant, however, has substance. The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or "otherwise". A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine." A further question whether there has to be specific empowerment to order imprisonment in default of fine was also considered and it was found that such power is implicit and possessed by courts administering criminal justice.

13. If the term of imprisonment in default of payment of fine is a penalty which a person incurs on account of non-payment of fine and is not a sentence in strict sense, imposition of such default sentence is completely different and qualitatively distinct from a substantive sentence. We must hasten to add that it is not the case of the appellant that default sentences awarded to him must run concurrently with substantive sentence imposed on him. His case is that all default sentences must inter se run concurrently. Imposition of fine, especially when certain minimum quantum is prescribed and/or mandatory imposition of fine is contemplated, has some significance.

Theoretically, if the default sentences awarded in respect of imposition of fine in connection with two or more offences are to be clubbed or directed to run concurrently, there would not be any occasion for the persons so sentenced to deposit the fine in respect of the second or further offences. It would effectively mean imposition of one single or combined sentence of fine. Such an exercise would render the very idea of imposition of fine with a deterrent stipulation while awarding sentence in default of payment of fine to be meaningless. For example, in the present case, in respect of three distinct offences punishable under the provisions of the MCOC Act, fine came to be imposed. Such fine going by the relevant provisions had to be at a minimum scale of Rs.5 lakhs. If the default sentences awarded in respect of each of those three counts under the MCOC Act are directed to run concurrently, the accused may not be inclined to deposit fine in respect of two out of those three counts. If imposition of fine and prescription of mandatory minimum is designed to achieve a specific purpose, the very objective will get defeated if the default sentences were directed to run concurrently. It is precisely for this reason that unlike Sections 31 and 427 17 of the Code, which specifically empower the concerned court to direct concurrent running of substantive sentences, Section 64 of the IPC does not stipulate such discretion. The language of said Section 64 rather mandates that the sentence awarded for non-payment of fine "imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence". Similar is the intent in Sections 30, 428 and 429(2) of the Code as discussed above. The rigour of the provisions is such that even if a person gets the benefit of commutation of a sentence, the sentence in default of payment of fine shall be in excess or in addition.

14. We must at this juncture deal with Full Bench decision of the Madras High Court in *Donatus (supra)*. After considering the decision of the Bombay High Court in *Emperor v. Subrao Sesharao*⁶, and earlier decision of the Madras High Court in *P. Balaraman v. State*⁷ and decisions of this Court in *Shantilal v. State of M.P. (supra)* and *Shahejadh Khan Maheebkhan Pathan v. State of Gujarat (supra)*, the High Court held that there cannot be concurrent running of more than one default sentences. It was rightly observed as under:-

"20. The principle laid down by the Hon'ble Apex Court in the decisions cited supra makes it crystal clear that imposition of the term of imprisonment in default of payment of fine is not a sentence and it is a penalty which a person incurs on account of non-payment of fine. It is also made clear that if such default sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. Therefore, there is no power for the Court to order the default sentences to run concurrently. The Hon'ble Apex Court also made it clear that when such a default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount." The conclusion regarding concurrent running of default sentence was as under:

"18. It is relevant to state that there are provisions under the code, as pointed out earlier, to order the substantive sentences to run concurrently and the legislature specifically excluded such power to the Court in respect of ordering the default sentences to run concurrently. The

Court cannot add or substitute any additional words to any particular provision of the Code. It is not for the Court to take up the work of legislation and the Court can only apply the provision contained under the Code as it is. It is well-settled in a catena of decisions that the term of imprisonment in default of payment of fine cannot be deemed to be a sentence, but a penalty which is incurred on account of non-payment of fine."

15. In the circumstances, we reject the submission regarding concurrent running of default sentences, as in our considered view default sentences, inter se, cannot be directed to run concurrently. However, considering the 19 financial condition of the appellant, a case is certainly made out to have a sympathetic consideration about the quantum of default sentence.

16. The quantum of fine imposed in the present case in respect of offences punishable under Sections 364A, 395, 397 and 387 of the IPC is not excessive and is quite moderate. However in our view, the default sentence for non-payment of such fine, ought to be reduced to the level of one month on each of those four counts in respect of the appellant. We now come to the imposition of fine and default sentences for the offences punishable under Sections 3(1)(ii), 3(2) and 3(4) of the MCOC Act.

The text of these Sections shows that these provisions contemplate, upon conviction, mandatory minimum fine of Rs.5 lakhs on each count. We do not therefore find anything wrong with the imposition of fine of Rs.5 lakhs in respect of each of those three counts under the MCOC Act. We however find that the imposition of default sentences of three years is slightly on a higher scale. We therefore reduce the default sentence to a period of one year each in respect of these three counts of offences under the MCOC Act.

17. Resultantly, while maintaining the quantum of fine, in respect of four counts of offences punishable under the IPC cumulatively at Rs.4000/-, the aggregate default sentence shall be four months; and in respect of three counts of offences punishable under the MCOC Act the fine shall be Rs.15 lakhs cumulatively with default sentence of three years in aggregate. Even if no amount of fine is paid by the appellant, the total default sentence for the appellant would thus be three years and four months, out of which three years of default sentence has already been undergone by the appellant.

18. This appeal thus stands allowed in aforesaid terms. A copy of this Judgment shall be immediately transmitted to the concerned jail where the appellant is presently lodged.

¹(1977) 2 SCC 0634

²(2007) 11 SCC 0243

³(2013) 1 SCC 0570

⁴(2013) 7 SCC 0211

⁵(2013) 1 MWN (Cr.) 175 (FB)

⁶AIR (1926) Bom. 0062

⁷(1990) MLJ (Cri) 0534