

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.548 OF 2013

Adam Gafoor Shaikh @ Adam Toofani .. Petitioner
Versus
The State of Maharashtra & Anr. .. Respondents

Mrs.Farhana Shah advocate appointed
Mr.K.V.Saste, APP for State.

CORAM : S. C. DHARMADHIKARI &
G.S. PATEL, JJ

Date : 30th September 2013.

P.C.:

1] This criminal petition presented through prison is filed claiming benefit of sub-section 2 of section 427 of Code of Criminal Procedure, 1973 (for short Cr.P.C.).

2] The petitioner is detained in the Yervada Central prison. He was convicted and sentenced in Terrorists and Disruptive Activities Act (TADA) Case No.15 of 1995 for offences punishable under section 302 and section 5 of the TADA Act together with section 4 of the Arms Act. He was sentenced to

suffer imprisonment for life by the judgement and order dated 27th November 1998 of the Additional Sessions Judge, Mumbai.

3] From the record it is apparent that this sentence was for imprisonment for life and the petitioner was required to undergo it subject to the remissions and conditions for maintaining good conduct and behaviour. The petitioner has been directed to be released in this case by an order dated 19th November 2012 of the State Government because of the benefits of remissions and the conditions noted above, being complied with.

4] However, what the petitioner alleges is that the Additional Sessions Judge, Thane tried another Sessions Cases No.203 of 1995 and sessions case No.500 of 1996. The petitioner before us was an accused in these cases. After the trial he was convicted for the offences punishable under section 302 and 307 of Indian Penal Code. He was sentenced to undergo imprisonment for life on 7th December 2000.

5] The petitioner filed the present petition stating that section 427 of the Cr.P.C. and particularly sub-section 2 thereof has not been noted by the authorities. Therefore, he is not being released from prison and is required to undergo the sentence in the subsequent sessions case as noted by us above. In other words, the sentence is taken to have been awarded consecutively.

6] Mrs.Farhana Shah Advocate appointed for the petitioner invited our attention to section 427 of Cr.P.C. That section reads thus:-

“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.”

7] She submits that sub-section 2 on a bare perusal would be attracted and if the wording of sub-section 2 is that the subsequent sentence shall run concurrently with such previous sentence, then, the Prison Authorities as also the State Government have committed a grave error in passing the impugned order dated 24th September 2013.

8] The learned APP Mr.Saste, submitted that the reasoning in the impugned order is based on the judgements of conviction and sentence recorded against the present petitioner. Since

the petitioner has not been conferred any benefit, the authorities rightly have taken into consideration the fact that the subsequent sentence must run consecutively.

9] In any event, the authorities have relied upon an order passed by a learned Single Judge (D.G.Karnik, J) dated 3rd December 2009 in Criminal Application No.1843 of 2008 (Mohammad Aslam Ahemad Hussain Khan Vs. State of Maharashtra).

10] With the assistance of the learned Advocates for both the sides, we have perused the petition and the annexures thereto and we have also perused the order passed by the State Government on 24th September 2013.

11] We are of the view that the law is absolutely clear in its application. "Sentence on offender" is the title of the section. Sub-section 1 states that when a person already undergoing

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 expiry 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. The proviso clarifies that any person who has been sentenced to imprisonment by order under section 122 in default of furnishing security, is while undergoing such sentence, but sentenced to imprisonment for an offence committed prior to the making of the order under section 122, the latter sentence shall commence immediately. Sub-section 2 states that a person already undergoing the sentence of imprisonment for life is sentenced on subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.

12] Before us, it is factually not disputed that the petitioner

was convicted by the learned Additional Sessions Judge and on 27th November 1998 in the TADA Case. He was sentenced to suffer imprisonment for life. Subsequent sentence for imprisonment of life is recorded against him on 7th December 2000. In these circumstances, sub-section 2 of section 427 was clearly attracted and we do not see how the same was inapplicable.

13] The reasoning in the impugned order is clearly contrary to the legal provision. If the section itself states that a subsequent conviction to imprisonment for a term or imprisonment for life has been awarded to a person already undergoing the sentence for imprisonment for life, then, we do not see how the distinction could have been made and as made in the impugned order. The conviction and sentence subsequently recorded or awarded is bound to be in a different case. It could not have been that a person who is convicted and sentenced to suffer imprisonment for life and undergoing a

sentence can be convicted and sentenced in the same case again. There is bound to be a separate case or a different trial and in any event a subsequent conviction and sentence. That the offences alleged are distinct is also irrelevant for the purpose of application of this section.

14] Way back in the year 1991 and in the case of Ranjeet Singh Vs. Union Territory of Chandigarh, reported in A.I.R. 1991 S.C. 2296, the Supreme Court clarified the legal position in the following terms:-

“7. The question now is of the meaning of Section 427(2) Cr.P.C. and its effect, in the present case, in view of the above quoted direction of this Court in its judgement dated 30-9-1983 (reported in A.I.R. 1984 S.C. 45).

“8. Sub-section (1) of Section 427 Cr.P.C. provides for the situation when a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or life imprisonment. In other words, sub-section (1) of section 427, Cr.P.C. deals with an offender who while undergoing sentence for a fixed term is subsequently convicted to imprisonment for a fixed term or for life.

In such a situation, the first sentence, being for a fixed term, expires on a definite date which is known when the subsequent conviction is made. Sub-section (1) says that in such a situation, the date of expiry of the first sentence which the offender is undergoing being known, ordinarily the subsequent sentence would commence at the expiration of the first term of imprisonment unless the court directs the subsequent sentence to run concurrently with the previous sentence. Obviously, in cases covered by sub-section (1) where the sentence is for a fixed term, the subsequent sentence can be consecutive unless directed to run concurrently. Sub-section (2), on the other hand, provides for an offender "already undergoing sentence of imprisonment for life" who is sentenced on a subsequent conviction to imprisonment for a term or for life. It is well settled since the decision of this Court in Gopal Vinayak Godse (AIR 1961 S.C. 600) and reiterated in Maru Ram (A.I.R. 1980 S.C. 2147) that imprisonment for life is a sentence for the remainder of the life of the offender unless the remaining sentence is commuted or remitted by the appropriate authority. This being so at the stage of sentencing by the Court on a subsequent conviction, the earlier sentence of imprisonment for life must be understood in this manner and, therefore, there can be no question of a subsequent sentence of imprisonment for a term or for life running consecutively which is the general rule laid down in sub-section (1) of Section 427. As rightly contended by Shri Garg and not disputed by Shri Lalit, the earlier sentence of imprisonment for life being understood to mean as sentence to serve the remainder of life in prison unless commuted or remitted by the appropriate authority and a person having only one life span, the sentence on a

subsequent conviction of imprisonment for a term or imprisonment for life can only be superimposed to the earlier life sentence and certainly not added to it since extending the life span of the offender or for that matter anyone is beyond human might. It is this obvious situation which is stated in sub-section (2) of section 427 since the general rule enunciated in sub-section (1) thereof is that without the Court's direction the subsequent sentence will not run concurrently but consecutively. The only situation in which no direction of the Court is needed to make the subsequent sentence run concurrently with the previous sentence is provided for in sub-section (2) which has been enacted to avoid any possible controversy based on sub-section (1) if there be no express direction of the Court to that effect. Sub-section (2) is in the nature of an exception to the general rule enacted in sub-section (1) of section 427 that a sentence on subsequent conviction commences on expiry of the first sentence unless the Court directs it to run concurrently. The meaning and purpose of sub-sections (1) and (2) of Section 427 and the object of enacting sub-section (2) is, therefore, clear.

“9. We are not required to say anything regarding the practical effect of remission or communication of the sentences since that question does not arise in the present case. The limited controversy before us has been indicated. The only question now is of the meaning and effect of the above quoted direction in this Court's judgement dated 30-9-1983 (reported in A.I.R. 1984 S.C. 45). It is obvious that the direction of this Court must have to be construed to harmonise with Section 427(2) Cr.P.C. which is the statutory mandate apart from

being the obvious truth. The subsequent sentence of imprisonment for life has, therefore, to run concurrently with the earlier sentence of imprisonment for life awarded to the petitioner. The real exercise is to construe the last sentence in the direction which reads as under:-

“We, therefore, direct that in case any remission or commutation in respect of his earlier sentence is granted to him the present sentence should commence thereafter.”

It is in the background of this ultimate direction that the preceding portion has to be read. This last sentence in the direction means that in case, any remission or commutation is granted in respect of the earlier sentence of life imprisonment alone, then the benefit of that remission or commutation will not ipso facto available in respect of the subsequent sentence of life imprisonment which would continue to be unaffected by the remission or commutation in respect of the earlier sentence alone. In other words, the operation of the superimposed subsequent sentences of life imprisonment shall not be wiped out merely because in respect of the corresponding earlier sentence of life imprisonment any remission or commutation has been granted by the appropriate authority. The consequence is that the petitioner would not get any practical benefit of any remission or commutation in respect of his earlier sentence because of the superimposed subsequent life sentence unless the same corresponding benefit in respect of the subsequent sentence is also granted to the petitioner. It is in this manner that the direction is given for the two sentences of life imprisonment not to run concurrently.”

15] Similarly in the order dated 23rd August 2013, passed on Criminal Writ Petition No.139 of 2013 (Vasudeo Shankar Rajput @ Kanjarbhat Kurkumbh, Tal.Daund, Dist. Pune Vs. State of Maharashtra), the Division bench of this Court held as under:-

“The language of the section is clear and unambiguous. The section has been worded in imperative terms which is evident from the use of the expression, “the subsequent sentence shall run concurrently with such previous sentence: and admits of no discretion or exception in the matter of directing the subsequent sentence to run concurrently. Learned APP for the State also graciously concedes this position. The Superintendent of Jail ought to have implemented the mandate of section 427(2) and given its benefit to the petitioner without making him knock at the doors of this Court. The petitioner, however, had to come before this Court. That was absolutely unwarranted and unavoidable. It has unnecessarily caused stress and inconvenience to the petitioner. Section 427(2) casts a public duty upon the authority, in charge of the physical custody of the convicts, to apply its provisions upon fulfillment of the conditions stated therein. Conversely, the section confers a right upon the convict to seek the benefit thereof whenever conditions stated therein are fulfilled. The Jail Superintendent, however, has ignored the import of section 427(2) and we hope that whenever he comes across such cases, he will apply

section 427(2) on being satisfied that the conditions prescribed therein are fulfilled. Needless to say that the only condition that has to be fulfilled in such a case is that the convict should have been previously sentenced for a life imprisonment and should have been subsequently sentenced for a imprisonment for a term or imprisonment for life.”

16] We do not see how in the impugned order the Authority could have relied upon an order made by the learned Single Judge of this Court, which does not discuss anything beyond accepting the factual position. This cannot be said to be a judgement for the principle relied upon before us at all. The attention of the learned Single Judge was not invited to the section 427(1) and particularly sub-section 2 or any of the judgements of the Supreme Court. In these circumstances, we do not think that the learned Judge laid down the correct legal principle insofar as applicability of Section 427(2) of Cr.P.C. assuming that the factual position was not disputed before him.

17] We are, therefore, of the opinion that the petitioner was entitled to the benefit of sub-section 2 of section 427 of the

Cr.P.C. and the impugned order is ex facie erroneous and illegal. It is totally perverse as well. For all these reasons, the petition succeeds. The impugned order dated 24th September 2013 of the State Government is quashed and set aside. The petitioner shall be entitled to the benefit of sub-section 2 of section 427 and the authorities shall abide by the same accordingly.

(S. C. DHARMADHIKARI, J)

(G.S. PATEL, J)