

CHAMPALAL POONJAJI SHAH

v.

STATE OF MAHARASHTRA

January 27, 1982

[O. CHINNAPPA REDDY, A.P. SEN AND BAHARUL ISLAM, JJ.]

Code of Criminal Procedure 1973, S. 428—Person—Preventively detained for different periods under MISA, COFEPOSA—Later prosecuted, convicted and sentenced to imprisonment—Period spent under preventive detention—Whether can be 'set-off' against sentence of imprisonment.

The Presidency Magistrate convicted the [petitioner for offences under section 120B of the Indian Penal Code read with section 135 of and Customs Act and Rule 126P(2) (ii) and (iv) of the Defence of India Rules 1962 and sentenced him to suffer imprisonment for various periods ranging from two years to four years and to payment of fine. The conviction and sentence was set aside by the High Court, but this Court in appeal by the State set aside the judgment of acquittal by the High Court and restored that of the Presidency Magistrate. The petitioner was also preventively detained for various periods first under the Maintenance of Internal Security Act and afterwards under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974.

In the review petition and writ petition to this Court it was contended on behalf of the petitioner that : (1) though it was argued in the appeal to this Court that the periods during which the petitioner had been preventively detained should be 'set off' against the sentence of imprisonment imposed upon him this court had not touched upon the point; and (2) this court's decision in *Government of Andhra Pradesh and another v. Venkateswara Rao*, AIR 1977 SC 1096, enabled the petitioner to claim the total of the three periods of detention to be 'set off' against the sentence of imprisonment.

Dismissing the review and writ petition,

HELD : 1. It was not argued that the petitioner was entitled to a 'set off' but that the period of his detention might be taken into account in considering the question of the appropriate sentence be imposed on him. [62 H, 63 A]

2(i) In *Government of Andhra Pradesh v. Venkateswara Rao*, this Court negated the contention that the expression period of detention in Section 428, Code of Criminal Procedure 1973 included the detention under the Preventive Detention Act or the Maintenance of Internal Security Act. [63 F-G]

(ii) Section 428, Code of Criminal Procedure 1973 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. [64 A-B]

A (iii) Only in circumstances where the petitioner would have unquestionably been in detention in connection with a criminal case if he had not been preventively detained, his preventive detention might be reckoned as detention as an undertrial prisoner or detention pursuant to conviction, for the purposes of Section 428, Code of Criminal Procedure 1973. [64 G]

B In the instant case the petitioner had been acquitted by the High Court before any of the orders of detention were made against him. There can, therefore, be no question of the detention being considered as detention pursuant to conviction nor can the detention be treated as that of an undertrial. [64 F]

ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 7207 of 1981.

C (Under Article 32 of the Constitution of India)

Ram Jethmalani and Miss Rani Jethmalani for the Petitioner.

The Judgment of the Court was delivered by

D CHINNAPPA REDDY, J. This petition for review and the petition for the issue of Writ under Article 32 were argued by Shri Jethmalani with, what appeared to us to be more than his customary vehemence and emotion. Nonetheless, we confess, we are not impressed.

E By our judgment dated August 12, 1981⁽¹⁾, we had set aside the judgment of acquittal passed by the High Court of Bombay and restored that of the learned Additional Chief Presidency Magistrate, 8th Court, Esplanade, Bombay, convicting the petitioner under different heads of charges and sentencing him to suffer imprisonment for various terms ranging from two years to four years and to the payment of fine of Rs. 10,000/- on each of different counts.

F Shri Jethmalani contended that though he had argued that the period during which the petitioner had been preventively detained under the Maintenance of Security Act and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act should be 'set off' against the sentence of imprisonment imposed upon him, we had not touched upon the point. He also drew our attention to a reference to 'set off' in the written submissions given to us after the hearing of the case. We may mention that what was argued before us was not that the petitioner was entitled to a 'set off' but that the period of his detention might be taken into

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(1) [1982] 1 SCR 299.

account in considering the question of the appropriate sentence to be imposed on the petitioner, which question was considered by us. But, we will let that pass, accept Mr. Jethmalani's word for it and proceed to consider the question straightaway.

It appears that the petitioner was detained first under the provisions of the MISA and later under the provisions of the COFEPOSA. The periods of detention were September 17, 1974 to April 18, 1975, July 1, 1975 to November 21, 1975 and May 20, 1976 to March 22, 1977. We are told that the orders of detention, which have not been produced before us, were based on facts which were the vary subject-matter of the criminal case. The learned Additional Chief Presidency Magistrate had convicted the petitioner by his judgment dated December 13, 1971 but that was set aside by the High Court by their judgment dated April 20, 1974. The State of Maharashtra filed an application for special leave under Art. 136 of the Constitution on November 30, 1974 and special leave was granted by this Court on April 15, 1975. It was noticed by this Court at the time of granting special leave that the petitioner was then in preventive detention and it was directed that in case he was released from detention but rearrested in connection with the case he should be released on bail on the same terms as those on which bail had been previously granted by the High Court. The submission of Shri Jethmalani was that the total of the three periods of detention should be "set off" against the sentence of imprisonment imposed upon him. He relied upon the decision of this Court in *Govt. of Andhra Pradesh & Anr. v. Anne Venkateswara Rao etc. etc.*⁽¹⁾

We are unable to agree with the submission of Shri Jethmalani. In the very case cited by the learned counsel, the Court negatived the contention that the expression 'period of detention' in Section 428 Code of Criminal Procedure included the detention under the Preventive Detention Act or the Maintenance of Internal Security Act. It was observed :

"It is true that the section speaks of the period of detention undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the

(1) AIR 1977 SC 1096—[1977] 3 SCR 7.

- A** 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 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,
- B** 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".
- C** After holding that the period during which the petitioners therein were in preventive detention could not 'set off' under Section 428 Code of Criminal Procedure against the term of imprisonment imposed on them, the Court went on to consider whether the period during which the petitioners were in preventive detention could for any reason be considered as period during which the petitioners
- D** were in detention as undertrial prisoners or prisoners serving out a sentence on conviction. In the case of the prisoner A. V. Rao the Court held that the period commencing from the date when he would have normally been arrested pursuant to the First Information Report registered against him should be reckoned as period of detention as an undertrial prisoner. In the case of another prisoner Krishnaiah it was held that the period during which he was
- E** in preventive detention subsequent to the conviction and sentence imposed upon him should be treated as detention pursuant to conviction and sentence. The case before us is altogether different. The petitioner had been acquitted by the High Court before any of the orders of detention were made against him. There can be no
- F** question of the detention being considered as detention pursuant to conviction; nor can the detention be treated as that of an undertrial. It is only in the circumstances where the prisoner would have unquestionably been in detention in connection with a criminal case if he had not been preventively detained, his preventive detention might be reckoned as detention as an undertrial prisoner or detention
- G** pursuant to conviction, for the purposes of Section 428 Code of Criminal Procedure.

- H** Shri Jethmalani next contended that the petitioner had not been given an opportunity to argue on the question of sentence. That is hardly fair to us. A substantial part of the argument of Shri Jethmalani on that occasion was on the question of sentence

and, in the judgment pronounced by us, we did consider the argument advanced by the learned counsel on the question of sentence. It was also contended before us that the Court was not justified in holding that the petitioner was responsible for the long delay that had been caused in the disposal of the case and that the Court was wrong in holding that it was for the accused to show that he had been prejudiced by the delay. We see no merit in these contentions. The application for review is therefore dismissed. No separate arguments were advanced in the Writ Petition which is also dismissed.

N.V.K.

Petitions dismissed.