

**Akloo Sada Vs. State of Bihar**

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**Court :** Patna

**Decided On :** May-08-1998

**Judge :** Aftab Alam, J.

**Acts :** Code of Criminal Procedure (CrPC) , 1974 - Sections 428; [Indian Penal Code \(IPC\), 1860](#) - Sections 395 and 397; Preventive Detention Act

**Appeal No. :** Crl. Appeal No. 27 of 1998

**Appellant :** Akloo Sada

**Respondent :** State of Bihar

**Advocate for Def. :** Anant Prakash Sahay, Addl. P.P.

**Advocate for Pet/Ap. :** S.N.P. Sinha, Sr. Adv., R.K. Sinha, J.N. Sinha and Syed Faiyaz Husain, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**Aftab Alam, J.**

1. The appellant stands convicted under Section 395 of the Penal Code and sentenced to undergo rigorous imprisonment for five years.

2. According to the prosecution case in the night between June 5 and 6, 1976, a dacoity was committed in the house of the informant Yogendra Yadav, PW 1. The miscreants apart from looting the household articles were looking for the informant's father Mauje Lal. On finding him, they assaulted him with lathis and sticks and one of them also fired a shot at him. Among the miscreants, the informant (and other members of his family) identified some dacoits including the present appellant. In his fardbeyan the appellant gave a list of the articles looted away and also stated that his family was having some dispute with the co-accused Sheonandan Yadav and it was his belief that Sheonandan Yadav had got the dacoity committed with the aid of some groups of dacoits.

3. The appellant who was named in the F.I.R. was arrested on 20-6-76 and was released on bail on 16-9-76. After his release on bail, the appellant absconded. Thus, compelling the trial Court to proceed with the trial of the other two co-accused in S.T. No. 108 of 1981 separating the appellant from that trial. It may only be noted incidentally that S.T. No. 108 of 1981 ended in the acquittal of the two other co-accused Bindul Mukhiya and Sheonandan Yadav vide judgment dated 15-3-1993.

4. When the appellant was later apprehended, he was put on trial in S.T. No. 119/1982 and at the conclusion of the trial, he was convicted and sentenced by the trial Court as indicated above.

5. The prosecution in support of its case examined five witnesses. PW 1 is the informant Yogendra Yadav; PW 2 Ram Bila.s is one of the neighbours of the informant. It may be stated that the trial Court has not found him trustworthy. PW 3 is a formal witness who proved the fardbyean which was marked as Ext. 1. PW 4 is the brother of the informant who was present in the house at the time of commission of the dacoity and who also had identified the appellant among the dacoits. PW 5 was tendered. The I.O. and the doctor who had examined the informant's father and some other witnesses named in the charge-sheet were not examined.

6. Learned Counsel appearing for the appellant submitted that the non-examination of the I.O. and the doctor had vitiated the trial and the conviction of

the appellant was not sustainable on that score. I am unable to accept the submission. The non-examination of the I.O. has in no way prejudiced the appellant's case. So far as non-examination of the doctor is concerned, it was perhaps due to the non examination of the doctor that the appellant was convicted under Section 395 and not under Section 397 of the Penal Code. The appellant, therefore, can make no grievance about non-examination of the doctor.

7. The participation of the appellant in the commission of the dacoity is fully established on the basis of the evidence of PWs 1 and 4 who named him consistently as being one of the dacoits. Both these witnesses identified him during the commission of the dacoity and also before the trial Court. Their evidence is quite consistent on all material issues and I see no reason not to accept their testimony.

8. I accordingly find and hold that the appellant's conviction was arrived at on a proper appraisal of the prosecution evidence by the trial Court and it does not warrant any interference by this Court. The appellant's conviction under Section 395 of the Penal Code is accordingly confirmed.

9. On the question of sentence, learned Counsel for the appellant submitted that in case the different periods of detention undergone by the appellant as an under-trial are properly accounted for in terms of Section 428 of the Code of Criminal Procedure ('the Code', hereinafter), it would be found that he has already served out the entire sentence and is, therefore, entitled to be released, learned Counsel further submitted that the trial Court erred in not reckoning the period during which the appellant was in custody in Begusarai jail in connection with some other case and from where he was not being produced before the Samastipur Court in the connection with this case notwithstanding the production warrant issued by the Samastipur Court.

10. From the records of the case, it appears that the appellant was arrested in connection with this case on 20-6-1976 and he was released on bail on 16-9-1976 (1st period of detention of two months and 21 days). Sometime after his release on bail, he failed to appear in this case before the Samastipur Court. Later on 30-6-1988 a petition was filed stating that the appellant was lodged in Begusari jail as

an under-trial in connection with some other case, On the basis of that petition, the trial Court at Samastipur issued a production warrant asking the jail authorities at Begusarai to produce the appellant in this case before the Samastipur Court. Though the production warrant was issued on 30-6-1988, the appellant was produced before the Samastipur Court in connection with this case on 22-11-1990 (2nd period of detention of 2 years 4 months 22 days at Begusari jail in connection with other case). On being produced on 22-11-1990, he was remanded in this case and was again released on bail on 16-9-1991. (3rd period of detention of 9 months 24 days). He was again arrested and produced before the Court on 31 -1 - 1994 and was once again released on bail on 19-4-1994 (4th period of detention of 3 months 19 days). Finally, the judgment was pronounced in this case on 28-11-1997. On that date the appellant was taken back in custody and has remained in jail from that date. On 8-5-1998 the date of pronouncement of this judgment by this Court, he has, thus, remained in jail for five months ten days as a convict undergoing sentence.

11. From the order coming under appeal, it appears that when a submission was made before the learned trial Court that the appellant had already completed about five years of detention as an under-trial, the trial Court did not accept the submission. For calculating the appellant's period of detention as an under-trial it took into account his first period of detention of two months 26 days; the 3rd period of detention of nine months and 24 days and the 4th period of detention of three months and 19 days and found and held that the appellant had remained in custody as under-trial only for 15 months and few days. The trial Court did not take into account the second period of his detention of two years four months and 22 days in Begusarai jail on the ground that that was in connection with some other case and not in connection with this case.

12. It is evident that in case the 2nd period of detention (two years four months 22 days) is taken into account along with his current detention (for the period of five months 10 days) as a convict undergoing sentence, he would complete more than five years of detention and would, therefore, be entitled to be released on completion of this sentence.

13. Learned Counsel for the appellant submitted that the 2nd period of detention (two years four months and 22 days) when the appellant was not being produced from the Begusarai jail in this case before the Samastipur Court must be taken into account in view of the fact that the Samastipur Court had issued the production warrant on 30-6-1988 and the failure of the jail authorities to produce the appellant before the Samastipur Court in disobedience of the Court's warrant must not be allowed to deprive the appellant from the benefit under Section 428 of the Code.

14. In support of his submission, learned Counsel relied upon a Supreme Court decision in *Government of A.P. v. A.V. Rao* AIR 1977 SC 1096 : (1977 Cri LJ 935) (para 8) which is as follows (at Page 939 of Cri LJ):

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 for remand on December 19, 1970. 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 the 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 under-trial prisoner, must be accepted as valid. *A.V. Rao's Appeal*

No. 484 of 1976 is allowed to this extent.

15. I find that the Supreme Court decision relied upon by the learned Counsel fully applies to the facts of the present case. In fact, the case of the appellant appears to me to be on a stronger footing. In the case of A.V. Rao, he was in detention under the Preventive Detention Act and in that circumstance the State Govt. took the plea that being in detention under the Preventive Detention Act, he could not be produced before the Magistrate for remand in the substantive case until the period of preventive detention, was over. The Supreme Court found no justification in the plea taken by the State.

16. In the present case, the appellant was lodged at the Begusarai jail merely as an undertrial prisoner in connection with some other case. The Samastipur Court had also issued a production warrant for his production before it. The jail authorities, therefore, had no reason to withhold his production before the Samastipur Court for more than two years and four months and the appellant can, therefore, lawfully claim that that period should also be set off against his sentence of imprisonment and I accordingly uphold the submission on his behalf. It is noted above that if the period along with the period of his detention after the pronouncement of the trial Court judgment is taken into account, he would have completed more than five years of detention. It must, therefore, be held that the appellant has already served out the sentence awarded to him by the trial Court in this case. He is accordingly directed to be released forthwith provided he is not wanted in any other case.

17. In the result, the appeal stands dismissed subject to the aforesaid observations and directions.

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