

Husseln Khan Mohamed Khan Vs. the State of Maharashtra

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Court : Mumbai

Decided On : Mar-26-1979

Reported in : (1980)82BOMLR262

Judge : B.N. Deshmukh, C.J.,; Chandurkar and ;Sawant, JJ.

Appeal No. : Criminal Application No. 623 of 1977

Appellant : Husseln Khan Mohamed Khan

Respondent : The State of Maharashtra

Judgement :

B.N. Deshmukh, C.J.

1. This application has been referred to the Full Bench as it was felt that there is apparent conflict between an earlier division Bench judgment in Shri, Chandiram v. Datwani v. The State of Maharashtra (1976) Criminal Application No. 2380 of 1973, decided by Chandurkar and Shah JJ., on August 18/19, 1976 (Unrep.) and the view expressed by the division Bench which passed the reference order in the present application.

2. The main point refers to the correct meaning and interpretation of Clause 37 of the Maintenance of Internal Security (Maharashtra Conditions of Detention) Order, 1971 (hereinafter referred to as 'the Order').

3. The facts which are not in dispute and which are relevant for the purpose of deciding the point are these : The petitioner was prosecuted in two different criminal cases being cases Nos. 1411 of 1974 and 1412 of 1974. The first was under Sections 7 and 8 of the Essential Commodities Act read with Clause 3(1)(b) of the Maharashtra Guests Control Order. The second prosecution was under Clause 8 of the Maharashtra Food Rationing (Second) Order. The petitioner was convicted in both the cases. In the first case, he was sentenced to pay a fine of Rs. 1,000 and to undergo one day's simple imprisonment. In the second case, he was merely sentenced to pay a fine of Rs. 500. He paid fine in both the cases and also underwent one day's simple imprisonment. The order of conviction in both the cases is dated October 8, 1974.

4. Being aggrieved by the inadequacy of the sentence, the State of Maharashtra filed also two appeals in the two criminal cases, being Criminal Appeals Nos. 209 of 1975 and 40 of 1975 for enhancing the sentence. These two appeals were heard by a learned single Judge of this Court and were disposed of on January 17, 1977. Both the appeals were allowed and the petitioner's sentence was enhanced to three months' simple imprisonment in respect of each of the criminal cases. The sentences were to run concurrently. *

5. It may be noted that on the same day, the High Court offices prepared two separate writs in respect of the two appeals, being Writs Nos. 340 and 341, and transmitted them to the Magistrate concerned for the purpose of preparation of warrant and its enforcement. The Magistrate received the writs on January 19, 1977. The record of the cases was transmitted to him on January 18, 1977 which he received on January 21, 1977. Instead of immediately issuing the warrant or warrants concerned, the Magistrate felt that two writs were defective and might lead to wrong warrants being issued. He, therefore, made a back reference to the High Court by his letter dated January 27, 1977 for correction of the two writs. It appears that the learned single Judge who delivered the judgment was not available and the corrected writs were sent to the Magistrate again on February 25, 1977. A warrant on the basis of these corrected writs was executed on April 4, 1977 and the petitioner-accused was sought to be detained as a convicted criminal prisoner under the High Court order for conviction.

6. During this period when the two appeals against the petitioner-accused were pending in this Court, he was detained under the provisions of the Maintenance of Internal Security Act, 1971 (hereinafter referred to as the 'MISA'), on February 18, 1976. He continued to be so' detained under that Act till February 22, 1977 when he was released from the MISA detention.

7. The petitioner filed the present application for claiming certain relief under Clause 37 of the Order on April 18, 1977. The petition was admitted and was heard on April 29, 1977 by a division Bench. As the division Bench felt that it was unable to agree with the view already taken in an earlier judgment of a division Bench in *Shri Chandiram V. Datwani v. The State of Maharashtra*, a reference to a larger Bench was made. However, while doing so, the petitioner was released on bail with effect from May 10, 1977.

8. The main point raised by the petitioner before us is that the provisions of Clause 37 of the Order changed the nature of his custody as he was a security prisoner when the sentence of imprisonment of three months was pronounced by the High Court. That the nature of detention or custody of security prisoner changes after the pronouncement of a sentence by a criminal Court is not in doubt. What is being seriously debated is the point of time from which this change should come about. It would, be therefore, necessary to have the provisions of Clause 37 of the Order before our eyes while interpreting it. It reads as follows :

Notwithstanding anything contained in this Order, a security prisoner who has been convicted of an offence under any law for the time being in force and sentenced to imprisonment shall be deemed to be a convicted criminal prisoner within the meaning of the Prisons Act, 1894, and shall be governed by the provisions of that Act and the rules made thereunder during the term of imprisonment: Provided that, nothing in this condition shall affect the powers of the Government to remove such convicted criminal prisoner from one place of detention to another place of detention under Clause (b) of Section 5 of the Ordinance.

9. Mr. Gupte for the petitioner argued by looking at the literal wording of this clause that the clause operates the moment conditions therein are satisfied. The first

condition is that there should be a security prisoner against whom an order of conviction of an offence under any law for the time being in force is being pronounced. The next condition is that the order of conviction must result in a sentence of imprisonment being imposed upon the security prisoner. If these two conditions are satisfied, the moment the judgment of conviction is pronounced by a competent criminal Court, the security prisoner is to be forthwith treated as a convicted criminal prisoner within the meaning of the Prisons Act, 1894. According to him, the present petitioner satisfied all the conditions of this clause. Initially under the two criminal cases, he had undergone the entire sentence. He paid the fine and also underwent one day's simple imprisonment. While the State appeals for enhancement of sentence were pending, he was detained as a security prisoner under MISA with effect from February 18, 1976. When the learned single Judge heard the appeal and enhanced the sentence by his judgment and order dated January 17, 1977, the petitioner was already in the State custody as a security prisoner. On January 17, 1977 itself, the nature of his custody must be deemed to have been changed under the above quoted Clause 37. This is because a security prisoner is already in the State custody and the Court's order of sentence would now begin to operate forthwith. On the plain wording of the section, the occurrence of this event of a sentence being enhanced as against the security prisoner is enough to convert the nature of his custody.

10. According to Mr. Gupte. the result that should follow is that from January 17, 1977 till February 22, 1977 when the petitioner was still a security prisoner, the period ought to be counted as a period of sentence undergone under the High Court's order enhancing the sentence. In other words, he must be given a credit of one month and five days towards his account of the three months' sentence imposed upon him. If that is done by taking into account the subsequent period from April 4, 1977 when he was arrested under a warrant to May 10, 1977 when he was released on bail by this Court, the total sentence would be deemed to have been undergone by him. In fact after giving credit of the period of one month and five days, May 10, 1977 was found to be the date when the bail should become effective.

11. As against this, learned Public Prosecutor, Mr. Kotwal, argued that there is not the least doubt that the nature of the custody of a security prisoner ought to change to that of a convicted criminal prisoner. However, according to him, Clause 37 is really declaratory of the legal position that already exists under the various laws applicable to such a situation. In fact, according to him, the Full Bench itself was unnecessary in view of the fact that the point in dispute is covered, if not directly at least inferentially, by a judgment of the Supreme Court.

12. He referred us to the provisions of the Prisons Act, 1894, in the first instance. Section 3 is a definition section in which Clause (2) defines 'criminal prisoner'. 'Criminal prisoner' means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court-martial. 'Convicted criminal prisoner' has been defined in Clause (3). According to this definition, a 'convicted criminal prisoner' means any criminal prisoner under sentence of a Court or Court-martial, and includes a person detained in prison under the provisions of chap. VIII of the Code of Criminal Procedure, 1882, or under the Prisons Act, 1871. In order that a person should be described as a criminal prisoner, it should be possible to point out that he is committed to the custody under a writ, warrant or order of a court or authority exercising criminal jurisdiction or by an order of a court-martial. The custody, therefore, is referable to some kind of an order of a court or authority exercising criminal jurisdiction or the court-martial. When such a criminal prisoner is committed to the custody in view of a sentence of a court or court-martial, then he becomes a convicted criminal prisoner. This is an inclusive definition and takes account of a person detained in prison under the provisions of chapter VIII of the Code of Criminal Procedure, 1882, or under the Prisons Act, 1871. The point that he wants to emphasise by referring to these two definitions is that it is not enough that a person is involved in some criminality or is sentenced to suffer imprisonment by an order of a court. His custody must be referable to an order, writ or warrant of a court or authority exercising criminal jurisdiction or to a sentence of a court or Court-martial under some law of this country,

13. He then proceeds to point out as to when the sentence of a criminal Court must be deemed to commence so far as the convict is concerned. Section 418 of

the Code of Criminal Procedure, 1973, deals with the execution of sentence of imprisonment. This section consists of two sub-sections and different situations are visualised under the two sub-sections. Sub-section (1) deals with a situation where the accused person is already in custody and is before the Court. If a sentence is pronounced of imprisonment for life or of imprisonment for a term in cases other than those provided for by Section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he 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. It is, therefore, clear that where the accused is present in Court or is already in some jail while the sentence is being pronounced, the Court has to send the warrant to the place concerned and where the accused is in Court, the accused is also to be forwarded with the warrant to the appropriate place where he is to be confined. The language of Sub-section (1) of Section 418 makes it clear that the person is described as an accused who is to be sentenced by the Court concerned and such an accused person is in custody in relation to the trial of that offence. Unless, therefore, the accused person is already in custody in relation to the trial of the particular offence, his case would not fall under Section 418(1). The proviso to Sub-section (1) is not relevant for our purpose and need not be referred to.

14. Sub-section (2) of Section 418 contemplates cases where the accused person is not in custody in relation to the very same proceedings and is also not present in Court. Where, therefore, the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in Sub-section (1), the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined and in such case, the sentence shall commence on the date of his arrest. In the case of other persons who do not fall under Sub-section (1) of Section 418, the procedure laid down is that the Court convicting him and sentencing him to jail must issue a warrant of arrest. On the date the warrant is actually executed and the accused is put under arrest, the sentence begins to run.

15. On the basis of these provisions, the learned Public Prosecutor argued that the present petitioner-accused had already undergone the sentence imposed upon him by the trial Court and he was not an accused in custody in relation to the very

same case or cases.

16. It may be that while the State appeals for enhancing the sentence were pending, he was detained under the provisions of the MISA. That detention which commenced on February 18, 1976 and continued till February 22, 1977 is referable only to the detention order under that Act and it is not a detention as an accused person in relation to the cases against which State appeals were pending before the High Court. When the High Court pronounced its judgment and enhanced the sentence, though the present petitioner was in State custody under the provisions of the MISA, he could not be described as a person to whom Sub-section (1) of Section 418 of the Code of Criminal Procedure would apply. He was a person to whom Sub-section (2) would apply. Realising this, after the order enhancing the sentence was passed by this Court, a writ was issued to the Magistrate concerned for issuance of a warrant under which the petitioner had to be arrested and taken into custody for undergoing the sentence now pronounced against him. That was done in this case by sending down the writ on January 17, 1977 itself and by forwarding the record of the case on January 18, 1977 to enable the Magistrate to issue a proper warrant of arrest. This record was received on January 21, 1977 and on that day ordinarily a warrant of arrest should have been issued and also enforced against the accused since he was in the State custody in some other case.

17. It is also brought to our notice that certain additional circumstances intervened due to no fault of anyone as the two writs issued seemed to confuse the Magistrate who was of the view that only one writ was enough in both the cases as both the appeals were heard together and disposed of by a common judgment and order. Due to this view taken by the Magistrate, time was lost in that reference and reply thereof and ultimately a warrant could be issued on the basis of the corrected writ on February 25, 1977 only. By that time, the petitioner was released from the custody under the provisions of the MISA and the warrant was to be enforced by arrest on April 4, 1977.

18. According to Mr. Kotwal, the Public Prosecutor, the entire time between January 17, 1977 and April 4, 1977 was, therefore, properly spent in the

preparation of a proper warrant and the enforcement thereof. The petitioner could not, therefore, claim any benefit under Clause 37 of the Order,

19. Before we consider what particular period could be treated as undergoing of sentence, it would be necessary to decide the principle on which Clause 37 of the Order could operate. What Clause 37 prima facie points out is that where two orders are running against the same person, namely, an order of detention under the provisions of the MISA and also an order of sentence of imprisonment under some offence, the overlapping period covered by these two orders shall be treated as a sentence being undergone by the person concerned. About this interpretation and meaning of Clause 37, there seems to be no dispute.

20. The crux of the problem is as to when these two periods should be deemed to be overlapping. Is it the mere pronouncement of the sentence even in the case of a person whose case falls under Sub-section (2) of Section 418 of the Code of Criminal Procedure or is it the date of the execution of the warrant either actually or on a date which the Court thinks the warrant could have been executed that is relevant.

21. It appears to us that a judgment of the Supreme Court in Govt. of A.P. v. A.V. Rao : 1977 CriLJ935 directly assists to arrive at the position. Appeals of two different types of prisoners were heard by the Supreme Court together. The first proposition laid down is not very relevant for our purpose, namely, that in order that a prisoner should get advantage of Section 428 of the Code of Criminal Procedure, the pre-conviction custody must be referable to his detention during investigation, enquiry or trial of the same case. If the earlier detention answers this description and the same case ends in conviction with a pronouncement of a substantive sentence, the earlier period is to be treated as if sentence undergone in respect of the offence. That part of the judgment is not very much relevant for us. In the case of a second person, namely, N.V. Krishnaiah, the judgment contains discussion which is directly relevant for our purpose, N.V. Krishnaiah was prosecuted in a sessions trial and sentenced to four years' rigorous imprisonment by the order of the Additional Sessions Judge dated April 10, 1972. He preferred an appeal to the High Court and the High Court released him on bail by order

dated April 29, 1972. While he was on bail, he was arrested under the provisions of the MISA on June 26, 1975. While he was so under detention under the provisions of the MISA, his appeal came to be decided on November 28, 1975. The appeal was dismissed. The argument raised on behalf of N.V. Krishnaiah was that the entire period from June 26, 1975 when he was detained under the MLSA to November 28, 1975 when the judgment of dismissal of his appeal was pronounced by the High Court must also be treated as sentence undergone by him. The Supreme Court does not indicate what positive provisions were relied upon on behalf of the accused in that case and whether they were similar to Clause 37 of the Order, Negating this claim of the accused person, what the Supreme Court lays down is that two different orders depriving the person of liberty and keeping him under the State custody are not impossible. In this case, Krishnaiah was under the State custody as a MLSA detenu from June 26, 1975. He could also be put under detention in relation to the sentence pronounced by the criminal Court. The Supreme Court accepts the proposition that with effect from the date the criminal sentence begins to run against the accused, it is the criminal sentence that is effective. What had happened in that case was that a warrant of arrest was prepared against the accused Krishnaiah on December 1, 1975 on the basis of the order dismissing his appeal dated November 28, 1975. Krishnaiah was subsequently released from the MLSA detention on December 30, 1975 on which day, the warrant dated December 1, 1975 was enforced against him and he was detained under the sentence in the sessions case. Having laid down earlier that two types of detention at one and the same time were possible, the Supreme Court analysing the facts held that the authorities were wrong in taking the stand that until Krishnaiah was released from the MLSA detention on December 30, 1975, the warrant under criminal case could not be executed against him. It could be enforced against him and ought to have been enforced against him as early as possible. On the facts of that case, the Supreme Court held that December 1, 1975 was the relevant date when the warrant was prepared in due course and since Krishnaiah was already in custody, it could have been enforced on that very day. In terms of Sub-section (2) of Section 418 of the Code of Criminal Procedure, 1973, the Supreme Court came to the conclusion that the relevant date from which the custody of Krishnaiah could be treated as that of a

convicted criminal prisoner was December 1, 1975 when the warrant could be and ought to have been executed against him.

22. This discussion gives a clear clue to the case before us. The principle which is now laid down is that there is no objection to the service of the warrant of arrest under a sentence pronounced by a criminal Court when the accused person is already in the custody of the State under the provisions of the MLSA. There is no need to wait till the release of that person from that custody before the warrant in relation to a sentence of a criminal Court could be executed. On the contrary, in due course, the warrant must be issued and also executed. What time would be normally taken in the preparation and execution of warrant and whether that time is to be called normal or in due course would depend on the facts and circumstances of each case. In relation to the facts before the Supreme Court, it felt that the preparation of a warrant of arrest on December 1, on the basis of the judgment pronounced on November 28, was a due course of preparation of the warrant. The Supreme Court also further laid down that the warrant could have been and should have been executed on that very day, namely, December 1. Even though, therefore, the warrant was actually executed on December 30, the Supreme Court held that Krishnaiah must be deemed to have undergone the criminal sentence even during the period from December 1, 1975 to December 30, 1975.

23. On the basis of this approach what would happen to the present petitioner seems to be pretty clear from the record before us. On January 17, 1977 this Court pronounced the judgment enhancing the sentence. By following the routine procedure which is laid down for executing orders of sentence passed by this Court, the office of this Court prepared two writs under the two appeals and transmitted them along with the record to the Magistrate for preparing the warrants and enforce the same. It is for the trial Court to execute the warrant. Hence the record was sent to the Magistrate from whose order the appeals were presented in this Court. The entire record together with the writs was in possession of the Magistrate by January 21, 1977. Ordinarily, therefore, he should have prepared a warrant on that day and also executed on the same day as the accused was in custody of the State. Instead of doing so, the Magistrate made a back reference by

his letter dated January 24, 1977 by assuming that the writs were not properly prepared. The writs were ultimately corrected as desired by the Magistrate and they were retransmitted to him. This correspondence consumed the time between January 21, 1977 and February 25, 1977. Before that date, the present petitioner was released from the MISA custody on February 22, 1977.

24. From February 22, 1977 to April 4, 1977 the petitioner-accused was at large and was not in State custody at all. The dispute, therefore, is whether he should be deemed to have undergone the sentence while he was under the MISA custody during the period from January 17, 1977 when the judgment was pronounced by this Court to February 22, 1977 when he was released from the MISA custody, If the warrants in question were actually executed on January 21, 1977, the case would have been directly covered by the judgment of the Supreme Court and there would have been no doubt at all as to how the detention should be treated between January 21, 1977 and February 22, 1977. Mr. Gupte, however, tries to argue that the relevant date should be the date when the High Court pronounced its order of sentence on January 17, 1977. We are afraid, such an approach cannot be accepted. The normal method by which a warrant is issued against the accused person after conviction and is executed as provided by the two sub-sections of Section 418 of the Code of Criminal Procedure must operate in all cases. In the present case, in our view, the time taken by the High Court office and the Magistrate between January 17, 1977 and January 21, 1977 is a reasonable time taken in due course in observing the routine laid down for the preparation and execution of warrants. So far as the further correspondence is concerned, we have gone through the original record and we are satisfied that the query raised by the Magistrate was not very relevant and ought not to have been raised. He could have and in fact should have prepared warrants and executed the same. If he still had further doubts he could have made a reference and got the record rectified as he desired. The two writs along with the copy of the judgment forwarded to him do not show that he was unable to prepare the warrants and there was no reason why he should have waited for the correction of the record. This is, therefore, a case where the warrant should have been prepared and executed on January 21, 1977 itself. In terms of the Supreme Court judgment, it shall be deemed to have been actually executed on that day. The nature of the custody of the present

petitioner, therefore, changed from January 21, 1977 onwards and he would be entitled to the benefit of Clause 37 of the Order. The language of Clause 37, however, is merely declaratory of the effect. Could it be said that simply because a judgment is made by a criminal Court imposing sentence upon an accused person who is in MISA custody, the authority ought to take a judicial notice for the purpose of enforcing provisions of Clause 37? Should not the authorities enforcing the sentence have same authentic order of the Court pronouncing the judgment That seems to be the reason why the Supreme Court has accepted that the time spent between November 28, 1975 and December 1, 1975 was the reasonable time when the warrant on the basis of the order of conviction and sentence was prepared and could thereafter be enforced. Unless this is done, anomalous result would follow. The authority detaining a person may be unaware of the judgment of the criminal Court and the detenu would continue to get the same advantages which he was deriving under the provisions of the Order. So far as this State is concerned, it appears that under the orders passed by this Court in some writ petitions, the conditions of detention under the provisions of MISA were very much more liberal than the conditions of detention of a convicted criminal prisoner under the Prisons Act, 1894. In order that the authorities should be in a position to treat detenu as a convicted criminal prisoner for the purpose of enforcing the provisions of the Prisons Act, 1894, they must have an authentic order in their hand. If, however, the order is not enforced for certain reasons which are not lawful, the date on which the order could have been and should have been enforced would be relevant date for converting the custody of a security prisoner to that of a convicted criminal prisoner. This being the principle on which the Supreme Court has acted, we are satisfied that in this case, the present petitioner ought to be treated as having undergone the sentence under the High Court order during the period January 21, 1977 to February 22, 1977.

25. In view of our discussion above, we find that the earlier division Bench had taken the correct view on the basis of facts that were assented before it. The learned Judges were told by an affidavit on behalf of the State that the accused concerned surrendered to his bail on May 14, 1976. If he was already on bail and surrendered to his bail on May 14, it was but proper that the division Bench look the view that the conversion of custody under Clause 37 of the Order took place

only with effect from that date. The reasoning of the reference order which seeks to merely enforce the language of Clause 37 literally seems to go a little further than the provisions seems to permit. The real legal position which now seems to be settled by the approach of the Supreme Court seems to be that the custody of a security prisoner gets itself converted into that of a convicted criminal prisoner only from that date when the two orders overlap. The order of sentence would begin to overlap in the case of a security prisoner when the warrant of arrest could have been and should have been prepared as well as enforced in due course. From that day when the warrant could have been and should have been enforced or executed, the custody gets converted.

26. In view of the interpretation we make of the provisions of Clause 37 of the Order, the petitioner is entitled to a credit of the period between January 21, 1977 and February 22, 1977, namely, one month and one day as a period undergone by him under the sentence pronounced by the High Court. If after giving this credit to him, some period out of the three months' sentence still survives, he will have to surrender to the present bail and undergo the balance of the sentence. One week's time granted to the petitioner to surrender to the bail.