

Zacharia Vs. State, Rep. by the Public Prosecutor, High Court of Kerala, Ernakulam

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Court : Kerala

Decided On : Jun-30-2011

Judge : Thomas P. Joseph

Appeal No. : Crl.M.C.No.373 of 2011

Appellant : Zacharia

Respondent : State, Rep. by the Public Prosecutor, High Court of Kerala, Ernakulam

Judgement :

If an accused while undergoing imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term, is he disentitled to get the protection of sub-sec.(2) of Section 427 of the Code of Criminal Procedure (for short, "the Code") for the reason that the subsequent sentence of imprisonment on him was suspended by the appellate court and he executed the bond but he was not released in view of the imprisonment for life awarded to him? That question is urged for a decision in this proceeding.

2. Petitioner, by the judgment of learned Second Additional Sessions Judge, Ernakulam dated November 10, 1997 in S.C. No.82 of 1996 was convicted for offence under Sec.302 of the Indian Penal Code (for short, "the IPC") and

sentenced to undergo imprisonment for life. While he was undergoing life imprisonment he preferred an appeal against conviction and sentence but the sentence of imprisonment was not suspended, nor requested for. While so, petitioner was convicted by learned Assistant Sessions Judge, Kochi by judgment dated September 30,

1999 in S.C. No.80 of 1995 for offence under Sec.307 of the IPC and sentenced to undergo rigorous imprisonment for six years. Learned Assistant Sessions Judge, in accordance with sub-sec.(2) of the Sec.427 of the Code directed that the said sentence shall run concurrently with the sentence of imprisonment for life (awarded in S.C. No.82 of 1996). Against conviction and sentence in S.C. No.80 of 1995, petitioner preferred an appeal and applied for suspension of sentence. The appellate court granted an order of suspension of sentence. Petitioner executed bond as directed by the appellate court but he was not released (nor could he) since at that time he was undergoing life imprisonment awarded in S.C. No.82 of 1996. The period of life imprisonment (having been commuted) has expired and petitioner was released on August 05, 2009. Criminal Appeal filed against conviction and sentence in S.C. No.80 of 1995 was dismissed on 28.10.2002 and the revision arising from that judgment was dismissed on October 15, 2009. Learned Assistant Sessions Judge, Kochi issued warrant for arrest of petitioner to take him to custody to serve the sentence of imprisonment awarded in S.C. No.80 of 1995 during the period it was suspended as per order of the appellate court. To recall that

warrant, petitioner filed Crl. M.P. No.71 of 2010 before learned Assistant Sessions Judge contending that he has already undergone the sentence of imprisonment awarded in S.C. No.80 of 1995 as well notwithstanding that the sentence was suspended during the period his appeal was pending, and hence he is not liable to suffer any further imprisonment. Learned Assistant Sessions Judge has dispelled that contention of petitioner observing that sentence of imprisonment for six years awarded to the petitioner in S.C. No.80 of 1995 was suspended by the appellate court and hence the period during which suspension remained in force cannot be reckoned as sentence undergone by petitioner in S.C. No.80 of 1995. The said

order is under challenge in this proceeding. Learned counsel has contended that though sentence of imprisonment awarded to the petitioner in S.C. No.80 of 1995 was suspended by the appellate court in Criminal Appeal No.319 of 1999 (of Sessions Court, Ernakulam) and petitioner had executed bail bond, he did not get the benefit of suspension since he was not released as he was undergoing imprisonment for life. Learned counsel argued that to direct petitioner to undergo imprisonment again in the above circumstances would lead to traversity of justice. Learned Public Prosecutor has contended that since sentence awarded to the petitioner in S.C. No.80 of 1995 was suspended by the learned Sessions Judge in Crl. Appeal No.319 of 1999, the period during which suspension remained in force cannot be reckoned for deciding whether petitioner has undergone the sentence awarded in S.C. No.80 of 1995.

3. Section 427 of the Code deals with sentence on offender already sentenced for another offence. I am concerned with sub-sec.(2) of the said Section which says:

"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."

It is in tune with the said provision that learned Assistant Sessions Judge while sentencing petitioner for imprisonment for six years in S.C. No.80 of 1995 directed that the said sentence shall run concurrently with the sentence of imprisonment for life awarded in S.C. No.82 of 1996. Even in the absence of a specific direction in that line, the law going by sub-sec.(2) of Sec.427 is that subsequent sentence shall run concurrently with the earlier sentence of imprisonment for life. The logic behind the legislature providing so is that a human being has only one life span, imprisonment for life means, imprisonment for rest of the life and when a person is already sentenced to undergo imprisonment for life, the court cannot add to it something to happen after his life span. It is so observed by the Apex Court also in *Zahid Hussein v. State of W.B.* ([2001] 3 SCC 750). It is also held that sentence of imprisonment for life does not automatically expire at the end of 20 years of imprisonment including remission as a sentence of imprisonment for life means a

sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or portion of the sentence.

4. Then the question is whether in the given circumstances of this case it could be said that petitioner has undergone imprisonment awarded in S.C. No.80 of 1995 as well? It is not disputed that the appellate court in Criminal Appeal No.319 of 1999 suspended sentence awarded to the petitioner in S.C. No.80 of 1995. Under sub-sec.(1) of Sec.389 of the Code appellate court is invested with the power to suspend the sentence and if the convicted person is in confinement, to order that he be released on bail or on his own bond. If the convicted person is in confinement, a mere suspension of sentence is not sufficient; he must be ordered to be released on bail or on his own bond. In this case in tune with the said provision learned Sessions Judge while suspending the sentence had directed release of petitioner on bail and the bail bond was also executed. But petitioner was not released as he was undergoing imprisonment for life.

5. Section 441 of the Code deals with execution of bond by the accused and sureties and states that before "any person is released on bail or released on his own bond", a bond for such sum of money as the police officer or court as the case may be thinks sufficient shall be executed by such person. As per the said provision a suspension of the sentence or order to release on bail is not sufficient; for his release the convicted prisoner who is in confinement has also to execute a bail bond. It is on execution of the bail bond that the convicted prisoner who is in confinement could be released. By passing an order under Sec.389(1) of the Code the sentence is not set aside - it is only kept in abeyance (See *Alijan v. State of Maharashtra* - 1989 CrL. L.J. 163). And if he is not released, the convicted prisoner remains so for all practical purposes. The Gujarat High Court in *Parshottam Soma v. State* (1972) 13 Guj. LR 585) has held that a person ordered to be released on bail but who has not yet executed the bail bond as required under Sec.441 of the Code cannot be said to be 'released' within the meaning of Sec.442 of the (old) Code.

6. It is not as if in view of Sec.427(2) of the Code, subsequent sentence of imprisonment would get merged with the earlier sentence of life imprisonment. It is only that the subsequent sentence is superimposed on the earlier life imprisonment. Assume a case where a person sentenced to life imprisonment was again sentenced to life imprisonment on a subsequent occasion and remission or commutation of the first life imprisonment is granted. The prisoner will not get any practical benefit of the remission or commutation in respect of the earlier sentence because of the superimposed subsequent life imprisonment unless corresponding benefit in respect of the subsequent sentence also is granted to the prisoner.

7. Now coming to the crucial question whether the mere fact of suspension of sentence and execution of bond should deprive petitioner of his statutory right under Sec.427(2) of the Code, I stated that suspension of sentence does not amount to setting aside the sentence but it only keeps the sentence in abeyance and further, that a person ordered to be released on bail but has not executed the bail as required under Sec.441 of the Code cannot be said to be 'released'. If he is not 'released', then there is no brake in the sentence of imprisonment which he is undergoing. In my view it is ridiculous to say that because there is an order of suspension of sentence and the prisoner has executed the bail bond but due to no fault of his, he is not released and continued to be in prison it must be taken that he has not undergone the sentence of imprisonment awarded to him. For instance, take a case where there was no earlier sentence of imprisonment awarded to the prisoner but he was sentenced to undergo imprisonment for a term and the appellate court suspended the sentence but the prisoner was not able to execute bail bond since sufficient sureties were not on hand for him, or he executed the bond but for some reason or the other he was not released or, he did not go on bail and continued to be in

prison. Could it be said that he was not undergoing imprisonment? If not, what else was his stay in the prison? In my view it can only be undergoing sentence of imprisonment. If that be so, it makes no difference that on account of earlier imprisonment for life petitioner could not be released in spite of the order of suspension of sentence by the appellate court in S.C. No.80 of 1995 and

execution of the bond. I am inclined to hold that for all practical purposes petitioner continued to be in the prison undergoing imprisonment during the period the sentence was suspended. In that situation, that imprisonment cannot be dissected and separated from the sentence awarded to him in S.C. No.80 of 1995 having regard to the tenor and legislative intent behind Sec.427(2) of the Code. As aforesaid the said provision is incorporated in the Code because it is not within the power of the court to add something after the life span of the accused. In the light of what I have stated above I hold that when a person who is undergoing life imprisonment is subsequently sentenced to life imprisonment or for a term, that subsequent sentence was suspended by the appellate court but in spite of execution of bail bond he could not be released and he continued to be in prison, he must be taken as undergoing the subsequent sentence of imprisonment as well and he is entitled to the protection of sub-sec.(2) of Sec.427 of the Code. It is not disputed that if the said period is also taken into account the sentence awarded in S.C. 80 of 1995 has also been suffered by the petitioner. If that be so, warrant issued by the learned Assistant Sessions Judge is illegal and has to be quashed. Resultantly, the Criminal Miscellaneous Case is allowed. Annexure-D, order dated November 03, 2010 of the court of learned Assistant Sessions Judge, Kochi is set and the warrant issued to the petitioner (to serve the period of sentence in S.C. No.80 of 1995 of the learned Assistant Sessions Judge) will stand recalled.

All pending Criminal Miscellaneous Applications will stand dismissed.

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