

## SURAJ BHAN

v.

## OM PRAKASH AND ANR.

February 2, 1976

[P. K. GOSWAMI, P. N. SHINGHAL AND JASWANT SINGH, JJ.]

*Code of Criminal Procedure 1973 (Act 2 of 1974)—S. 428—Scope of—Whether contemplates any challenge to conviction—Procedure to invoke the section.*

*Practice—Interference by the Supreme Court under Art. 136 of the Constitution, when the Criminal Revision before the High Court for enhancement of the sentence has become infructuous, by virtue of a judgment in the Criminal Appeal which has become final u/s 393 of CrI. P.C. 1973 (Act 2 of 1974) is not proper.*

The respondent "OP" inflicted five stab wounds on the appellant "S" on 19-4-1973 but the appellant survived thanks to prompt medical attention and an immediate operation. The trial court convicted "OP" under section 307 I.P.C. by its judgment dated 26-2-74 and sentenced him to 10 years rigorous imprisonment and also to a fine of Rs. 200/- The accused "OP" filed a (Criminal Appeal No. 442/74) in the Punjab High Court on the ground that he was entitled to set off u/s 428 of the CrI. P.C. 1973 (Act 2 of 1974), the period of his detention as an under trial prisoner against the period of imprisonment imposed upon him. The appellant "S" also filed a Criminal Revision No. 606/74 in the High Court for enhancement of the sentence against the accused. Since there was no opposition from the State to the plea in the criminal appeal, the High Court accepting the appeal, reduced the sentence of the term of imprisonment to that already undergone by him. Against the said appeal, there was no further appeal either by the State or by "S" and therefore the orders became final. The criminal revision filed by "S" was however dismissed separately by the High Court for the "reasons recorded in Criminal Appeal No. 442/74". Unable to obtain leave under Art. 134(1)(c) of the Constitution, "S" obtained special leave after notice to the accused "OP" and the State.

Dismissing the appeal, the Court

HELD: (1) It is clear from S. 428 of the Criminal Procedure Code, 1973 (Act 2 of 1974) itself that even though the conviction was prior to the enforcement of the code of criminal procedure benefit of Section 428 would be available to such a conviction. Indeed S. 428 does not contemplate any challenge to a conviction or a sentence. It confers a benefit on a convict reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as an under trial prisoner. [301H, 302A]

(2) The procedure to invoke Section 428 Criminal Procedure Code could be a Miscellaneous application by the accused to the court at any time while the sentence runs for passing an appropriate order reducing the term of imprisonment which is the mandate of the section. [302A]

(3) In the instant case, in the absence of an appeal against the judgment of the High Court in Criminal Appeal No. 442/74 either by the State or by the injured, that judgment has become final. The scope of criminal revision before the High Court was whether the sentence of ten years should be further enhanced, but that sentence itself disappeared by virtue of the judgment of the High Court in the Criminal Appeal. The criminal revision therefore became infructuous and the Supreme Court can do nothing about it while the judgment of the High Court remains operative. [302D, E-F]

*Obiter*: The order of the High Court was clearly unsustainable even in terms of section 428 Criminal Procedure Code as the only set off which was

**A** urged for under the section and which was admissible, was a period of about nine months of pretrial detention.

[The Court disapproved of such a grossly lenient sentence imposed by the High Court and deprecated that the State ignored to take notice of such a grossly lenient sentence and for not preferring an appeal to the Court.]

**B** CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 381 of 1975.

Appeal by Special Leave from the Judgment and Order dated the 10th January, 1973 of the Punjab and Haryana High Court at Chandigarh in Criminal Revision No. 606 of 1974.

*V. C. Mahajan, S. K. Mehta and K. R. Nagaraja* for the Appellant.  
*Ch. Ram Sarup and R. A. Gupta* for Respondent No. 1

**C** *H. S. Marwah and S. P. Nayar* for Respondent No. 2

The Judgment of the Court was delivered by

**D** GOSWAMI, J.—On April 19, 1973, the respondent Om Parkash (hereinafter to be described as the accused) inflicted as many as five stab wounds on the appellant Suraj Bhan. The injuries were very severe as will be found from the description given below :—

“1. Incised wound 5 cm x 2 cm x oblique spindle shape on the left side of the front of abdomen, 8 cm below the xiphisternum and 6 cm to the left of mid line. Depth not probed edges were fresh.

**E** 2. Incised wound 2½ cm × 1 cm oblique, 6 cm on the left and 2 cm above injury No. 1, spindle shaped. Edges were fresh and depth was not probed.

3. Incised wound 2½ cm × 1 cm horizontal, spindle shaped 6 cm above the left anterior superior iliac spine. Depth was not probed and edges were fresh.

**F** 4. Incised wound 1 cm × ¼ cm × 2 mm deep, horizontal 6 cm inner to end at the level of left anterior superior iliac spine, edges were fresh.

**G** 5. Penetrating wound 5 cm × 2½ cm × cavity deep, horizontal on the front of abdomen 2 cm to the right of mid line 10 cm below the level of xiphisternum, edges were clean cut and fresh the coils of small intestine protruding through the wound.”

The appellant had also to under-go an operation. There is no doubt that prompt and proper medical attention alone saved the appellant from death.

**H** The accused was convicted under section 307 IPC by the trial court by its judgment dated February 26, 1974 and sentenced to 10 years' rigorous imprisonment and also to a fine of Rs. 200/- in default rigorous imprisonment for one year. Although the accused gave his

age as 19 years, according to the trial court he appeared to be aged about 23 years. A

The accused appealed to the High Court against his conviction and sentence. The appeal was numbered as Criminal Appeal No. 442 of 1974. The injured Suraj Bhan also filed a Criminal Revision Application being numbered as 606 of 1974 for enhancement of the sentence passed on the accused. The appeal was decided by a learned single Judge of the High Court of Punjab and Haryana on January 10, 1975. It appears from the judgment of the High Court in that appeal that conviction of the accused was not challenged. The only point that was argued was that the accused was entitled to set off the period of his detention as an under trial prisoner against the period of imprisonment imposed upon him under section 428 of the Criminal Procedure Code 1973 (Act No. 2 of 1974) which came into force from April 1, 1974. It appears also from the judgment that the State did not oppose the aforesaid submission on behalf of the accused. The learned single Judge, therefore, passed the order in the following terms :— B C

“There is force in this submission of the learned counsel which is not opposed by the State counsel. I am of the view that the ends of justice will be met if the term of imprisonment of the convict-appellant is reduced to that already undergone by him.” D

Having said so the learned single Judge dismissed the appeal maintaining the conviction and reduced the accused's term of imprisonment to that already undergone by him and also maintained the sentence of fine. Including the pre-conviction detention the accused served only one year and eight months of the sentence. E

It appears the State did not choose to prefer any appeal against the grossly inadequate sentence passed by the High Court. On the other hand the injured Suraj Bhan made an application to the High Court for a certificate of fitness for leave to appeal to this Court under article 134(1)(c) of the Constitution without success and thereafter obtained special leave from this Court after notice to the respondents including the State to show cause why special leave to appeal should not be granted. F

We have described the above facts in some detail as we fail to appreciate why the State in this case should have ordinarily ignored to take notice of such a grossly lenient sentence. G

The order of the High Court was clearly unsustainable even in terms of section 428, Criminal Procedure Code, as the only set off which was urged for under the section and which was admissible, was a period of about nine months which the accused had served as an under trial prisoner prior to the conviction.

It is also clear from section 428, Criminal Procedure Code itself that even though the conviction was prior to the enforcement of the Code of Criminal Procedure, benefit of section 428 would be available to such a conviction. Indeed section 428 does not contemplate any H

- A challenge to a conviction or a sentence. It confers a benefit on a convict reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as an under trial prisoner. The procedure to invoke section 428, Criminal Procedure Code, could be a miscellaneous application by the accused to the court at any time while the sentence runs for passing an appropriate order for reducing the term of imprisonment which is the mandate of the section.

In the appeal before the High Court there was no scope for the High Court to reduce the sentence only to the period already undergone under section 428, Criminal Procedure Code, in view of the only point argued before it.

- C Since in an attempt to murder hurt was caused, the maximum punishment under the second part of section 307 IPC would be imprisonment for life. The injured was not satisfied with the maximum punishment of ten years contained in the first part of the section and moved the High Court in revision for enhancement of the sentence. The revision was separately dismissed by the High Court for the "reasons recorded in Criminal Appeal No. 442 of 1974" and it is against this order of the High Court in revision that special leave was obtained by the appellant.

- D In the absence of an appeal against the judgment of the High Court in Criminal Appeal No. 442 of 1974, **either by the State or by** the injured, that Judgment has become final which means that the accused's sentence remains to be for a period of one year and eight months and a fine of Rs. 200/- in default rigorous imprisonment for one year.

- E The scope of the criminal revision before the High Court was whether the sentence of ten years should be further enhanced but that sentence itself disappeared by virtue of the Judgment of the High Court in the criminal appeal. The criminal revision, therefore, became infructuous and we can do nothing about it while the Judgment of the High Court remains operative. Unfortunately that judgment in the criminal appeal is not before us in this Court. Although, therefore, we cannot approve of such a grossly lenient sentence in the present case, we have no other alternative than to dismiss the present appeal. The appeal is, therefore, dismissed.

S.R.

*Appeal dismissed.*