

THE STATE OF UTTAR PRADESH

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v.

TRIBHUWAN & ORS.

(Criminal Appeal No. 2437 of 2010)

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NOVEMBER 06, 2017

**[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]**

*Sentence/Sentencing – Conviction under s.325 IPC – If accused is held guilty of commission of offence under s.325, imposition of jail sentence and fine on accused is mandatory – In the instant case, High Court was not right in setting aside the entire jail sentence of respondent No.1 while upholding his conviction under s.325 IPC – High Court ought to have either upheld the award of jail sentence of four years awarded by the Sessions Court or reduce the jail sentence to any reasonable term but it had no jurisdiction to fully set aside the jail sentence and substitute it by imposing only fine of Rs.10,000/- – In view of time consumed in the litigation (37 years) coupled with the findings of two courts below that respondent No.1 did not cause any injury to the deceased and injured (PW-2), respondent No.1's conviction under s.325 IPC is upheld and punishment of imprisonment of 40 days with fine of Rs.10,000/- and in default of payment of fine, to undergo one month rigorous imprisonment is awarded – Penal Code, 1860 – s.325 – Code of Criminal Procedure, 1973 – s.428.*

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*Code of Criminal Procedure, 1973 – s.428 – Scope of – Held: s.428 provides that the period of detention spent in jail as under-trial or as convict will be set off against his total jail sentence once awarded to him in connection with the same offence – In the instant case, the period already undergone by respondent No.1 (40 days) while he was in detention, as under-trial and as convict, was also a jail sentence and could be treated as jail sentence once awarded to respondent no.1 under s.325 IPC, and accordingly its benefit by way of set off could be given to him under s.428 of Code – Penal Code, 1860 – s.325.*

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A Partly allowing the appeal, the Court

HELD: 1. So far as Section 325 IPC is concerned, its reading would show that once the accused is held guilty of commission of offence punishable under Section 325 IPC, then imposition of jail sentence and fine on the accused is mandatory. In other words, the award of punishment would include both, i.e., jail sentence and fine. So far as jail sentence is concerned, it may extend upto 7 years as per Court's discretion whereas so far as fine amount is concerned, its quantum would also depend upon the Court's discretion. So far as Section 428 of Code is concerned, it provides that the period of detention spent in jail as under-trial or as convict will be set off against his total jail sentence once awarded to him in connection with the same offence. [Paras 22, 23][10-C-D]

2. The High Court was, therefore, not right in setting aside the entire jail sentence of respondent No.1 while upholding his conviction under Section 325 IPC. The High Court ought to have either upheld the award of jail sentence of four years awarded by the Sessions Court or reduce the jail sentence to any reasonable term but it had no jurisdiction to fully set aside the jail sentence and substitute it by imposing only fine of Rs.10,000/-. The period already undergone by respondent No.1 (40 days) while he was in detention, as under-trial and as convict, was also a jail sentence and could be treated as jail sentence once awarded to respondent No.1 under Section 325 IPC, and accordingly its benefit by way of set off could be given to him under Section 428 of Code. [Paras 25, 26][11-D-E]

3. In view of the time consumed in the litigation (37 years) coupled with the findings of two courts below wherein it was held that respondent No.1 did not cause any injury to the deceased and injured (PW-2), respondent No.1's conviction under Section 325 IPC is upheld and punishment of imprisonment of 40 days with fine of Rs.10,000/- and in default of payment of fine, to undergo one month rigorous imprisonment is awarded. Since respondent No.1 has already undergone the jail sentence of 40 days partly as under-trial and partly as convict, he is not required to undergo any further jail sentence in the case at hand. [Paras 27, 28][11-E-H]

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*State of Maharashtra & Anr. v. Najakat Alia Mubarak Ali* (2001) 6 SCC 311 : [2001] 3 SCR 600 – referred to. A

Case Law Reference

[2001] 3 SCR 600 referred to Para 24 B

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2437 of 2010.

From the Judgment and Order dated 10.02.2006 passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 211 of 1982. C

Ratnakar Dash, Sr. Adv., Ms. Alka Sinha, Abhishek, Anuvrat Sharma, Advs. for the Appellant.

Sidharth Dave, Ms. Jemtiben A.P., Senthil Jagadeesan, Advs. for the Respondents. D

The Judgment of the Court was delivered by

**ABHAY MANOHAR SAPRE, J.** 1. This appeal is filed by the State against the judgment and order dated 10.02.2006 of the High Court of Judicature at Allahabad in Criminal Appeal No. 211 of 1982 whereby the High Court partly allowed the appeal filed by the accused persons and while upholding the conviction of the five accused interfered in the sentence and its quantum awarded to the accused persons by order dated 22.01.1982 passed by the IVth Additional Sessions Judge, Azamgarh in Sessions Trial No. 132 of 1981. E

2. Having regard to the short controversy, which now remains for decision in this appeal as a result of subsequent events occurring in the case after the incident in question which took place way back in the year 1980, it is not necessary to set out the facts in detail except those which are relevant for the disposal of the appeal. F

3. Six accused persons, (1) Tribhuwan (2) Sita Ram (3) Ram Suresh (4) Rajendra (5) Ram Vijay and (6) Jogendra were the residents of a village - Seerpatti District Azamgarh (UP). One Ram Lagan (deceased) was also the resident of same village. The houses of accused persons and Ram Lagan were situated in the same cluster and were in the close vicinity of each other. All the accused persons, Ram Lagan and his family members were known to each other. G H

A 4. On 14.06.1980 around 8.00p.m., Tribhuwan was passing in front of Ram Lagan's house when pet dog of Ram Lagan sitting in front of his house started barking on Tribhuwan, due to which Tribhuwan got infuriated and started hurling filthy abuses to Shobh Nath-son of Ram Lagan, his family members and Ram Lagan, who were sitting on the door steps of their house.

B 5. This incident, unfortunately, aggravated and led to filthy verbal exchanges between Ram Lagan, Shobh Nath and Tribhuwan. Tribhuwan then went to his house after threatening Ram Lagan and his son that he would come back soon to teach them a lesson. After sometime, Tribhuwan came back along with five persons, namely, Sita Ram, Ram Suresh, Ram Vijay, Rajendra and Jogendra with weapons (Pistol, Farsa, C Lathi, Spear) in their hands. This incident attracted many persons living in the area and who were passing on the road. The altercation and the attack by the accused persons resulted in causing injuries to Ram Lagan and one Baij Nath (PW-2). Both injured persons were taken to nearby D hospital for treatment. After sometime, Ram Lagan succumbed to his injuries in the hospital whereas Baij Nath survived.

E 6. After making necessary investigation, six accused persons, named above, were apprehended and put to trial for commission of the offences punishable under Sections 147, 148, 302, 324/149 and 325/149 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") in Session Trial No.132 of 1981 before the IVth Additional Sessions Judge, Azamgarh.

F 7. The Sessions Judge, by his order 22.01.1982, acquitted one accused-Jogendra from all the charges whereas convicted remaining five accused and sentenced each of them as under:

Name of the accused	conviction	sentence
Jogendra	acquitted	
G Ram Vijay	U/S 302 IPC	Life imprisonment
	Section 325/149 IPC	RI for four years
	Section 148 IPC	RI for two years

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Tribhuwan	Section 324/149 IPC	RI for two years	A
	Section 325/149 IPC		
	Section 148 IPC	RI for four years	
		RI for two years	B
Sita Ram	Section 324/149 IPC	RI for two years	
	Section 325/149 IPC		
	Section 147 IPC	RI for four years	C
		RI for one year	
Ram Suresh	Section 147 IPC	RI for one year	
	Section 324/149 IPC		D
	Section 325/149 IPC	RI for two years	
		RI for four years	E
Rajendra	Section 147 IPC	RI for one year	
	Section 324/149 IPC	RI for two years	
	Section 325/149 IPC		F
		RI for four years	

8. The five accused, namely, Tribhuwan, Sita Ram, Ram Suresh, Rajendra and Ram Vijay, who suffered conviction and sentence, filed Criminal Appeal No.211/1982 before the High Court. So far as the State is concerned, they did not file any cross appeal against that part of the order of the Sessions Court by which one accused person-Jogendra was acquitted of the charges and other accused persons though convicted for other offences but stood acquitted of the charge of murder. As a

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A consequence, the order of the Sessions Judge so far as the State was concerned, became final.

9. The High Court, by impugned judgment, partly allowed the appeal and while upholding the conviction of the five accused interfered in the sentence and its quantum awarded to each accused persons. The

B High Court modified the sentence of the five accused as under: -

	Name of the accused	conviction	sentence
C	Ram Vijay	Section 304 Part I IPC	RI for 10 years
D		Section 148 IPC	Fine of Rs,3000/- In default of payment of fine, to undergo RI for three months
		Section 325/149 IPC	Fine of Rs.10,000/- In default of payment of fine, to undergo RI for one year
E	Tribhuwan	Section 148 IPC	Fine of Rs,3000/- In default of payment of fine, to undergo RI for three months
F		Section 325/149 IPC	Fine of Rs.10,000/- In default of payment of fine, to undergo RI for one year
G	Sita Ram	Section 147 IPC	Fine of Rs.1000/- In default of payment of fine, to undergo RI for one month
H		Section 325/149 IPC	Fine of Rs.10,000/- In default of payment of fine, to undergo RI for one year

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Ram Suresh	Section 147 IPC  Section 325/149 IPC	Fine of Rs.1000/- In default of payment of fine, to undergo RI for one month  Fine of Rs.10,000/- In default of payment of fine, to undergo RI for one year
Rajendra	Section 147 IPC  Section 325/149 IPC	Fine of Rs.1000/- In default of payment of fine, to undergo RI for one month  Fine of Rs.10,000/- In default of payment of fine, to undergo RI for one year

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10. The State, however, felt aggrieved of the judgment of the High Court, filed this appeal by way of special leave before this Court.

11. During pendency of this appeal, two respondents, namely, Sita Ram (respondent No.2) and Rajendra (respondent No.4) died. As a consequence thereof, the appeal against Sita Ram and Rajendra stood abated. Ram Suresh (respondent No.3) also died and the appeal stood dismissed as abated against him also by this Court's order dated 26.07.2010.

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12. So far as the appeal against Ram Vijay (respondent No.5) is concerned, the same was also dismissed by this Court's order dated 26.07.2010 for non-compliance of the orders by the appellant (State) *qua* Ram Vijay. As a consequence thereof, the appeal against Ram Vijay also does not survive for its consideration on merits.

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13. This appeal is now survived only against Tribhuwan (respondent No.1) for its consideration on merits.

14. The short question, which arises for consideration in this appeal, is whether any case is made out by the State against accused person-

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A Tribhuwan (respondent No.1) seeking any kind of interference in his order of conviction and acquittal or in award of sentence and, if so, to what extent?

15. Heard Mr. Ratnakar Dash, learned senior counsel for the appellant-State and Mr. Sidharth Dave, learned counsel for the respondent.

16. Learned counsel for the appellant (State) has argued only one legal point in support of the appeal. According to learned counsel, the Sessions Judge rightly convicted respondent No.1 (Tribhuwan) for an offence punishable under Section 325 read with Section 149 IPC and, accordingly, awarded rigorous imprisonment of four years to him but the High Court though was right in upholding the conviction fell in error in setting aside the jail sentence of four years awarded to him by the Sessions Court and substituting the same by imposing only a fine of Rs.10,000/-.

17. Learned counsel urged that imposition of jail sentence and fine both is mandatory once the accused is held guilty for the offence punishable under Section 325 IPC which may extend upto 7 years. Learned counsel urged that the High Court, in its discretion, could reduce the award of jail sentence to any period less than four years but, in no case, it could set aside the entire jail sentence and substitute it by awarding a sentence of fine of Rs.10,000/-. It is not permissible in law and hence to this extent, the judgment of the High Court deserves to be set aside and the order of the Sessions Judge be restored.

18. In reply, the submission of learned counsel for respondent No.1 (accused-Tribhuwan) was that admittedly respondent No.1 has undergone 40 days' jail sentence partly as under-trial prisoner and remaining after suffering the conviction from the Sessions Court. It was, therefore, his submission that such imprisonment can be taken as imposing jail sentence of 40 days to respondent No.1 under Section 325 IPC. In other words, his submission was that though the High Court instead of awarding any jail sentence awarded only the fine of Rs.10,000/- but since respondent No.1 has, in the meantime, already undergone 40 days' jail sentence partly after his arrest pending investigation, inquiry and then partly during pendency of trial and appeal, he should be held to have been awarded jail sentence for 40 days for an offence punishable under Section 325 IPC. Learned counsel urged that respondent No.1 would thus be entitled to take benefit of set off of the period as already

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undergone by him under Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") once he is awarded jail sentence to that extent on his conviction. A

19. Learned counsel further pointed out that this Court should also take into consideration the two circumstances appearing in the case, namely, the incident in question occurred in 1980 and in the meantime, 37 years has passed in prosecuting this litigation, and second, both the Courts below, on appreciation of evidence, have come to a conclusion that no injury was caused by respondent No.1 to the deceased and to injured Baij Nath (PW-2). It was, therefore, his submission that the interest of justice would, accordingly, be met, if respondent No.1's conviction under Section 325 IPC is maintained by awarding him jail sentence of what he has already undergone, i.e., 40 days with fine amount of Rs.10,000/- which has already been awarded by the High Court. Such order of conviction would be in conformity with the requirement of Section 325 of the IPC. B C

20. Having heard learned counsel for the parties and on perusal of the record of the case, we find force in the submission of the learned counsel for the appellant and also of respondent No.1 (Tribhuwan). D

21. Section 325 of IPC and Section 428 of the Code are relevant for deciding the appeal. These Sections read as under:

**Section 325 of IPC** E

**"325. Punishment for voluntarily causing grievous hurt.-** Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." F

**Section 428 of Cr.PC**

**"428. Period of detention undergone by the accused to be set off against the sentence of imprisonment.-**Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such H

A conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him:

B Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.”

C 22. So far as Section 325 IPC is concerned, its reading would show that once the accused is held guilty of commission of offence punishable under Section 325 IPC, then imposition of jail sentence and fine on the accused is mandatory. In other words, the award of punishment would include both, i.e., jail sentence and fine. So far as jail sentence is concerned, it may extend upto 7 years as per Court’s discretion whereas so far as fine amount is concerned, its quantum would also depend upon the Court’s discretion.

D 23. So far as Section 428 of Code is concerned, it provides that the period of detention spent in jail as under-trial or as convict will be set off against his total jail sentence once awarded to him in connection with the same offence.

E 24. This Court (Three Judge Bench) had the occasion to interpret Section 428 of the Code in the case of **State of Maharashtra & Anr. vs. Najakat Alia Mubarak Ali**, (2001) 6 SCC 311 wherein this Court speaking through Justice K.T. Thomas representing majority view held as under:

F “15.....We may now decipher the two requisites postulated in Section 428 of the Code:

(1) During the stage of investigation, enquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

G (2) He should have been sentenced to a term of imprisonment in that case.

H 16. If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of

investigation, enquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words "if any" in the section amplify that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, enquiry or trial of a particular case and was later convicted and sentenced to any term of imprisonment in that case the earlier period of detention undergone by him should be counted as part of the sentence imposed on him." A  
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25. In our considered opinion, the High Court was, therefore, not right in setting aside the entire jail sentence of respondent No.1 while upholding his conviction under Section 325 IPC. The High Court, in our view, ought to have either upheld the award of jail sentence of four years awarded by the Sessions Court or reduce the jail sentence to any reasonable term but it had no jurisdiction to fully set aside the jail sentence and substitute it by imposing only fine of Rs.10,000/-. D

26. As rightly argued by the learned counsel for respondent No.1, the period already undergone by respondent No.1 (40 days) while respondent No.1 was in detention, as under-trial and as convict, was also a jail sentence and could be treated as jail sentence once awarded to respondent No.1 under Section 325IPC, and accordingly its benefit by way of set off could be given to him under Section 428 of Code. E

27. In our considered opinion, having regard to the time consumed in the litigation (37 years) coupled with the findings of two Courts below wherein it was held that respondent No.1 did not cause any injury to the deceased and injured Baij Nath (PW-2), we are inclined to uphold respondent No.1's conviction under Section 325 IPC and award to respondent No.1's punishment of imprisonment of 40 days with fine of Rs.10,000/- and in default of payment of fine, to undergo one month rigorous imprisonment. F  
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28. Since respondent No.1 has already undergone the jail sentence of 40 days partly as under-trial and partly as convict, he is not required to undergo any further jail sentence in the case at hand.

A            29. Respondent No.1, however, claims to have deposited a fine amount of Rs.10,000/- imposed by the High Court. If that be so then he need not undergo any more jail sentence. However, this fact must be verified by the Sessions Court on receipt of this judgment.

B            30. The appeal thus is allowed in part. The impugned judgment is modified to the extent indicated above.

Devika Gujral

Appeal partly allowed.