REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 679 OF 2015

ABU SALEM ABDUL KAYYUM ANSARI …Appellant

Versus

THE STATE OF MAHARASHTRA …Respondent

With
CRIMINAL APPEAL NO.180/2018

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. Crime and punishment is something which has agitated the judicial minds. Punishment cannot be disproportionately high or low. It should not be oppressive, but should serve the purpose of deterrence against crimes in a society along with a sense of justice to the victim and their family. This is a delicate balance, which has to be kept in mind – an

aspect recently discussed in the judgment of this Court in ***Jaswinder Singh (Dead) Through Legal Representative v. Navjot Singh Sidhu & Ors.***[1] As was observed in the said case, the principle of just punishment is the bedrock of sentencing in respect of a criminal offence. We are faced with a somewhat similar scenario though with certain crucial nuances, which have to be considered.

Facts :

2. Abu Salem Abdul Kayyum Ansari has a history – and not a palatable one at all. He has been a part of the crime syndicate as is obvious from the facts of the two criminal appeals before us. Criminal Appeal No.679/2015 emanates from threatening a party in a civil dispute relating to a property and extracting money, which under threat was conceded by the litigating party, i.e., Jain brothers. On failure to make the payment of some instalments of the threat money, one of the Jain brothers, i.e., Pradeep Jain, was murdered on 07.03.1995. As a result the crime was registered at D.N. Nagar Police Station under Sections 302, 307, 452, 506(ii) read with Section 120-B of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'), read with Sections 5, 27 of the

[1] 2022 SCC OnLine SC 652

Arms Act, 1959 (hereinafter referred to as the 'Arms Act') read with Sections 3(2)(i), 3(2)(ii), 3(5) and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the 'TADA').

3. The second Criminal Appeal No.180/2018, deals with the factual scenario where the very foundation of the civil society of our country was threatened and disrupted by causing bomb explosions at vital Government installations, public and crowded places in Mumbai and its suburbs (commonly known as the 'Bombay Bomb Blasts'). Loss of life and loss of properties in enormous amount was the result. The appellant was alleged to have stored, distributed and transported illegally smuggled AK-56 rifles, hand grenades as well as boxes of magazines from the godown in Gujarat to Mumbai in a Maruti van which had specially crafted secret cavities and all this was done after conspiratorial meetings relating to the blasts. In order to evade the penal consequences of his actions, the appellant left Mumbai and later entered Portugal under an assumed name on a Pakistani passport, which reflects from where the conspiracy and support may have emanated.

4. The appellant could not be arrested for his crime having moved out

of the country during the course of the investigation and, thus, the Designated Court, Mumbai issued Proclamation No.15777 of 1993 against him on 15.09.1993. As the appellant did not appear before the court, he was declared as a proclaimed offender on 15.10.1993. He was shown as an absconder in the chargesheet dated 04.11.1993. Thereafter, common charge of conspiracy was framed by the Designated Court, Mumbai against all the accused persons on 10.04.1995. The Designated Court, Mumbai issued a non-bailable warrant against the appellant and Interpol Secretariat General, Lyons, France also issued a Red Corner notice for his arrest on 18.09.2002.

Detention in Republic of Portugal:

5. The appellant having travelled on a fake passport to the Republic of Portugal was charged with the same and convicted and sentenced on 18.09.2002. The said sentence would have been completed on 18.03.2007 without taking into consideration any remission or commutation or conditional release. The fact remains that the appellant served the sentence from 18.09.2002 to 12.10.2005 when he was granted conditional release for the remaining sentence.

6. It is during this period of detention that on 18.09.2002, the appellant was also formally detained (already in custody) by the Portuguese Police in Lisbon on the basis of the Red Corner notice. To complete the period of detention, he was again imprisoned from 12.10.2005 till 10.11.2005 for a month when he was handed over to the Indian authorities.

Extradition request and Sovereign assurance by the Government of India:

7. The Government of India through Mr. Omar Abdullah, who was the then Minister of State for External Affairs, submitted a requisition for extradition dated 13.12.2002 to Portugal in nine criminal cases relying on the International Convention for the Suppression of Terrorist Bombings and on an assurance of reciprocity as applicable in international law. Along with the requisition, relevant facts of the cases were enclosed in the form of duly sworn affidavits of the concerned police officers along with supporting documents. Subsequently, the Government of India issued a notification under Section 3(1) of the Extradition Act, 1962 (hereinafter referred to as the 'Extradition Act') applying the provisions of the Extradition Act to Portugal with effect from 13.12.2002.

8. The Government of India further gave a solemn sovereign assurance on 17.12.2002 through the then Deputy Prime Minister, Shri L.K. Advani, to the effect that the Government will exercise its powers conferred by the Indian laws to ensure that if extradited by Portugal for trial in India, the appellant would not be visited by death penalty or imprisonment for a term beyond 25 years. The assurance reproduced Section 34C of the Extradition Act mandating that in case of extradition of a fugitive criminal involved in the commission of offences punishable with death in India, on his surrender, he shall not be liable for death penalty and shall be liable for punishment of life imprisonment in place of death penalty, for the said offence. The sovereign assurance also referred to Article 72(1) of the Constitution of India (hereinafter referred to as the 'Constitution') to emphasise that the President of India has power to grant pardon, reprieve, respite, or remit punishment or suspend, remit or commute the sentence of any person convicted of any offence. Lastly, the assurance also mentioned that Sections 432 and 433 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.), which confer power on the Government to commute the sentence of life imprisonment to a term not exceeding 14 years. In a

way, the relevant constitutional and legal provisions were brought to the notice of Portugal to give them confidence that there were provisions in India which would ensure that the commitments given would be adhered to.

9. The Ministry of Justice, Portugal by its order dated 28.03.2003, admitted the appellant's extradition for offences such as, *inter alia*, Section 120-B read with Section 302 of the IPC and Section 3(2) of the TADA. The ministerial order, however, declined extradition for offences such as Sections 201, 212, 324, 326, and 427 of the IPC, Sections 3(4), 5 and 6 of the TADA, Sections 4 and 5 of the Explosive Substances Act, 1908 (hereinafter referred to the 'Explosive Substances Act'), Section 9-B of the Explosive Act, 1984 and Sections 25(1-A) and (1-B) of the Arms Act.

10. The Ambassador of India in Lisbon gave another solemn assurance on 25.05.2003 that if the appellant is extradited, then:

i. he will not be prosecuted for offences other than those for which the extradition was sought, and
ii. he will not be extradited to any third country.

11. The appellant preferred an appeal against the aforesaid ministerial order dated 28.03.2003 before the Court of Appeal, Lisbon and the said Court vide order dated 14.07.2004 allowed the appellant's extradition for offences mentioned in the request, except those which are punishable with death or life imprisonment. The Supreme Court of Portugal confirmed the aforesaid order of the Court of Appeal, Lisbon on 27.01.2005 in view of the assurance given by the Government of India that the person extradited would not be visited with death penalty or imprisonment for a term beyond 25 years. The Courts in Portugal granted extradition for the following offences:

S.No.	Offence	Maximum Punishment
i.	The offence of criminal conspiracy punishable under Section 120-B IPC	Death penalty in the present case
ii.	Murder punishable under Section 302 IPC	Death Penalty
iii.	Attempt to murder punishable under Section 307 IPC	Imprisonment for life
iv.	Mischief punishable under Section 435 IPC	Imprisonment for 7 years
v.	Mischief by fire or explosive punishable under Section 436 IPC	Imprisonment for life
vi.	Offence punishable under Section 3(2) of the TADA Act	Death penalty in this case
vii.	Offence punishable under Section 3(3) of the TADA Act	Life Imprisonment
viii.	Offence punishable under Section 3 of the Explosive Substances Act, 1908	Life Imprisonment

ix.	Offence punishable under Section 4 of the Prevention of Damage to Public Property Act	Imprisonment for 10 years

The Supreme Court of Portugal while emphasising on the "principle of speciality" stated that it cannot be suspected that the appellant will be subjected to trial for committing offences not included in the extradition request.

12. The consequence of the failure of the Indian Government to fulfil its undertaking to impose a sentence as submitted in its assurance was clearly specified in the aforesaid order dated 27.01.2005, i.e., Portugal either officiously or upon the interested party's request, could timely demand devolution of the appellant. The Court specifically observed in para 12.2 of its judgment that the Government of India cannot guarantee that the sentence as assured by the Government of India will be applied by the Courts in India, in view of the Indian judicial system where the Courts are independent of the Executive. Hence, the Court stated that it could only request a guarantee that should such sentence be imposed, in order to restrict the sentence, it will resort to all legal measures available, the description of which had already been set out in the request letter. On

13.06.2005, the appellant's appeal against this order dated 27.01.2005 was rejected by the Constitutional Court of Portugal.

13. The custody of the appellant was handed over to the Indian authorities on 10.11.2005, the appellant was extradited to India from Portugal on 11.11.2005 and was arrested on 24.11.2005. On 09.12.2005, the Designated Court, Mumbai altered the common charge of criminal conspiracy by adding the appellant's name in the list of the accused persons before the court, by deleting his name from the list of absconding accused in the said charge. That brought to an end the saga of ensuring that the appellant is brought back to India and is tried and sentenced for what he had done.

History of Proceedings:

14. It is not necessary in view of the limited pleas urged and examined in this case to get into a further detailed examination of facts and evidence. Suffice to say that by Criminal Appeal No. 990 of 2006, the appellant first assailed the order dated 13.06.2006 of the Designated Court, Mumbai, which had separated the trial of the appellant from the main trial as well as a prior order dated 18.03.2006 of the Designated

Court, Mumbai, where substantive charges were framed against the appellant for different offences relating to the IPC and TADA. In addition, Criminal Appeals Nos. 1142-1143 of 2007 were filed against the order framing charges dated 16.04.2007. A writ petition was also filed seeking quashing of charges and proceedings against him on the ground that the trial for offences for which he has specifically not been extradited is violative of the fundamental rights enshrined under Article 21 of the Constitution. This was coupled with the appellant moving an application before the Court of Appeal, Lisbon which was predicated on the violation of the assurance given by India as he was sought to be tried in India in violation of "principle of speciality".

15. The Court of Appeal in Lisbon passed an order dated 18.05.2007 while opining that it did not have the competence to order the devolution of the appellant, observed that if the alleged violations were confirmed, it could only justify the accountability of the State (India in this case) at an international level, which does not depend on the action of any Portuguese Court and adequate use of defence by the appellant under Indian laws. On appeal to the Supreme Court of Portugal, the matter was remitted to the Court of Appeal, Lisbon by an order dated 13.12.2007 to

enquire whether violation of the “principle of speciality” had taken place. It further opined that if any violation did take place, the Court of Appeal, Lisbon would extract all due consequences such as declaring the termination of the authorisation for extradition, in which case the presence of the appellant in India would have to be considered illegal. However, the Court of Appeals, Lisbon considered it appropriate to defer consideration of the matter till the Supreme Court of India passed a final order in the aforementioned appeals and the writ petition. The Supreme Court of India passed a common order dated 10.09.2010 with respect to the aforementioned appeals and the writ petition and observed that Portugal had not included certain offences for which charges had been framed against the appellant by the Designated Court, Mumbai. However, it opined that a bare reading of Section 21 of the Extradition Act indicated that the appellant could be tried for lesser offences, in addition to the offences for which he had been extradited. These charges made in addition were punishable with lesser punishment than the offence for which he had been extradited and, thus, these lesser offences could not be equated with the term “minor offence” as mentioned in Section 222 of the Cr.P.C. The opinion given was that there had been no

violation of the "principle of speciality" and the solemn sovereign assurance given by the Government of India in the letter by the Indian Ambassador dated 25.05.2003.

16. On the aforesaid opinion being delivered of the Supreme Court of India, the Court of Appeal, Lisbon in its order dated 14.09.2011 held that the authorisation granted for the appellant's extradition ought to be terminated. It was also held that while not considering the limits imposed by Portugal on the appellant's extradition, India had violated the "principle of speciality". If the extradition for certain crimes was not admissible in the ministerial order dated 28.03.2003 due to lapses of the criminal cases, then India could not impute and try the appellant for identical crimes at a subsequent time, even if it is well founded on different facts. The Court further opined that Law 144/99 of 31 August does not anticipate any specific consequences for violation of "principle of speciality", however, this did not prevent Portugal from calling for intervention of instances of international jurisdiction, drawing due political conclusions from the case, and reacting through political-diplomatic channels, for which the judgment passed by the Portuguese Courts would be relevant. However, crime punishable under Section 3(3)

of the TADA had not been expressly or implicitly excluded by Portugal in the appellant's extradition and, thus, the same could be imputed on the appellant without violation of "principle of speciality" laid down in Article 16 of Law 144/99 of 31 August, which reads as under:

> "**Article 16 – Rule of Speciality**
>
> 1. The person who, as a consequence ofan act of international cooperation appears in Portugal to participate in a penal procedure as a suspect, defendant or convicted person cannot be prosecuted, tried, detained or subjected to any other restriction of his freedom for a fact prior to his presence on national territory, other than the one which gives rise to the request for cooperation formulated by a Portuguese authority.
>
> 2. The person who, under the terms of the number above, appears before a foreign authority cannot be prosecuted, detained or tried or subjected to any other restriction of his freedom for a fact or conviction prior to his leaving the Portuguese territory other than those determined in the request for cooperation.
>
> 3. Before the transfer referred to in the number above is authorised, the State that formulates the request must provide the assurance required for the compliance with the rule of speciality.
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> 4. The immunity referred to in this article ceases whenever:
>
> a. the person under consideration has the possibility of leaving the Portuguese or foreign territory and does not do so within 45 days; or
>
> b. He voluntarily returns to one of those territories;

c. After earlier hearing the suspect, defendant or the convicted person, the State that authorises the transfer gives consent for the derogation of the rule of speciality.

5. The provisions of numbers 1 and 2 do not exclude the possibility of requesting by means of a new request for the extension of the cooperation to facts other than those that laid the foundation for the previous one, a request which will be submitted and prepared under the terms of this legal statute.

6. In the case referred to in the number above, the submission of proceedings containing the declarations of the person who benefits from the rule of speciality is mandatory.

7. In the event of the request being submitted to a foreign State, the cases referred to in the number above, are drawn up by the High Court situated in the place where the person who benefits from the rule of speciality resides or is present."

17. The Union of India filed an appeal before the Supreme Court of Portugal, which was dismissed on 11.01.2012 as the Court observed that the non-observance of the "principle of speciality" requires two orders of consequences in the ambit of international relations – first, the mistrust on a State that does not have a credible and reliable behaviour in its international relations, and second, a discredit of the judicial power that is used by the institution of extradition in duplicity manner, generating doubts on the administration of justice. A further appeal before the Constitutional Court of Portugal was also dismissed on 05.07.2012 and,

thus, the termination of appellant's extradition attained finality. There rests the story of the extradition proceedings in Portugal.

18. However, the appellant filed Criminal Appeal Nos. 415-416 of 2012 before the Supreme Court of India challenging the order of the Designated Court, Mumbai dated 08.11.2011, which had dismissed the applications filed by the appellant for stay of all further proceedings in view of the order dated 14.09.2011 passed by the Court of Appeals, Lisbon treating the extradition order dated 28.03.2003 as having been withdrawn. The abovementioned appeals were still pending when the Central Bureau of Investigation (for short 'CBI') filed an application for clarification/modification of the judgment and order dated 10.09.2010 of the Supreme Court of India and prayed for permission to withdraw certain charges levelled against the appellant. It was the submission of the CBI that in the interest of comity of courts and united fight at international level against global terrorism, the Government of India was making further efforts through diplomatic talks and the additional charges framed against the appellant might come as an impediment in furthering such diplomatic talks. The application of the CBI was allowed by the Supreme Court of India in terms of its order dated 05.08.2013 to

the extent of withdrawal of additional charges under Sections 3(3), 5 and 6 of the TADA, Sections 4(b) and 5 of the Explosive Substances Act, Sections 25(1-A), (1-B)(a) read with Section 387 of the Arms Act, as well as Section 9-B of the Explosives Act, 1884. The Court observed that the offences for which the appellant was extradited to India are grave enough to award the appellant with maximum punishment and, therefore, it would not be detrimental to any of the parties. This Court also held that the ministerial order dated 28.03.2003 stands valid and effective in the eyes of law and that the Portugal Courts had categorically stated that the Portuguese law does not provide for any specific consequence for violation of the "principle of speciality". Thus, the findings of the Portugal Courts may not be construed as a direction to the Union of India to return the appellant to Portugal but shall serve as a legal basis for the Government of Portugal to seek return of the appellant through political or diplomatic channels, which had not been done till that date according to the then learned Attorney General. The Court also recorded the then Attorney General's assurance that they were in the process of withdrawing other charges pending in various States against the appellant, which were claimed to be in violation of the extradition order.

Thus, what the Government of India sought to do was to bring the legal process fully in conformity with the extradition order of Portugal albeit belatedly and the consequences of the termination of the appellant's extradition attained finality. This showed that the Government of India was conscious of its sovereign assurance and sought to do everything to abide by its assurance at that stage.

Trial Court Proceedings:

A. Sovereign Assurance:

19. The State initially pressed for awarding death sentence to the appellant in Special Case No.1/2006. However, after the arguments of the defence, the State submitted that death penalty is out of question in the appellant's case but in view of Section 34C of the Extradition Act and Section 302 of the IPC, the appellant was liable to be punished with imprisonment for life. It was urged that the solemn sovereign assurance given by the Deputy Prime Ministry of India could not be construed as a guarantee that no court in India would award the punishment provided by Indian law and the same would, thus, come into play after awarding the punishment by the Designated Court, Mumbai.

20. On the other hand, the appellant sought to urge that the solemn sovereign assurance given to Portugal was construed as an undertaking that no court in India shall award punishment of death or punishment for a period of more than 25 years and a paramount duty had been cast upon the Designated Court, Mumbai to enforce the solemn sovereign assurance while awarding the punishment. While conceding that Section 34C of the Extradition Act, Section 302 of the IPC and Section 3(2)(i) of the TADA are mandatory in character, the plea was that the hands of the Designated Court, Mumbai are tied from awarding punishment for more than 25 years.

21. The Designated Court, Mumbai examined the aforesaid submissions and expressed concerns about serious repercussions if a decision was taken contrary to the letter and spirit of Indian law. At the same time, the spirit of the solemn sovereign assurance given by the Deputy Prime Minister of India and understood by the Supreme Court of Justice, Portugal in its judgment dated 27.01.2005 could not be lost sight of as in substance, the principles of comity of courts and respect for Indian Government and law was in issue. Section 34C of the Extradition Act mentioned in the sovereign assurance made it clear that no court in

India was empowered in the appellant's extradition to award death sentence to him and that he could only be liable for life imprisonment. The objective of incorporating Article 72 of the Constitution and Sections 432 and 433 of the Cr.P.C. was to assure that the Union of India would ensure that while executing the sentence or punishment imposed by the Court in India, the Union of India would exercise its powers and bring down the punishment consistent with the solemn sovereign assurance given to the Government of Portugal.

22. The trial court opined that the sovereign assurance was a plain and simple assurance that death penalty was out of question and if any other punishment was awarded as per law by Indian Courts, the Government of India would exercise the powers under the Constitution, Indian Extradition Act and the Cr.P.C. to bring the punishment in conformity with the assurance. The Government of India was conscious of the principle of the independence of the Judiciary. The sovereign assurance could not have been construed as an assurance of the Courts of India and, in fact, had not been so construed by the Courts at Portugal. The independence of Judiciary would not support impeding the powers of the Designated Court, Mumbai to exercise its jurisdiction to award

punishment provided under the law. This is so as the application in awarding the punishment fell within the domain and jurisdiction of the court, whereas the execution of the punishment fell within the domain and jurisdiction of the executive and this power of the executive was independent and not subject to judicial review.

23. The effect of the aforesaid was that the Judiciary had to perform its functions of imposing sentence in accordance with law, while the executive would have to perform its duty by restricting the sentence in conformity with the assurance given to the Portuguese Courts.

B. Set off claimed by the Appellant:

24. The appellant relied upon the decision of this Court in ***State of Maharashtra & Anr . v. Najakat Ali Mubarak Ali***[2] and submitted that as per Section 428 of the Cr.P.C., the period of imprisonment undergone by an accused as an undertrial prisoner during investigation, inquiry or trial of a particular case, irrespective of whether it was in connection to that very case, or another case can be set-off for the period of detention imposed on conviction in that particular case. The appellant, thus, submitted that he was entitled to the benefit of set off as he was already

2(2001) 6 SCC 311

in custody for a time period in Portugal.

25. On this aspect, the Designated Court, Mumbai opined that the appellant was not kept in detention till 12.10.2005 exclusively pursuant to the execution of the Red Corner notice by the Interpol and, thus, could not be granted set off for the period for which he was undergoing the sentence awarded to him by the Portuguese Court against the sentence awarded to him in the present case. A set off would amount to granting benefit to the appellant even for the period for which he was sentenced for commission of offences as per Portuguese law in the Republic of Portugal.

26. The judgment in ***Allan John Waters v. State of Maharashtra &Anr.***[3] sought to be relied upon by the appellant was distinguished as in that case the accused was not arrested in USA for commission of offence under the laws of USA while in the present case it was so. The proposition of law in ***Najakat Ali Mubarak Ali***[4] case was also found not applicable. The appellant was arrested on 11.11.2005 and was arrested in TADA Special Case No.1/2006 later, where the benefit of set off had

3 2012 SCCOnline Bom 389
4 (supra)

been granted to him. The appellant would, thus, have the benefit of set off from that date against the sentence that would be imposed on him.

27. The Designated Court, Mumbai convicted the appellant and sentenced him under the different provisions of law as reflected in the judgment, which need not be referred to by us because that does not have a bearing on the propositions advanced before us.

The Present Proceedings:

28. The appeal was taken up for hearing on 02.02.2022, when the learned counsel for the appellant, Mr. Rishi Malhotra made a four-fold submission recorded in that order as under:

> "1) The stand of the Government of India/State Government (three appeals have been prosecuted by the State while two other by the C.B.I.) vis-à-vis the solemn sovereign assurance given by them to the Court in Portugal while seeking extradition of the appellant (on 17.12.2002 and 25.05.2003). In a nutshell it is his submission that the imprisonment term cannot extend beyond 25 years as per the assurance given, even though the TADA Courts said it was not bound by the assurances as the judicial system was independent of the executive. He submits that even if the TADA Court does not have the power, this Court can pass necessary orders based on an affidavit to be filed by the Central Government/prosecuting agencies. Learned counsel for the State submits that by and large they will follow the guidance of the Central Government in this behalf but we believe in any case the Central Government/prosecuting agencies may discuss this issue with

the State Government to file an appropriate affidavit before us.

2) The period of set-off, as according to the learned counsel for the appellant(s) he was detained on 18.09.2002 by the Portugal authorities on account of the look out notice, that should be the reckoning time and not when he was released from the Portugal Court and taken into custody by the Indian authorities on 12.10.2005.

3) The consequences of Portugal Courts withdrawing the permission for extradition on account of breach of the solemn sovereign assurance given to them.

4) The Merits of the controversy."

29. He made a submission, which was recorded, that it may be possible to resolve these appeals if a reasonable stand is taken at least on the first aspect and on the second aspect, also the authorities might take a stand or in the alternative he would endeavour to persuade the Court. We found that a fair stand was taken by the counsel and called upon the Union of India to take a stand on both these aspects. However, the affidavit filed was not found to be satisfactory. We wanted a clear stand on behalf of the Government of India as to whether it stood by the international commitment made by the former Deputy Prime Minister of India and, thus, called upon the Home Secretary to file an affidavit in the case.

30. On 21.04.2022, we recorded a detailed order. We went into the affidavit filed by the Home Secretary, who had emphasised what was only obvious, that it was a dastardly act conducted with pre-meditation in which the appellant played a very active role, was absconding and brought back to India under the Extradition Act. These powers were stated to be Executive powers which would bind the Executive of the respective States but the Judiciary, as the Constitution of India envisaged was independent in deciding the cases in accordance with the law applicable. Para 6 of that affidavit referred to the assurance given vide letter dated 17.02.2002 as solemn assurance to the Government of Portugal by the Government of India, while para 7 stated as under:

> "It is respectfully submitted that the Government of India is bound by the assurance dated 17.12.2002.The period of 25 years which is mentioned in the assurance will be abided by the Union of India at an appropriate time subject to the remedies which may be available."

31. We did not appreciate the underlined portion aforesaid as once it was recognised that the Government would abide by the assurance, nothing more or less was to be said. As far as the courts were concerned, they were to take a view as to the effect of that assurance.

32. The affidavit also averred that the occasion for the Union of India honouring the assurance will arise only when period of 25 years was to expire. We noted that we had to take a call on the effect of that assurance and we could not postpone the hearing of the appeal on that basis, nor was it permissible for the Government to say on an affidavit that the appellant could not raise this argument. In effect, the affidavit sought to urge this Court to decide the appeal on merits. As to what the Court will do will be the Court's own call. If the convict was accepting his guilt, he could not be compelled to urge on the merits of the appeal. Learned counsel for the appellant on that date also clearly stated that his third and fourth pleas recorded aforesaid stood withdrawn. In view of the assurance of the Government of India, he only sought that the sentence should be 25 years in terms of the solemn assurance. The other point sought to be urged and debated before us is the point of set off. The appeal was finally heard on 05.05.2022 and judgment was reserved.

Legal Pleas urged before us:

33. The matter remained in a narrow contour in view of what we have recorded aforesaid, i.e., on the two aspects of sovereign assurance and set

off.

Plea of Sovereign Assurance:

34. The appellant submitted that solemn sovereign assurance dated 17.12.2002 categorically mentioned that under Portuguese law, an offender cannot be extradited to the requesting country if the offences committed attract either death penalty or imprisonment for an indefinite period beyond 25 years. The supplementary assurance dated 25.05.2003 envisaged that the appellant will not be prosecuted for offences other than those for which extradition had been sought. The affidavit submitted by the Home Secretary, Government of India dated 18.04.2022 also stated that the Government of India was bound by its assurance. These solemn assurances were considered by the Court of Appeals, Lisbon in its judgment dated 14.07.2004 and the Supreme Court of Justice, Portugal in its judgment dated 27.01.2005. It was opined that the rule of traditional *estoppel doctrine* as well as International Public Law (for instance, with respect to principle of reciprocity) required that the solemn sovereign guarantees provided by sovereign States are respected in future. The consequence of failure to do so gave Portugal the right to timely demand devolution of the person to be extradited through

diplomatic or judicial channel.

35. The aforesaid aspect has been kept in mind by the Designated Court, Mumbai in its main judgment dated 07.09.2017, wherein it opined that India would ensure that while executing the sentence or punishment imposed by the court in India, it would exercise its power and bring down the punishment consistent and commensurate with the solemn sovereign assurance.

36. The only real submission in this behalf by the learned counsel for the appellant was that in view of the Constitution Bench decision of this Court in ***Union of India v. V. Sriharan alias Murugan & Ors.***[5] it had been opined that the powers to impose a modified punishment providing for any specific term of incarceration lies only either with the High Court or the Supreme Court, and not any inferior court. Thus, what the counsel urged was that this Court should opine now itself as to when the term would end and direct the release of the appellant on expiry of that term.

37. On the other hand, learned ASG, Mr. K.M. Nataraj urged that in the Constitutional Scheme of India, there was a doctrine of separation of

52016 (7) SCC 1 (paras 104 & 105)

powers with the Judiciary being independent and, thus, the solemn sovereign assurance given by the Executive was carefully worded such that it could not bind the Judiciary while deciding the case on merits. The Extradition Act enabled the Executive of one State to extradite accused/convicts of another State. These were Executive powers, by only the Executive of the respective States were bound.

38. It was sought to be urged that honouring the period of 25 years mentioned in the assurance will arise only when the 25 years were to expire, i.e., on 10.11.2030 and that the Union of India would abide by the period of 25 years at an appropriate time subject to remedies, which may be available and that such a plea cannot be raised as an argument before the period elapses.

39. We tend to agree with the submissions of the learned ASG on the larger conspectus, i.e., the separation of Judicial and Executive powers and the scheme of the Indian Constitution cannot bind the Indian courts in proceedings under the Extradition Act. Thus, the courts must proceed in accordance with law and impose the sentence as the law of the land requires, while simultaneously the Executive is bound to comply with its

international obligations under the Extradition Act as also on the principle of comity of courts, which forms the basis of the extradition. A reference to the solemn sovereign assurance on 17.12.2002 itself makes it clear that the assurance, which was given on behalf of the Executive in India was that if the appellant was extradited by Portugal for trial in India, he would not be visited with death penalty or imprisonment for a term beyond 25 years. To achieve this objective the methodology placed before the Portugal Courts was that Article 72(1) of the Constitution conferred power on the President of India to grant pardon, reprieve, respite or remit punishment or suspend, remit or commute the sentence of any convict person convicted of any offence. This was with the assurance under Sections 432 and 433 of the Cr.P.C. which conferred the power on the Government to commute the sentence to life imprisonment with terms not exceeding 14 years. It is also the subsequent solemn assurance of the Ambassador of India given on 25.05.2003 that on the appellant being extradited, he will not be prosecuted for offences other than those for which the extradition was sought and he will not be extradited to any third country. Insofar as the latter assurance is concerned, it is nobody's subsisting case that there is a violation or there

can at all be a violation. As far as the first assurance is concerned, there was some ostensible deviation from it, but the ultimate affidavit in the earlier proceedings before the Supreme Court sought to correct it by limiting the trial to the offences for which he was extradited. That is the reason that the challenge to the extradition proceedings on account of extradition order being recalled by Portugal Courts was given up before us. No doubt those proceedings attained finality before the Portugal Courts but it is subsequently in the earlier proceedings before the Supreme Court of India that the Government of India possibly realising the larger consequences, sought to bring it within the conformity with the order of the Portugal Courts.

40. A significant aspect is that the Courts in Portugal realised the constraints of the extent to which the Government of India could give an undertaking considering that the courts in India were independent of Executive control. Thus, it was opined in para 12.2 of the judgment of the Supreme Court of Portugal dated 27.01.2005 that what could be requested was only a guarantee by the Government of India that should a sentence be imposed higher than that is specified, the Government of India would take all measures to comply with its obligations. As to how

the obligations were to be complied with, was also specified by the Government of India in the solemn sovereign assurance dated 17.12.2002, in view of the powers of the President of India under Article 72(1) of the Constitution. The President acts under the aid and advice of the Government of India under the provisions of Article 74 of the Constitution and, thus, the Government of India bound itself to advice the President of India to commute the sentence to 25 years in view of its commitment to the Courts in Portugal. The sovereign assurance also mentioned Sections 432 and 433 of the Cr.P.C., by which the Government could itself suspend or remit, and commute the sentence respectively.

41. We do believe that looking into the grievousness of the offence in which the appellant was involved, there is no question for this Court exercising any special privileges to commute or restrict the period of sentence of the appellant. In fact, different States in India have followed different patterns before even a case for remission is considered. We, thus, do not accept that the plea of the learned counsel for the appellant based on the judgment of this Court in ***Sriharan***[6] case.

6(supra)

42. However, we are in agreement with the submissions of the learned counsel for the appellant and do not accept the contention of the learned ASG that we should not opine on this aspect at present. The affidavit of the Union of India through the Home Secretary is clear, at least, to the effect that they will abide by the assurance given by the Government of India to Portugal. Thus, on completion of the period of 25 years of sentence, in compliance of its commitment to the courts in Portugal, it is required that the Government of India advise the President of India to exercise its powers under Article 72(1) of the Constitution to commute the remaining sentence, or that the Government of India exercise powers under Sections 432 and 433 of the Cr.P.C. We do believe that there is a necessity of making this time bound so that it does not result in an unending exercise and, thus, the Government of India must exercise the aforesaid powers or render advice on which the President of India is expected to act, within a month of the period of completion of sentence. We say so also to respect the very basis on which the Courts of Portugal observed the principles of comity of courts by recognising that there is a separation of powers in India and, thus, the Courts cannot give any assurance. The corresponding principle of comity of courts, thus, has to

be observed such that the Government of India having given the solemn assurance, and having accepted the same before us, is bound to act in terms of the aforesaid. We are, thus, taking a call on this issue now and do not want to leave it to any uncertainty in future. This is of course subject to any aggravating aspect of the appellant.

Plea of Set off:

43. The appellant was arrested on 18.09.2002 on the basis of the Red Corner notice. Thereafter, the appellant's extradition proceedings started on 28.03.2003. The Designated Court, Mumbai did not give benefit of any set off from 18.09.2002 till 12.10.2005.

44. Learned counsel for the appellant urged that as per Section 428 of the Cr.P.C., an accused person is entitled to set off for the period of detention undergone by him during any investigation or inquiry and such period would be set off against the remainder of the sentence. It was also urged that it is immaterial that the appellant was in custody for some other case in Portugal and was also serving a sentence there, as it is not the requirement of law that an accused has to be only in exclusive custody of that particular case for which the set off is claimed. To

support this proposition learned counsel for the appellant relied upon the following judicial pronouncements:

i. ***Allan John Waters***[7]: The petitioner therein was arrested in pursuance of a Red Corner notice on 02.07.2003 and remained in custody till 06.09.2004. The extradition procedure had commenced in America and the competent court had allowed the extradition to India on 24.11.2003 though the petitioner was finally brought to India only on 06.09.2004. The Bombay High Court vide its judgment dated 13.03.2012 referred to Section 2(h) of Cr.P.C., which defines 'investigation' and held that all proceedings for collection of evidence etc., is investigation, and hence the proceedings adopted by the investigating officer for seeking arrest was also part of the investigation. Hence, the detention in America of the appellant in that case was his detention during investigation.

7(supra)

ii. ***Najakat Ali Mubarak Ali***[8]: This court observed that Sections 427 and 428 of the Cr.P.C. are intended to provide amelioration to the prisoner. Under Section 427 of the Cr.P.C., the sentence of life imprisonment imposed on the same person in two different convictions would converge into one and thereafter it would flow through one stream alone. Even if the sentence in one of those two cases is not imprisonment for life, but only a lesser term, the convergence will take place and post-convergence flow would be through the same channel. In all other cases, it is left to the court to decide whether the sentences in two different convictions should merge into one period or not. Under Section 428 of the Cr.P.C., if the convict was in prison, for whatever reason, during the stages of investigation, inquiry 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 and it is immaterial if the

8(supra)

prisoner was undergoing a sentence of imprisonment in another case also during the said period.

iii. ***Bhagirath v. Delhi Administration***[9]: The Constitution Bench held that the assumption that the word "term" under Section 428 of Cr.P.C. implies a concept of ascertainability, or conveys a sense of certainty is contrary to the letter of law and hence the period of detention undergone by the accused as undertrial prisoners shall be set off against the sentence of life imprisonment imposed on them.

45. The nutshell of the submission was that the set off period should commence from 18.09.2002 when the appellant was arrested pursuant to the Red Corner notice, or at worst from 28.03.2003, i.e., the date of the ministerial order when extradition was granted to the appellant for various offences.

46. On the other hand, learned ASG referred to the fact that the appellant was convicted by the Courts in Portugal for an offence committed in Portugal and was serving a sentence which cannot be for

9(1985) 2 SCC 580

the appellant's benefit for purposes of Section 428 of the Cr.P.C. The period undergone by the appellant then was not as an undertrial prisoner as in the present case. In any case, assuming that the Union of India is bound by its assurance, the period would start only from the date the appellantwas handed over to the Indian authorities, i.e., 10.11.2005.

47. Learned ASG also submitted that the convicts sentenced to life imprisonment are liable to undergo imprisonment for the rest of their normal life, subject to power under Sections 432 and433 of the Cr.P.C., or Article 72 or 161 of the Constitution and Section 428 of the Cr.P.C. will be attracted only if and when such power is exercised. Thus, Section 428 of the Cr.P.C. applies to a specified term, and not the whole life of the accused as there is no purpose of setting off a few years from the punishment of life imprisonment. However, no order under Sections 432 and433 of the Cr.P.C., Article 72 or 161 of the Constitution has been passed in the present case so far and as such Section 428of the Cr.P.C. has no application.

48. Learned ASG sought to rely upon the judgment of this Court in

Raghbir Singh v. State of Haryana[10], wherein it was held that to secure the benefit of Section 428 of the Cr.P.C., the prisoner should show that he had been detained in prison for the purpose of investigation, inquiry or trial of the case in which he is later on convicted and sentenced. The Court also held that an accused cannot claim a double benefit under Section 428 of the Cr.P.C., i.e., the same period being counted as part of the period of imprisonment imposed for committing the former offence and also being set off against the period of imprisonment imposed for committing the latter offence as well. This view was also followed in ***Atul Manubhai Parek v. CBI***[11].

49. In the context of the judgment of this Court in ***Najakat Ali Mubarak Ali***[12] case, it was submitted by learned ASG that the judgment in ***Raghbir Singh***[13] case was considered, but not overruled. It was urged before us that there is apparently a misreading of the opinion of Justice Phukan as it aligned with the dissenting opinion of Justice R.P. Sethi and did not concur with Justice K.T. Thomas's opinion, which had opined that any other period, which is not connected with a case cannot be said

10(1984) 4 SCC 348
11(2010) 1 SCC 603
12(supra)
13(supra)

to be reckonable for set off. It was submitted that these judgments have also been mentioned in ***Atul Manubhai Parek***[14] case but the Court has followed the view taken in ***Raghbir Singh***[15] case.

50. On examination of the submissions, we are unable to concur with the view sought to be propounded by learned counsel for the appellant. It cannot be lost sight that when reference is made in a set off for adjustment of periods, the reference is to proceedings within the country. The criminal law of the land does not have any extra-territorial application. Thus, what happens in another country for some other trial, some other detention, in our view, would not be relevant for the purposes of the proceedings in the country. The factual scenario is that the appellant was charged with having a fake passport. He was found guilty and convicted of sentence from 18.09.2002. This had nothing to do with the proceedings against him in India. His sentence would have been completed on 18.03.2007 *de hors* the aspect of remission or commutation. However, he was granted conditional release for the remaining sentence on 12.10.2005. The mere fact that there was also a detention order under the Red Corner notice was of no significance. He

14(supra)
15(supra)

was again imprisoned from 12.10.2005 till 10.11.2005, i.e. when he was handed over to the Indian authorities. The period till 10.12.2005, when he was serving out the sentence, certainly could not have been counted. That leaves the period of less than a month only, which is really more of an academic exercise.

51. We cannot accept the plea of the learned counsel for the appellant that the formal arrest on 18.09.2002 of the appellant under the Red Corner notice is the date to be taken into reckoning for serving out sentence in the present case or for that matter that the relevant date should be 28.03.2003, when the extradition proceeding started. In view of what we have said, the only case which could emerge was of taking the date when he was given a conditional release on 12.10.2005. Thus, if one looks from the perspective of detention of the case in India, the period commences only on his being detained at Portugal on 12.10.2005, albeit giving him benefit of a little less than one month.

52. The factual scenario aforesaid, thus, makes the debate over the judgment in ***Raghbir Singh***[16] case, ***Atul Manubhai Parek***[17] case and

16(supra)
17(supra)

Najakat Ali Mubarak Ali[18] case more academic. Suffice for us to say that the judgment on this issue in ***Atul Manubhai Parek***[19] case discusses the earlier two opinions in ***Raghbir Singh***[20] case and ***Najakat Ali Mubarak Ali***[21] case to opine that the accused cannot claim a double benefit under Section 428 of the Cr.P.C. As already stated, the law would have application within the country and does not have anything to do with extra-territorial application where the trial and conviction has taken place for a local offence, i.e. Portugal in this case.

53. Now turning to ***Allan John Waters***[22] case relied upon by learned counsel for the appellant, the factual scenario is quite different from the present case. The petitioner there was arrested pursuant to a Red Corner notice on 02.07.2003 and remained in custody till 06.09.2004. In this time period, the extradition process was on. Since the detention was in pursuance of a case in India, the benefit of period in detention in the USA was given to him. In fact, to that extent we have followed that principle in the present case by giving the benefit of detention period qua the present case and, thus, treated the date of detention in custody from

18(supra)
19(supra)
20(supra)
21(supra)
22(supra)

12.10.2005. We have ignored the formal detention order passed earlier for the reason that the period the appellant was serving out his sentence in Portugal, in pursuance of a local offence, cannot be a set off against the detention in the present case. It is also apparent from the fact that on serving his sentence and getting the benefit of conditional release, his detention thereafter was in pursuance of the present proceedings on the same date of 12.10.2005.

Conclusion:

54. In view of the aforesaid facts and circumstances, we conclude that the detention of the appellant commence from 12.10.2005 in the present case. On the appellant completing 25 years of sentence, the Central Government is bound to advice the President of India for exercise of his powers under Article 72 of the Constitution, and to release the appellant in terms of the national commitment as well as the principle based on comity of courts. In view thereof, the necessary papers be forwarded within a month of the period of completion of 25 years sentence of the appellant. In fact, the Government can itself exercise this power in terms of Sections 432 and 433 of the Cr.P.C. and such an exercise should also take place within the same time period of one month.

55. The appeals are accordingly disposed of leaving the parties to bear their own costs.

……J.
[Sanjay Kishan Kaul]

....……J.
[M.M. Sundresh]

New Delhi.
July 11, 2022.