

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

561-A No.585/2015
MP No.01/2015

Date of Order: 28.03.2016.

Parshotam Lal vs State and ors.

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Appearing counsel:

For the petitioner(s)	:	Mrs. Rozina Afzal, Advocate.
For the Respondent(s)	:	Mr. Rakesh Khajuria, AAG.

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| (i) | Whether approved for reporting in press/media: | Yes. |
| (ii) | Whether approved for reporting in Law Journal/Digest: | Yes. |
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1. The petitioner seeks quashment of the order dated 26.11.2015 passed by the Court 1st Additional Sessions Judge Jammu in terms whereof clarification vis-a-vis custody period of petitioner (convict prisoner) has been issued.

2. The question for determination in essence is as to whether total period of detention during investigation, enquiry and trial in connection with two separate criminal cases against the petitioner and the period of detention undergone under Public Safety Act 'for short PSA' shall be counted for the purposes of period of sentence of 10 years rigorous imprisonment awarded by the trial Court (1st Additional Sessions Judge Jammu) upheld by High Court. The answer has to be in negative.

3. Petitioner-Parshotam Lal was arrested on 09.08.1989 by Superintendent, Customs Preventive Station R S Pura for commission of offence under Sections 20/22 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'. He was released on bail on 01.09.1989.
4. In connection with the said case, the petitioner after facing trial was convicted vide detailed judgment dated 22.07.1992 passed by the Court of 1st Additional Sessions Judge Jammu. He has been sentenced alongwith two other co-accused persons to undergo imprisonment for 10 years and to pay a fine of Rs.1,00,000/- (one lakh only) under Section 20 of the NDPS Act and also sentenced to rigorous imprisonment of 10 years and to pay fine of Rs.1,00,000/- (one lakh only) under Section 22 of the NDPS Act. Both the sentenced have been ordered to run concurrently.
5. During the trial when the petitioner was on bail, he had been detained under Public Safety Act under the orders of the detaining authority i.e. Divisional Commissioner, Jammu on 24.09.1990. The said order of detention was quashed by this court on 28.08.1991 while disposing of HC(W) No.563/1990 titled Parshotam Lal vs/ Divisional

Commissioner Jammu.

6. On the date, trial Court recorded the conviction i.e. 22.07.1992, the petitioner was taken into custody to serve out the period of sentence. An appeal was filed against the judgment of the Ld. 1st Additional Sessions Judge Jammu. During the pendency of the appeal, petitioner was released on bail under the orders of the High court on 24.11.1992. The appeal was finally dismissed on 12.05.2000 but the petitioner had not surrendered to serve out the period of sentence.
7. While being at large having not surrendered, he again was arrested by Directorate of Revenue Intelligence New Delhi for commission of offence under Sections 21 and 29 of the NDPS Act on 09.09.2003. After facing trial for commission of the said second offence at Delhi, he was convicted by the Court of Special Judge, NDPS Patiala House New Delhi vide judgment dated 03.12.2009 and was sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.2,00,000/- (Two lakh only) vide order dated 14.12.2009. As against the said judgment and order, appeal has been filed before the Hon'ble Delhi High Court. He has been admitted to bail vide order dated 06.02.2012 recorded on

the Criminal Application No.190/2010. Before he could be released, production warrant as was issued by the Court of Id. 1st Additional Sessions Judge Jammu was received by the Tihar jail authorities, in compliance whereof, the petitioner was produced before the Court of 1st Additional Sessions Judge Jammu on 13.04.2010. On production, he has been lodged in District Jail Jammu for serving out the period of sentence as was awarded by the Court of 1st Additional Sessions Judge Jammu and upheld by the High Court of J&K.

8. It appears that the petitioner had projected before the jail authorities that he has served out the period of sentence of 10 years as had been awarded by the Court of 1st Additional Sessions Judge Jammu and has also deposited the fine of Rs.2,00,000/- (Two lakh only). Therefore, he shall be released. The jail authorities confronted with the position, as was projected by the petitioner i.e. whole period of detention which the petitioner had served in connection with the case as was registered at Jammu, period of detention under PSA and the period for which he was lodged in Tihar Jail shall be counted, sought clarification from the Court of 1st Additional Sessions Judge Jammu.

9. Learned Court of Ist Additional Sessions Judge Jammu has passed a detailed order dated 26.11.2015 whereunder it has been clarified that the convict-Parshotam Lal has to undergo imprisonment as was ordered by the Court of ^{1st} Additional Sessions Judge Jammu without being concurrent with any other sentence and the period of imprisonment has to be calculated as per the warrant of imprisonment issued w.e.f 13.04.2010 neither w.e.f 01.09.2003 nor w.e.f 10.12.2007 as has been suggested by the superintendent Central Jail, Kot-Bhalwal, Jammu.
10. The admitted position as has emerged regarding the period of detention of the petitioner is as under:
 - A (i). In connection with the commission of the offence at R S Pura punishable under Section 20/22 NDPS Act, the petitioner has been arrested on 09.08.1989, convicted and sentenced on 22.07.1992.
 - A (ii). Appeal against the conviction has been dismissed by the High Court of J&K on 12.05.2000.
 - (B) The petitioner has also remained under detention in pursuance to detention order passed under PSA from 24.09.1990 till its quashment by the High court i.e. 28.08.1991.

11. The period of detention in connection with the said cases is as under:

(A) (i) 09.08.1989 (date of arrest) to 1.09.1989 (date of release on bail) = **22 days.**

(ii) 22.07.1992 (date of conviction on which convict was taken into custody) to 24.11.1992 (date of release on bail by the High Court) = **4 months and 02 days.**

(iii) 13.04.2010 (when pursuant to warrant of production, petitioner had been brought from Tihar Jail to Jammu and lodged in District Jail for serving out the period of sentence) to till date of hearing of this petition = **6 years, 03 months and 26 days.**

(B) Period of detention under PSA from 04.09.1990 (date of taking into custody) to 29.08.1991 (date of release pursuant to quashment of the order of detention by the High Court) = **11 months and 21 days.**

(C) Period of detention in Tihar Jail in connection with the case for commission of offence under Sections 21 and 29 of NDPS Act.

From 09.09.2003 (date of arrest by DRI, New Delhi) to 13.04.2010 (date when on production of

warrant issued by the Court of 1st Additional Sessions Judge Jammu, the petitioner was produced in Jammu and lodged in District Jail Jammu). The total period = **6 years, 07 months and 04 days.**

12. The period of detention i.e. 06 years, 07 months and 04 days during investigation, enquiry, trial and appeal in connection with the case committed at New Delhi has not to be counted vis-a-vis period of sentence of 10 years rigorous imprisonment passed by the Court of 1st Additional Sessions Judge Jammu and upheld by the High Court of J&K because the Id. Trial Court at Delhi (Special Judge, NDPS, Patiala House, Delhi) while recording conviction and passing the order of sentence has not directed that the period of sentence shall run concurrently with the previous sentence which fact perhaps has not been brought to the notice of the said Court. Now since the appeal is pending against that conviction, the appellate Court (High Court of Delhi) if after upholding the conviction may or may not direct the running of the sentence concurrently with the previous sentence. As on date, there is no such order.
13. Learned trial court at Delhi in the judgment had directed

that the period of detention during investigation, enquiry and trial of the said case undergone by the accused to be set off against the sentence of imprisonment as permissible under Section 428 Cr.PC (Central Code) which corresponds to Section 397(A) of the State Code.

14. Learned Counsel for the petitioner tried to project that the learned trial Court at Delhi has allowed running of sentence concurrently with the previous sentence as recorded by the trial Court (1st Additional Sessions Judge Jammu) is mis-placed because such a direction i.e. running of the sentence concurrently with the previous sentence is governed by Section 427 of the Code of Criminal Procedure (Central code) which corresponds to Section 397 of the State Code. There is no such direction by the trial Court at Delhi under Section 427 Central Code.
15. There is a marking difference between Sections 427 and 428 Central Code which corresponds to Sections 397 and 397(A) State Code. Under Section 428 Central Code which corresponds to Section 397(A) State Code while recording sentence, the court has to direct that the period of detention if any undergone during investigation, enquiry or trial of the same case and

before the date of such conviction shall be set off against the term of imprisonment imposed on the accused. Whereas, under Section 427 Central Code, subsequent imprisonment has to commence at the expiration of the imprisonment to which the accused has been previously sentenced unless the Court directs that the subsequent sentence shall run concurrently with the previous sentence. Therefore, the requirement of running subsequent sentence with the previous sentence concurrently, it has to be directed by the Court while awarding subsequent sentence.

16. The period of detention during investigation, trial and conviction in subsequent case i.e. at Delhi has been set off by the Trial Court at Delhi in the same case that cannot be a set off against the period of sentence which the petitioner is suffering pursuant to the first conviction and sentence passed by the Court of 1st Additional Sessions Judge Jammu unless of course while deciding the appeal as is pending against the conviction and sentence recorded by the trial Court at Delhi, the High Court of Delhi where the same is pending directs running of sentences concurrently with the previous sentence.
17. The period of detention of the petitioner for 11 months

and 21 days in pursuance to the order of detention passed under PSA has not to be set off because that is a period for which the petitioner has not been in custody during trial, enquiry and conviction of the case.

18. In the view taken, I am fortified by the judgment of the Hon'ble Supreme court rendered in the case of State of Maharashtra v. Najakat Alia Mubarak Ali (2001 Legal Eagle (SC) 829): **Equivalent Citation 2001 (6) SCC 311.** Para 28, 30, 33 and following portion from Para 27 are advantageous to be quoted:

"27.....
.....
.....We are unable to agree with the submission of Shri Jethmalani. In the very case cited by the learned counsel, the Court negated the contention that the expression 'period of detention' in Section 428 Code of Criminal Procedure included the detention under the Prevention Detention Act or the Maintenance of Internal Security Act. It was observed (para 7):
" IT is true that the section speaks of the period of detention undergone by an accused person, but it expressly says that the detention mentioned refers to the detention during the investigation, enquiry or trial of the case in which the accused person has been convicted. The section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the

accused on conviction must be during the investigation, enquiry or trial in connection with the 'same case' in which he has been convicted. We therefore agree with the High Court that the period during which the Writ Petitioners were in preventive detention cannot be set off under Section 428 against the terms of imprisonment imposed on them".....
.....

(28). A perusal of the section unambiguously indicates that only such accused is entitled to its benefit of that period of detention which he has undergone during the investigation, enquiry or trial of the same case. It does not contemplate of the benefit of set-off of the period of detention during investigation, inquiry or trial in any other case. The purpose and object of the section, as pointed out by Brother Thomas, J., is aimed at providing amelioration to a prisoner in a case where he has been in detention for no fault of his. The section, however, does not intend to give any benefit or bonus to an accused guilty of commission of more than one crime by treating the period of detention during investigation, inquiry and trial in one case as that period in the other cases also for the purposes of set-off in the sentence. Such an entitlement requires the judicial determination which can be adjudicated by a court awarding the sentence in exercise of its powers under Section 427 of the Code. The words " period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case " are important to indicate

the paramount concern and intention of the legislature to protect the interests of under-trial prisoners by giving them the set-off of that period in "that case", at the conclusion of the trial. The Section makes it clear that the period of detention which it allows to be set off against the term of imprisonment imposed on the accused, on conviction, must be during the investigation, inquiry or trial in connection with the same case in which he has been convicted.

(30) THE dictionary meaning of the word "same" is identical; referring to a person or thing just mentioned; the same thing as previously mentioned. It generally refers to the last preceding antecedents: one and the same: not distinct. Generally speaking the "same case" would thus mean "same transaction" for which the accused has been tried. Two different criminal cases, therefore, cannot be treated to be the "the same case" in relation to an accused for the purposes of determining the applicability of Section 428 of the Code.

33) AFTER referring to the judgments of this Court in Mr. Boucher Pierre Andre v. Superintendent Central Jail Tihar⁹, Suraj Bhan v. Om Prakash¹⁰, Govt. of A.P. v. A.V. Rao¹¹, the earlier judgment of that Court in Nasim v. State of U.P.¹², the judgment of the Delhi High Court in K.C. Das v. State (supra), of Bombay High Court in Jaswant Lal Harjivan Das Dholkia v. State¹³, Mohan Lal v. State of U.P.¹⁴, the Full Bench further held that under Section 428 the period of detention as an undertrial of an accused in a particular case can be set off only

towards the sentence ultimately awarded to him in that very case. The Court further held:
 "WHETHER or not the detention of a person in one case should also be treated to be his detention for the purposes of any other case, wherein he is wanted, is a question to be decided upon the facts and circumstances of each case. No set formula can be laid down in that behalf."

19. For the stated reason and the law, the order impugned passed by Id. Trial Court (1st Additional Sessions Judge Jammu) dated 26.11.2015 is maintained.
20. Petition being without merit is accordingly dismissed alongwith connected MP.

(Mohammad Yaqoob Mir)
Judge

Jammu
 28.03.2016
Raj Kumar