

ATUL MANUBHAI PAREKH

v.

CENTRAL BUREAU OF INVESTIGATION

(Criminal M.P. No. 13384 of 2009)

IN

(Criminal Appeal No. 164 of 2004)

NOVEMBER 24, 2009

**[ALTAMAS KABIR AND CYRIAC JOSPEH, JJ.]**

*Code of Criminal Procedure, 1973 – s. 428 – Benefit of set-off – For the period of detention or imprisonment, undergone by the accused in another case – Held: Period to be set-off relates only to pre-conviction detention, and not to imprisonment on conviction – In case of s. 428, question of merger does not arise – Period of set-off is in respect of each separate case.*

**The question for consideration in the present cases was whether a person, who has been convicted in several cases and has suffered detention or imprisonment in connection therewith, would be entitled to the benefit of set-off in a separate case for the period of detention or imprisonment undergone by him in the other cases.**

**Dismissing the applications, the Court**

**HELD: 1. The heading of Section 428 Cr.P.C. itself indicates that the period of detention undergone by the accused is to be set-off against the sentence of imprisonment. The Section makes it clear that the period of sentence on conviction is to be reduced by the extent of detention already undergone by the convict during investigation, enquiry or trial of the same case. It is quite clear that the period to be set-off relates only to pre conviction detention and not to imprisonment on conviction. [Para 9] [1110-G-H; 1111-A]**

**2. Section 428 Cr.P.C. deals with a situation, where the question of merger of sentence does not arise and the**

A **period of set-off is in respect of each separate case and the detention undergone by the accused during the investigation or trial of such case. [Para 10] [1111-D]**

*Champalal Punjaji Shah vs. State of Maharashtra (1982) 1 SCC 507; Raghubir Singh v. State of Haryana (1984) 4 SCC 348; Government of A.P. vs. Anne Venkateswara Rao (1977) 3 SCC 298; Maliyakkal Abdul Azeez vs. Asstt. Collector, Kerala and Anr. (2003) 2 SCC 439, relied on.*

*State of Maharashtra and Anr. vs. Najakat Alia Mubarak Ali (2001) 6 SCC 311, distinguished.*

C **Case Law Reference :**

(1982) 1 SCC 507	Relied on.	Para 6
(1984) 4 SCC 348	Relied on.	Para 8
(1977) 3 SCC 298	Relied on.	Para 10
D (2003) 2 SCC 439	Relied on.	Para 11
(2001) 6 SCC 311	Distinguished.	Para 13

CRIMINAL APPELLATE JURISDICTION : CRLMP No. 13384 of 2009 in Criminal Appeal No. 164 of 2004.

E From the Judgment & Order dated 04.12.2003 of the Special Court constituted under the Special Court (Trial of Offences Relating to Transaction in Securities) Act, 1992 at Bombay in Case No. 2 of 1993.

WITH

F CRLMP. No. 13382 of 2009 in Crl. A. No. 905 of 2005; CRLMP. No. 13381 of 2009 in Crl. A. No. 925 of 2005; and CRLMP. No. 17357 of 2009 in Crl. A. No. 90 of 2004.

G P.P. Malhotra, ASG, Kamini Jaiswal, I. H. Syed, Varinder Kumar Sharma, Abhimanue Shrestha, P. Parmeswaran, Mohan Parasaran, P.K. Dey, A.K. Sharan, T.A. Khan, Subhash Kaushik, R.K. Tanwal, A.K. Sharma, for the appearing parties.

The Judgment of the Court was delivered by

H **ALTAMAS KABIR, J.** 1. Crl. M.P. No.13384 of 2009 has been filed in Criminal Appeal No.164 of 2004, which was

ATUL MANUBHAI PAREKH v. CENTRAL BUREAU 1107  
OF INVESTIGATION [ALTAMAS KABIR, J.]

disposed of by this Court by judgment and order dated 7th August, 2009, upholding the conviction of the appellant under Section 120-B and sentencing him to undergo rigorous imprisonment for a period of 15 days and to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for a further period of 15 days. By the same order, the appellant was also granted the benefit of set-off for the period of detention he had already undergone under Section 428 Cr.P.C. This application has been filed on behalf of the appellant, Atul Manubhai Parekh, for a direction that he be entitled to set-off of 30 days in the present case against the detention of 15 days already undergone by him.

2. The short point involved in this application is whether a person, who has been convicted in several cases and has suffered detention or imprisonment in connection therewith, would be entitled to the benefit of set-off in a separate case for the period of detention or imprisonment undergone by him in the other cases.

3. Ms. Kamini Jaiswal, learned Advocate appearing for the appellant, submitted that the right of a convict to be allowed set-off in one case in respect of detention or imprisonment undergone by him in other cases, fell for the consideration of this Court in *State of Maharashtra & Anr. vs. Najakat Alia Mubarak Ali* [(2001) 6 SCC 311], wherein three Judges of this Court had occasion to consider the provisions of Section 428 Cr.P.C., and it was the majority view that the period of imprisonment undergone by an accused as an undertrial during investigation, enquiry or trial of a particular case, irrespective of whether it was in connection with that very case or other cases, could be set-off against the sentence of imprisonment imposed on conviction in that particular case. Their Lordships held that the words "same case" used in Section 428 do not suggest that set-off would be available only if the period undergone as an undertrial prisoner is in connection with the same case in which he was later convicted and sentenced to a term of imprisonment. According to Their Lordships, the said expression merely denoted the pre-sentence period of detention undergone by an accused and nothing more.

A 4. Ms. Jaiswal also referred to the Three-Judge Bench  
 decision of this Court in *State of Punjab vs. Madan Lal* [(2009)  
 5 SCC 238], where also the provisions of Section 428 of the  
 Code fell for consideration and the decision in *Najakat Alia's*  
 B case was noticed with approval. While deciding the matter, the  
 Hon'ble Judges had occasion to consider the objects and  
 reasons for introducing Section 428 into the Code of Criminal  
 Procedure, 1973 by amendment. The Hon'ble Judges extracted  
 a portion of the objects and reasons, wherein it was stated that  
 in many cases the accused person is made to suffer jail life for  
 C a period out of all proportion to the gravity of the offence or even  
 to the punishment provided in the statute. Their Lordships  
 emphasized that the new clause provides for the setting off of  
 the period of detention as an undertrial prisoner against the  
 sentence of imprisonment imposed on him. Their Lordships  
 D interpreted the same to mean that the purpose of introduction of  
 Section 428 into the Code was to give the convicted person the  
 right to reckon the period of his sentence of imprisonment from  
 the date he was in jail as an undertrial prisoner and that the period  
 of his being in jail as an undertrial prisoner would be added as a  
 part of the period of imprisonment to which he was sentenced.

E 5. Ms. Jaiswal, therefore, submitted that in the light of the  
 aforesaid decisions the petitioner was entitled to set off of all  
 periods of detention unconnected with the case in which he has  
 been convicted and sentenced. It was urged that the High Court  
 had erred in rejecting the petitioner's prayer for grant of set-off  
 F against periods of imprisonment already undergone by him in  
 connection with other cases.

6. Ms. Jaiswal's submissions were opposed on behalf of  
 the Central Bureau of Investigation by the learned Additional  
 Solicitor General who contended that the question involved in  
 these appeals had fallen for consideration before this Court  
 G earlier, also by a Three-Judge Bench in *Champalal Punjaji Shah*  
*vs. State of Maharashtra* [(1982) 1 SCC 507], where this Court  
 was called upon to decide as to whether the period of detention  
 under the Preventive Detention Act could be set-off under  
 Section 428 of the Code. In the said context, this Court held that  
 H the period of detention under preventive detention laws could not

ATUL MANUBHAI PAREKH v. CENTRAL BUREAU 1109  
OF INVESTIGATION [ALTAMAS KABIR, J.]

be counted for the purposes of Section 428 Cr.P.C. It was further  
contended that the question of applicability of Section 428 in  
respect of a period which had lapsed in an earlier case, could  
not be set-off against the term of imprisonment imposed in the  
latter case. It was held that in order to secure the benefit of  
Section 428 of the Code, the prisoner has to show that he had  
been detained in prison for the purpose of investigation, enquiry  
or trial of the case for which he is later on convicted and  
sentenced, but he cannot claim a double benefit under Section  
428, 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. Their Lordships further  
held that if a person is undergoing a sentence of imprisonment  
on being convicted of an offence in one case during the period  
of investigation, enquiry or trial of some other case, he cannot  
claim that the period occupied by such investigation, enquiry or  
trial should be set-off against the sentence of imprisonment to  
be imposed in the latter case, even though he was under  
detention during such period. In such a case, the period of  
detention is really a part of the period of imprisonment which he  
is undergoing on being sentenced for another offence. It was  
submitted that the subsequent judgments of the Three-Judge  
Benches of this Court reveals that there were misgivings  
regarding the law sought to be explained in the said cases. It was  
submitted that the High Court did not commit any error in  
sentencing the appellant to undergo rigorous imprisonment for  
a period of 15 days under Section 120-B of the Indian Penal  
Code and to also pay a fine of Rs.10,000/- and in default to  
undergo simple imprisonment for a further period of 15 days.

7. We have carefully considered the submissions made on  
behalf of both the parties, having particular regard to the two  
views expressed as to whether the period of detention undergone  
by an accused in some other case could be the subject matter  
of an order of set-off in connection with a different case. At this  
juncture, it may be relevant to reproduce the provision of Section  
428 Cr.P.C. :

*"428. Period of detention undergone by the accused to be*

A *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  
 B case and before the date of such conviction, shall be set  
 off against the term of imprisonment imposed on him on  
 such 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  
 C him.

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."

8. From the wording of Section 428 it is clear that what is to  
 be set-off is the period of detention, if any, undergone by the  
 D convict during the investigation, enquiry or trial of the same case  
 and before the date of such conviction. What has fallen for the  
 interpretation of the courts is the expression "the same case".  
 While in one set of judgments it has been held that periods of  
 detention undergone in connection with other cases can be  
 E counted towards set-off under Section 428 Cr.P.C. in respect  
 of the conviction in another case, in the other set of cases it has  
 been held that it cannot. However, even in *Najakat Alia's* case,  
 one of the three Hon'ble Judges took a dissenting view that set-  
 off under Section 428 of the Code would have to be in respect  
 F of the detention undergone in respect of the same case. It is the  
 said view which had earlier been accepted in *Raghubir Singh v.*  
*State of Haryana* [(1984) 4 SCC 348] and in the case of  
*Champalal Punjaji Shah's* case (supra).

9. The wording of Section 428 is, in our view, clear and  
 unambiguous. The heading of the Section itself indicates that the  
 G *period of detention undergone by the accused is to be set off*  
*against the sentence of imprisonment.* The Section makes it  
 clear that the period of sentence on conviction is to be reduced,  
 by the extent of *detention* already undergone by the convict during  
 investigation, enquiry or trial of the same case. It is quite clear  
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ATUL MANUBHAI PAREKH v. CENTRAL BUREAU 1111  
OF INVESTIGATION [ALTAMAS KABIR, J.]

that the period to be set off relates only to pre conviction detention and not to imprisonment on conviction. A

10. Let us test the proposition by a concrete example. A habitual offender may be convicted and sentenced to imprisonment at frequent intervals. If the period of pre-trial detention in various cases is counted for set-off in respect of a subsequent conviction where the period of detention is greater than the sentence in the subsequent case, the accused will not have to undergo imprisonment at all in connection with the latter case, which could not have been the intention of the legislature while introducing Section 428 in the Code in 1973. The reference made in the several decisions cited before us to Section 427 Cr.P.C. appears to be a little out of focus since the same deals with several sentences passed in the same case against the same accused on different counts which are directed to run concurrently. Section 428 Cr.P.C. deals with a different situation, where the question of merger of sentence does not arise and the period of set-off is in respect of each separate case and the detention undergone by the accused during the investigation or trial of such case. The philosophy of Section 428 Cr.P.C. has been very aptly commented upon by this Court in *Government of A.P. vs. Anne Venkateswara Rao* (1977) 3 SCC 298, in the following terms : B  
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"Section 428 provides that the period of *detention* of an accused as an undertrial prisoner shall be set off against the term of *imprisonment* imposed on him on conviction."

11. In fact, a similar situation arose in the case of *Maliyakkal Abdul Azeez vs. Asstt. Collector, Kerala & Anr.* [(2003) 2 SCC 439], wherein it was sought to be argued on behalf of the petitioner that he was entitled to the benefit of set-off under Section 428 Cr.P.C. for the period of detention under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. While deciding the said case, the Hon'ble Judges observed that Section 428 Cr.P.C. had been brought on the statute book for the first time in 1973 and was incorporated in the light of the proposal put forward by the Joint Select Committee which noticed that in many cases the accused persons were kept in prison for a very long period as undertrial F  
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- A prisoners and in some cases the period spent in jail by undertrial prisoners far exceeded the sentence of imprisonment ultimately awarded. It was also noticed by the Select Committee with concern that a large number of prisoners in the overcrowded jails of the country were undertrial prisoners and that Section 428 Cr.P.C. was introduced to remedy the unsatisfactory state of affairs by providing for setting-off of the period of detention as an undertrial prisoner against the sentence of imprisonment imposed on the accused.

12. The decision in the case of *Maliyakkal Abdul Azeez* (supra) was rendered after the decision in *Najakat Alia's* case (supra) and we respectfully follow the same as it reiterates the law laid down in the earlier cases such as in the case of *Anne Venkateswara Rao* (supra), *Raghubir Singh* (supra) and *Champalal Punjaji Shah* (supra).

13. The facts on which the decision was rendered in *Najakat Alia Mubarak Ali's* case are distinguishable from the facts of this case. In the said case, the convict was undergoing imprisonment in two cases in which he had been convicted and he claimed that he was entitled to set-off in respect of both the cases. This Court drawing inspiration from Section 427 on the concurrent running of sentences, held that the petitioner was entitled to set-off in both cases in view of the doctrine of merger of sentences when directed to run concurrently in a particular case where conviction is on many counts.

14. The application filed by Atul Manubhai Parekh, being Criminal Misc. Petition No.13384 of 2009, in the disposed of Criminal Appeal No.164 of 2004, and the connected applications being Criminal Misc. Petition No.13382 of 2009 in Criminal Appeal No.905 of 2005, Criminal Misc. Petition No.13381 of 2009 in Criminal Appeal No.925 of 2005 and Criminal Misc. Petition No.17357 of 2009 in Criminal Appeal No.90 of 2004, are, accordingly, dismissed.

K.K.T.

Applications dismissed.