

(1985) 01 GUJ CK 0019
In the Gujarat High Court

Balubhai Muradbhai Sindha	Vs	APPELLANT
State of Gujarat and Another		RESPONDENT

Date of Decision : 25-01-1985

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(d), 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 428
Customs Act, 1962 — Section 135, 135

Citation : (1985) 2 GLR 736

Hon'ble Judges : B.S. Kapadia, J

Bench : Single Bench

Judgement

B.S. Kapadia, J.—In this Petition the question arises as to whether the petitioner is entitled to set off for the period of his detention in jail

from 27th August, 1975 to 22nd March, 1977.

2. The short facts leading to the present petition are as under: In Criminal Case No. 113 of 1974 in the Court of Judicial Magistrate First Class,

Umargaon the present petitioner was accused No. 3 along with others for the offence punishable u/s 135 of the Customs Act. Subsequently it

appears that the said case was transferred to the Additional Chief Judicial Magistrate, Bulsar on September 23, 1978 where it was renumbered as

Criminal Case No. 90 of 1978. In the said case he was convicted by order dated 4th June, 1979 and sentenced to rigorous imprisonment for a

period of three years and a fine of Rs. 3,000/- in default rigorous imprisonment for a period of three months. The present petitioner preferred

Appeal against the said order of conviction and sentence. It was Criminal Appeal No. 26 of 1979 before the Sessions Judge, Bulsar. But in the

said case one Ratilal Devabhai was acquitted and, therefore, the complainant

being dissatisfied with the order of acquittal passed in favour of said

Ratilal Devabhai preferred Appeal before this Court which was numbered as Criminal Appeal No. 943 of ,1979. The Appeal of the petitioner was

withdrawn from Sessions Court, Bulsar and was brought to the High Court and it was numbered as Criminal Appeal No. 111 of 1979 and it was

heard along with the aforesaid Criminal Appeal No. 943 of 1979 by Justice A.S. Qureshi by order dated 19th July, 1983. Both the appeals were

dismissed. But so far as the sentence of the present petitioner was concerned, it was reduced from three years R.I. to two years R.I.

3. During the time when the case was pending, the learned Magistrate passed the order that each of the accused be released on personal bond of

Rs. 10,000/- with one surety for the like amount and the time was granted till 9th September, 1974 to furnish the bonds. Accordingly on 9th

September, 1974 the petitioner furnished the bail-bonds.

4. However, on 21st September, 1974 on execution of the warrant under the provisions of the Maintenance of Internal Security Act, 1971

(Amendment) Ordinance, 1974 (11 of 1974) the petitioner was detained in prison, but was thereafter released from prison on 19th December,

1974 on repeal of MISA. However, by Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA)

which came into force on 7th December, 1974. The petitioner was again detained on the same day on execution of warrant under the

COFEPOSA till March 22, 1977.

5. It is the case of the petitioner that during the detention under the COFEPOSA the petitioner by written application, dated 27th August, 1975

made in Criminal Case No. 113 of 1974 had applied to the learned Judicial Magistrate First Class, Umargaon camp at Pardi for cancellation of his

bail as he did not want to continue on bail because of his detention under the COFEPOSA and for considering him in judicial custody for the

purpose of the case. The learned Magistrate on that application on the same day passed order as under:

Bail-bond cancelled. Inform Jailor.

On the basis of this application and the order made thereon the petitioner submits that for the purpose of trial of the same case the petitioner was

considered as under-trial prisoner and thereafter the petitioner was released on

March 22, 1977.

6. The petitioner further submits that he made an application for getting set off to the Additional Chief Judicial Magistrate, Bulsar for the period

from 27th August, 1975 to 22nd March, 1977 but the learned Magistrate by his order dated 11th April, 1974 rejected the said application.

Thereafter he preferred Revision Application before the Sessions Judge, Bulsar being Revision Application No. 39 of 1984 and the said Revision

Application by order dated 20th July, 1984 has also been rejected by the learned Sessions Judge. Bulsar and now the petitioner has approached

this Court under Articles 226, 227, 14, and 19(1)(d) of the Constitution of India read with Section 428 of the Criminal Procedure Code.

7. From the above facts it is clear that the only question which is required to be considered is whether the petitioner can be said to have undergone

detention during investigation, inquiry or trial of the case in which he is convicted.

8. Mr. Gandhi, learned advocate appearing for the petitioner vehemently submits that in view of the application made by the petitioner which is

filed at annexure "A" and the order made by the learned, Magistrate thereon on the same day that is on 27th August, 1975 the petitioner should be

held to be as under-trial prisoner and, therefore, his detention for the period from 27th August, 1975 to 22nd March, 1977 should be treated as a

period of detention undergone during trial of the same case. Mr. Malik, learned Additional Public Prosecutor on behalf of the State does not

dispute the fact that the petitioner had made application for cancellation of bail on 27th August, 1975. He also does not dispute the fact that the

learned Magistrate had passed order on the same day for cancelling the bail-bond, and for informing the Jailor accordingly. However, what he

points out is that when order of detention under COFEPOSA came to an end on 22nd March, 1977 the petitioner was released from Jail. If at all

his bail bond was cancelled he would not have been released on bail and, therefore, though there is formal order passed by the learned Magistrate,

still however, it was not implemented and, therefore, the detention in Jail under COFEPOSA for the period from 27th August, 1975 to 22nd

March, 1977 cannot be treated as the period under detention as under-trial prisoner as required by Section 428 of the Criminal Procedure Code.

9. In view of the fact that the factual aspect is not disputed there is very little

compass of controversy in this case. Section 428 of the Criminal

Procedure Code runs as under:

428. 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 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.

It is, therefore, clear that the person on conviction can get set off if he had undergone detention during investigation, inquiry or trial of the same case

and that set off can be given for sentence to imprisonment which is not imprisonment in default of payment. On this point Mr. Gandhi has pointed

out a judgment in the case of Government of Andhra Pradesh and Another Vs. Anne Venkatesware and Others, . While dealing with Mr. A.V.

Rao's case W.P. No. 1865/76, in paragraph 8 of the judgment it is mentioned that he was already in detention under the Preventive Detention Act

when F.I.R. was lodged on December 18, 1969 in connection with Sessions Cases. Some of the accused in these cases were arrested and were

produced before the Magistrate for remand on December 19, 1969 but Rao was produced before the Magistrate some time in April, 1970 after he

was released from preventive detention. In that case it was argued that he could have been produced before the Magistrate for remand on

December 19, 1970. However, on behalf of the respondent-State of A.P. it was contended that as Rao was already in detention under the

Preventive Detention Act it was not possible to produce him before the Magistrate for remand until the period of preventive detention was over.

On this contention the Supreme Court has held as under:

We do not find any justification in law for the position taken up by the State, Rao being already in custody, the authorities could have easily

produced him before the Magistrate when the First Information Report was lodged. Nothing has been pointed out to us either in the Preventive

Detention law or the Code of Criminal Procedure which can be said to be a bar to such a course. That being so we think that the claim that the

entire period from December 19, 1969, when many of the co-accused were produced before the Magistrate, to April 18, 1970 should be treated

as part of the period during which Rao was under detention as an undertrial prisoner, must be accepted as valid. A.V. Rao's appeal No. 434 of

1976 is allowed to this extent.

10. The facts of the present case are more clear. There is no dispute on the point that when the petitioner was under detention he had made an

application for cancellation of bail and that the learned Magistrate had also passed order cancelling the bail and informing the Jailor accordingly.

However, it appears that ultimately on 22nd March, 1977 when the order under COFEPOSA came to an end he was released. It may be noted

that he is released not because that he was not an under-trial prisoner but because of some laxity or inadvertance on the part of the Court officers

and/or Jail authorities in implementing the order passed by the learned Magistrate and I do not find any reason why the present petitioner whose

bail-bonds were cancelled and why he was treated as under-trial prisoner should lose benefit of set off u/s 428 of the Criminal Procedure Code on

account of some laxity or mistake or inadvertance on the part of the Court officers or the Jail authorities.

11. Mr. Malik, learned Additional Public Prosecutor has pointed out a judgment in the case of Champalal Punjaji Shah Vs. State of Maharashtra, .

In the said case the accused was acquitted by the High Court and after his acquittal he was kept detained under the Preventive Detention Act and

thereafter he was convicted in appeal by special leave and in the said case it was held that the detention was neither as one pursuant to the

conviction nor as that of under-trial and it was held in the circumstances of the case that the period of detention could not be set off u/s 428 of the

Criminal Procedure Code. It may be stated that in the aforesaid case the above referred judgment reported in Government of Andhra Pradesh and

Another Vs. Anne Venkatesware and Others, was considered and it was distinguished on facts. In Champalal Punjaji Shah Vs. State of

Maharashtra, the facts of the case were altogether different. The petitioner was acquitted by the High Court before any orders of detention were

made against him. There can be no question of detention being considered as detention pursuant to conviction nor that of under-trial. It is only in

these circumstances where the prisoner would have unquestionably been in detention in connection with a criminal case if he had not been

preventively detained, his preventive detention might be reckoned as detention as an under-trial prisoner of detention pursuant to conviction for the

purposes of Section 428 of the Criminal Procedure Code.

12. Here in this case applying the same test, it is clear that if the present petitioner had not been preventively detained the petitioner would have

been unquestionably been in detention in connection with the case in view of the fact that his bail-bond was ordered to be cancelled and Jailor was

to be informed accordingly as per the order passed by the learned Magistrate. In that view of the matter his detention for the period from 27th

August, 1975 to 22nd March, 1977 should be treated as a period of detention as an under-trial prisoner for the purposes of Section 428 of the

Criminal Procedure Code.

13. Accordingly the Rule is made absolute. The orders passed by both the Courts are hereby quashed and set aside and the period of detention

of the petitioner for the period from 27th August, 1975 to 22nd March, 1977 be treated as a period of detention as an under-trial prisoner for the

purpose of set off u/s 428 of the Criminal Procedure Code.

14. Necessary intimation be given to the Superintendent, Central Prison, Baroda where the petitioner is detained.