

**(2017) 05 BOM CK 0091**  
**In the Bombay High Court**  
**Case No : 2285 of 2016**

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|---------------------------------------------|------------|
| Saquib Abdul Hamid Nachan and others        | APPELLANT  |
| Vs                                          |            |
| The Superintendent, Central Jail and others | RESPONDENT |

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**Date of Decision :** 05-05-2017

**Acts Referred:**

<a href=3863>Code of Criminal Procedure, 1973</a>, <a href=3863-427>Section 427</a>, <a href=3863-428>Section 428</a> - Sentence on offender already sentenced for another offence - Period of detention undergone by the accused to be set off against th

**Citation :** (2017) 05 BOM CK 0091

**Hon'ble Judges :** Ranjit More, Anuja Prabhudessai

**Bench :** DIVISON BENCH

**Advocate :** Sandeep Pasbola, Rohini Salian

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## Judgement

1. Rule. Rule is made returnable forthwith. With consent of the parties, petition is taken up for hearing.
2. The petitioner is sentenced to undergo maximum imprisonment for a period of 10 years in Special Case No.2 of 2003 and fine of Rs.1,00,000/-. The sentence of imprisonment imposed for other offences, is ordered to run concurrently. The period of detention undergone by the Petitioner from 10.4.2003 to 2.3.2011 is set off under Section 428 of Cr.P.C.
3. The Petitioner was arrested on 10.4.2003 for committing offences under POTA ( Mulund, Ghatkoper, Vile Parle and Bombay Central Bomb Blast cases). He faced trial for the said offence in Special Case No. 2 of 2003 and was in custody till 1.3.2011 i.e. for a period of 7 years, 10 months and 22 days. He was convicted in the said case by judgment dated 6.4.2016 for a period of 10 years.
4. On 4.8.2012, i.e. after he was released on bail in POTA case, the Petitioner came to be arrested in Crime No. I131 of 2012 and he faced trial in MCOCA Special Case No. 10 of 2012 with 6 of 2013. He was remanded in the said case from time to time and was released on bail on 31.10.2016. Thus, the Petitioner

was in custody in MCOC Special Case No.10 of 2012 for a period of 6 months and 24 days. The said case is still pending trial.

5. The petitioner has claimed that he was in custody as an undertrial Prisoner in MCOC Case No. 10 of 2012 till 31.10.2016. In the course of trial of POTA Case No. 2 of 2003, he was produced before the POTA Court under production warrant. In Writ Petition 4047 of 2016, the Petitioner has claimed that he was produced in POTA Case No 2 of 2003 from 7.9.2012, whereas in Writ Petition No.2285 of 2016 the Petitioner has claimed that he was produced before POTA Court in Pota Case No. 2 of 2003 from 1.9.2012. The Petitioner claims that since he was an undertrial prisoner in MCOC case and was produced before POTA Court under production warrant, the period of detention undergone in MCOC Case should be set off against the sentence of imprisonment in POTA case.

6. In Writ Petition No. 4047 of 2016 he has sought set off from 7.9.2012 to 6.4.2016, whereas in Writ Petition No. 2285 of 2016 he has sought set off from 1.9.2012 to 6.4.2016.

7. Shri Pasbola, the learned Counsel for the Petitioner has submitted that the Petitioner was admittedly in custody in MCOC Special Case No. 10 of 2012 as undertrial prisoner from 4.8.2012. While he was in custody in MCOC Case, he was produced in POTA Case under production warrant. He has submitted that in terms of Section 428 Cr.P.C. the period during which he was produced before POTA Court under production warrant is required to be set off as against the period of imprisonment imposed in the said case. He has submitted that in State of Maharashtra v. Najakat @ Mubarak Ali, 2008 Cri.L.J. 2588, the Apex Court has clearly laid down that the words "same case" do not suggest that set off would be available only if the period undergone as undertrial prisoner is in connection with the same case in which he was later convicted and sentenced to imprisonment and that the words "same case" merely denote presentence period of detention undergone by the accused and nothing more. Shri Pasbola, has further submitted that the Petitioner was released on bail in POTA Special Case No. 2 of 2003. He was produced in the said case under production warrant and was thereafter remanded to judicial custody, and this fact indicates that he was deemed to be in custody in the said case.

8. Ms. Salian, the learned Spl.PP for the State has submitted that the words "same case" in Section 428 of Cr.P.C. clearly indicate that in terms of Section 428 Cr.P.C. only the period undergone by the petitioner in the "same case" can be set off. She has submitted that the facts of the case in Najakatali (supra) are distinguishable and hence the ratio laid down in the said case is not applicable to the facts of the present case.

9. We have perused the records and considered the submissions advanced by the learned Counsel for the Petitioner and the learned Spl.PP for the State. Before advertng to the facts of the present case, it would be necessary to refer to Section 428 of Cr.P.C. which reads as under: 428. Period of detention undergone

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

10. In *Najakatali* (supra) the accused had been convicted and sentenced to imprisonment in two criminal cases. He was arrested on the same day in both the cases and he remained in jail as an undertrial during the same period in both the cases. The question before the Apex Court in the said case was whether it was permissible for the accused to claim the benefit of set off and discharge under section 428 of Cr.P.C. in both the cases. While answering the said question, the Apex Court held that : "15. The purpose is therefore clear that the convicted person is given the right to reckon the period of his sentence of imprisonment from the date he was in jail as an undertrial prisoner. In other words, 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 is sentenced. We may now decipher the two requisites postulated in Section 428 of the Code. (1) During the stage of investigation, inquiry or trial of a particular case the prisoner should have been in jail at least for a certain period.

(2) He should have been sentenced to a term of imprisonment in that case. 16. If the above two conditions are satisfied then the operative part of the provision comes into play i.e. if the sentence of imprisonment awarded is longer than the period of detention undergone by him during the stages of investigation, inquiry or trial, the convicted person need undergo only the balance period of imprisonment after deducting the earlier period from the total period of imprisonment awarded. The words if any in the section amplifies that if there is no balance period left after such deduction the convict will be entitled to be set free from jail, unless he is required in any other case. In other words, if the convict was in prison, for whatever reason, during the stages of investigation, 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.

17. In the above context it is apposite to point out that very often it happens when an accused is convicted in one case under different counts of offences and sentenced to different terms of imprisonment under each such count, all such sentences are directed to run concurrently. The idea behind it is that the imprisonment to be suffered by him for one count of offence will, in fact and in effect be imprisonment for other count as well.

18. Reading Section 428 of the Code in the above perspective, the words of the same case are not to be understood as suggesting that the set off is allowable

only if the earlier jail life was undergone by him exclusively for the case in which the sentence is imposed. The period during which the accused was in prison subsequent to the inception of a particular case, should be credited towards the period of imprisonment awarded as sentence in that particular case. It is immaterial that the prisoner was undergoing sentence of imprisonment in another case also during the said period. The words of the same case were used to refer to the presentence period of detention undergone by him. Nothing more can be made out of the collocation of those words."

11. The facts of the present case are distinguishable. In the instant case, the Petitioner was in custody in POTA Special Case No. 2 of 2003 from 10.4.2003 till 1.3.2011. The period undergone by him from 10.4.2003 to 1.3.2011 as an undertrial prisoner is admittedly set off in terms of Section 428 of Cr.P.C. The question is about setting off the period from 1.9.2012 till 6.4.2016.

12. It is to be noted that the petitioner was on bail in POTA Special Case No.2 of 2003 from 2.3.2011. In other words, unlike in the case of Najakatali (supra) the Petitioner was not a undertrial prisoner in both the cases. He was already released on bail in POTA Special Case No. 2 of 2003 on 2.3.2011, hence was not a undertrial prisoner in the said case during the period between 1.9.2012 till 6.4.2016. During this period the Petitioner was a undertrial prisoner in MCOC Case No. 10 of 2012. This period is sought to be set off as against the period of imprisonment imposed in POTA Special Case No. 2 of 2003 wherein he was already released on bail. The facts of this case are therefore distinguishable and the principles laid down in Najakatali (supra) are not strictly applicable to the Petitioner's case.

13. At this stage we would like to make a reference to the judgment of the Apex Court in Atul Manubhai Parekh v. Central Bureau of Investigation, (2010) 1 SCC 603 The question involved in the said case was whether a person who has been convicted in several cases and has suffered detention or imprisonment in connection therewith would be entitled for the benefit of set off in a separate case for the period of detention or imprisonment undergone by him in the other cases. The Apex Court, after considering the principles laid down by the Three Judge Bench in Najakatali (supra), and also the scope of Section 428 of Cr.P.C. has held as under: 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 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 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 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 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.

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 pretrial detention in various cases is counted for setoff 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. v. Anne Venkateswara Rao* (1977) 3 SCC 298, in the following terms : "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 v. 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 setoff 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 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 settingoff 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 setoff 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 setoff 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. At this stage, we may also refer to the decision of this Court in Sanjay Shriram Gondchar v. State of Maharashtra, 2012 BCR (Cri) 472. wherein another Division Bench of this Court while dealing with the similar issue has held that the Petitioner is not entitled to get the period of under trial imprisonment suffered in one case for setff against the sentence to be undergone in another case.

15. In the light of above, in our considered view, the period undergone by the Petitioner in MCOC Case No. 10 of 2012 cannot be set off as against the sentence imposed in POTA Case No. 2 of 2003. Hence, both the petitions are dismissed. Rule is discharged.

16. In view of dismissal of the writ petitions, Criminal Application No. 290 of 2016 does not survive and the same is also rejected.