RAJASTHAN HIGH COURT
सत्यमेव जयते

HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

S.B. Criminal misc. Application No. 712/2026
CNR: RJHC011060272026 | URN: CRLMA / 1194U / 2026

Hoshiyar Mohammad Niyan S/o Shri Hatam Sardast, Aged About 28 Years, R/o Iran,(At Present Lodged In Central Jail, Bikaner)

----Petitioner

Versus

State Of Rajasthan, Through Pp

----Respondent

Rajasthan High Court
सत्यमेव जयते
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For Petitioner(s)	:	Mr. Vikas K. Bishnoi
For Respondent(s)	:	Mr. Narendra Gehlot, PP

HON'BLE MR. JUSTICE ASHOK KUMAR JAIN

Order

REPORTABLE

25/11/2026

1. Instant misc. application is preferred by applicant Hoshiyar Mohammad Niyan for clarification/modification regarding set off period in respect of present petitioner, while passing order dated 29.09.2026.

2. The facts of the case indicate that while considering S.B. Criminal Appeal no. 1258 of 2026 on 29.09.2026, we have passed following order:

> *18. All three appellants are sentenced to undergo rigorous imprisonment of five years with fine of ₹10,000/- under Section 14 of Foreigners Act, 1946. Section 14 is attracted when any person remains in area in India for a period exceeding the period for which the visa was issued to him, and commits any act in violation of condition of the valid visa issued to him for his entry and stay in India. The contravention under the Act or any other order made thereunder is punishable under Section 14 of Foreigners Act and the maximum sentence is five years with fine.*
> *19. Having gone through the entire material, the evidence against the petitioners, the*

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allegations that they were using Indian identity, though the charge has not been established and were acquitted from the charge, though it was proved that they are Iranian nationals and staying in India without any legal documents, therefore, considering the totality of facts and circumstances of the case, I am of the considered view that the sentence awarded to the petitioner under Section 14 of the Foreigners Act deserves to be reduced to three years of imprisonment with fine of ₹1,000/- each.

20. Accordingly, the appeal deserves to be allowed in terms of the quantum of sentence.

21. In view of discussion made herein above, the criminal appeal filed by appellants- Hoshiyar Mohammad Niyan, Salman @ Shahram Zakari and Ahmed Jihai Bahle, filed aggrieved from judgment of conviction dated 10.07.2026 in sessions case no. 53/2023 (6/2026) is hereby dismissed and the judgment of conviction is hereby affirmed. The appeal against sentence has been partly allowed and sentence of all these appellants have been modified as under:

(i) Appellants-Hoshiyar Mohammad Niyan, Salman @ Shahram Zakari and Ahmed Jihai Bahle who were convicted under Section 14 of the Foreigners Act, 1946, are sentenced to undergo rigorous imprisonment of three years with fine of ₹ 1,000/-each. In case of default in payment of fine, each of the petitioner(s) will undergo an additional sentence of seven days each.

(ii) Appellant accused Hoshiyar Mohammad Niyan, who was convicted under Section 8/20 of NDPS Act is sentenced to undergo rigorous imprisonment of one month with fine of ₹1,000/- and in case of default of payment of fine, shall undergo sentence of seven days of imprisonment.

(iii) Appellant accused Salman @ Shahram Zakari, who was convicted under Section 8/18 of NDPS Act is sentenced to undergo rigorous imprisonment of six months with fine of rupees ₹ 10,000/- and in default shall undergo imprisonment of two months.

(iv)All substantive sentences shall run concurrently and the period already undergone by the appellant shall be subject to set off and all the appellants are entitled for set off for the period already spent in police and judicial custody.

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> *22. After serving the sentence, the appellants, who are Iranian nationals, are entitled for deportation to their country subject to valid legal document, until the time they will be kept in detention center, waiting for deportation.*

3. Learned counsel for petitioner submitted that during pendency of Sessions Case no. 53/2023(6/2026), the bail application of present petitioner was allowed and on execution of bail and bond he was directed to be released but the prison authority instead of releasing him, on bail had detained the petitioner in detention center (Central Jail, Alwar) and after disposal of appeal, he was directed to serve remaining sentence vide order passed by this Hon'ble Court on 29.09.2026. He also submitted that two other accused Salman @ Shahram Zakari and Ahmed Jihai Bahle have already been released and their documents for deportation/return to their nation Iran has already been prepared and they are about to leave India.
4. Learned Public Prosecutor has admitted that present petitioner remained in detention center from 08.07.2023 till transfer to the Central Jail, Bikaner and no other case was registered against him.
5. A certificate dated 20.11.2026 clearly indicates that the sentence has been modified by order dated 29.09.2026 and the petitioner was sentenced to undergo rigorous imprisonment of three years. As per certificate petitioner has served seven months and eleven days till 20.11.2026.
6. A certificate dated 14.07.2026 issued by the Central Jail, Alwar indicate that the petitioner remained in detention center (Central Jail, Alwar) from 08.07.2023 till date he was

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transferred to Central Jail, Bikaner to undergo modified sentence pursuant to order dated 29.09.2026. The only question before this Court is whether the period of detention undergone by accused on detention (Central Jail, Alwar) to be treated as set off as provided under Section 468 of BNSS (corresponding Section 428 of CrPC).

7. For ready reference we are reproducing Section 468 as under:

> ***"468. Period of detention undergone by accused to be set off against 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, if any, of the term of imprisonment imposed on him:*
>
> *Provided that in cases referred to in section 475, such period of detention shall be set off against the period of fourteen years referred to in that section. "*

8. Section 468 of BNS provides for set off for the period of detention, if any undergone by him during the investigation, inquiry or trial of same case before the date on which conviction shall be set off against the term of imprisonment imposed on him on such conviction.

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9. The word *"detention"* has not been defined under Section 2 of BNSS. The only provision is with regard to arrest which has been provided in Chapter V of the BNSS. Article 22 of the Constitution of India provides protection against arrest and detention in certain cases.

10. The detention in the detention center is not for any preventive detention rather it is in relation to present case. It is an admitted position that except the current case there is no other criminal case against the present petitioner. The petitioner was not detained under any other law related to preventive detention rather he has been detained in detention center as he is a foreign national and does not possess any document to stay in India.

11. These detention centers or the campus are created under the Immigration and Foreigners Laws and meant to restrict movement of foreign nationals, illegally landed in India. The petitioner remained in detention center after being released on bail but during trial of the Sessions case. The detention centre in Rajasthan is managed at the Central Jail, Alwar. It clearly means the petitioner remained in custody but not in judicial custody. The word "custody" has also not been defined in the BNSS.

12. In case of **Atul Manubhai Parekh Vs. Central Bureau of Investigation** reported in **(2010) 1 SCC 603**, Hon'ble Supreme Court has considered Section 428 of Cr.P.C (corresponding provision 468 of BNSS) and observed that Section 428 provides for pre-conviction detention undergone during investigation, inquiry or trial of the same case. It also

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distinguished ordinarily under trial detention other than detention under the Preventive Detention law. The judgment clarifies that physical confinement by itself is not sufficient; rather the legal nature and purpose of the detention must also be examined. Hon'ble Supreme Court has observed 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 Raghbir 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."*

13. Again in case of **The Superintendent of Prison & Anr. Vs. Venkatesan @ Senu @ Srinivasan @ Baskaran**

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@ Radio @ Prakasam, reported in **2025 INSC 541**, while considering a Three-Judge Bench Judgment of Hon'ble Supreme Court in case of **State of Maharashtra Vs. Najakat Alia Mubarak Ali; (2001) 6 SCC 311**; has observed that 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. While considering the dissenting opinion in said case, Hon'ble third judge has observed that the provision is couched in clear and unambiguous language and states 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 one undergone by him during investigation, inquiry or trial in connection with the same case in which he has been convicted. Any other period which is not connected with such case cannot be set to be reckonable for set off.

14. In case of **Venkatesan @ Senu @ Srinivasan @ Baskaran (supra),** Hon'ble Supreme Court after considering the legal position even after considering the judgment in case of **Atul Manubhai Parekh (supra)** has held that in view of majority view in case of **State of Maharashtra Vs. Najakat Alia Mubarak Ali (supra)** has directed for placing the matter for constitution of appropriate bench for proper interpretation of Section 428 of CrPC while noticing reference in case of ***Kiran Vs. State of Karnataka reported in 2025 INSC 1453***, Hon'ble Supreme Court has observed that the reference to larger

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bench was limited to the principle of set off being made applicable insofar as the period of detention with respect to other offences, suffered in the course of separate investigation inquiry and trial.

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15. In case of **Maliyakkal Abdul Azeez v. Assistant Collector, Kerala (2003) 2 SCC 439**, Hon'ble Supreme Court while considering the application of Section 428 of CrPC after appreciating the object behind introduction of Section and observed as under:

> *"Section 428 of the Code was brought on the statute book for the first time in 1973. It was incorporated in the light of the proposal put forward by the Joint Select Committee. It was noticed by the Committee that in many cases the accused persons are kept in prison for a very long period as under-trial prisoners and in some cases the period spent in jail by under- trial prisoners far exceeded the sentence of imprisonment ultimately awarded. It was also noticed by the Committee with concern that large number of prisoners in the over-crowded jails of the country were under- trial prisoners. Provision was introduced to remedy the unsatisfactory state of affairs, by providing for setting off the period of detention as under-trial prisoners against the sentence of imprisonment imposed on the accused. Views of the Committee were expressed in following words:*
>
> > *"The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as undertrial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of the period spent in jail as undertrial prisoner. Indeed, there may even be cases where such a person is acquitted. No doubt, sometimes courts do take into account the period of detention undergone as undertrial prisoner when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case so that in many cases*

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> *the accused person is made to suffer jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also noted that a large number of persons in the overcrowded jails of today are undertrial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. 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. The Committee trusts that the provision contained in the new clause would go a long way to mitigate the evil."*

16. The law on the point is well settled that if there is a pre-conviction detention in same case either during investigation, inquiry or trial, same has to be considered and treated as set off under Section 428 of Cr.P.C (corresponding provision under Section 468 of BNSS).

17. In view of legal position as explained hereinabove, we can certainly say that the detention must be in same case in which conviction order has been passed and set off is available only for pre-conviction period in same case, however, the detention must not be a detention under any preventive detention law.

18. In the instant case the petitioner after execution of bail and bond pursuant to bail order passed by a Co-ordinate bench of this Court was not set at liberty to enjoy his freedom allowed after the bail rather he was transferred from prison to detention centre which is also established at Central Jail at Alwar.

19. The petitioner remained in detention as he was not having a valid document either to travel to his own country

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or remain free in the territory of India. The freedom has been curtailed by the authorities and no other case was registered thus reason behind the detention in the detention centre, is not to set free petitioner in terms of bail. Thus, the period spent in detention centre deserves to be counted as a period of set off as prescribed under Section 468 of BNSS (corresponding Section 428 of Cr.P.C).

20. With aforesaid legal position, the misc. application is disposed of and it is clarified that the petitioner is entitled for set off for the period spent by him in the detention centre (Central Jail, Alwar) during the period as referred hereinabove.

21. Misc. application stands disposed of.

22. Office is directed to send a copy of this order by email to concerned prison.

(ASHOK KUMAR JAIN),J

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