



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 03.01.2018

CORAM:

**THE HONOURABLE DR.JUSTICE S.VIMALA
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI**

H.C.P. (MD) No.1808 of 2017

Venkadachalam

... Petitioner

-vs-

1. The Superintendent of Prison,
Palayamkottai Central Prison,
Tirunelveli District.

2. The Inspector of Police,
Ervadi Police Station,
Tirunelveli District.

... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Habeas Corpus directing the respondents to produce the body or person of the petitioner by name Venkatachalam, Son of Subbiah Konar, aged about 47 years, now lodged and confined at Central Prison, Palayamkottai before this Court for set off the remand period of the petitioner since 12.8.1995 to 13.10.1995 under Section 428 of Criminal Procedure Code and set the detenu at liberty.

For Petitioner

: Mr.R.Alagumani

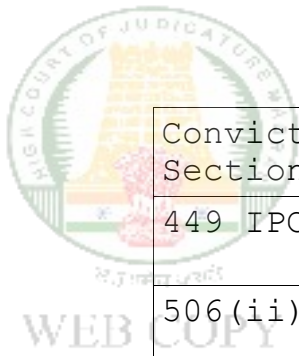
For Respondents

: Mr.C.Mayilvahan Rajendran
Addl. Public Prosecutor

O R D E R

[Order of the Court was made by S.VIMALA, J.]

The petitioner herein is a third accused in S.C.No.114 of 1996 on the file of the III Additional District and Sessions Court, Tirunelveli. By the Judgment, dated 11.01.1999, the accused herein along with two others by name Subbiah and Lakshmanan, were found guilty under Sections 449, 506(ii) and 032 IPC r/w Section 34 of IPC and they were convicted and sentenced as follows:-



Convicted under Sections	Sentence imposed
449 IPC	To undergo rigorous imprisonment for seven years
506(ii) IPC	To undergo simple imprisonment for two years.
302 IPC	To undergo life imprisonment.

The sentences were ordered to run concurrently.

2.The petitioner is in custody as a convict prisoner on and from 11.01.1999. It is the case of the petitioner that even prior to that i.e. from 12.08.1995 to 13.10.1995 that is for a period of 62 days, he was in custody and this period of 62 days incarceration has not been mentioned in the Judgment of the learned Sessions Judge. The petitioner claims that for this period, he is entitled for consideration, as contemplated under Section 428 of Criminal Procedure Code.

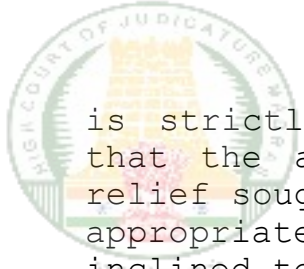
3.The learned counsel for the accused would submit that the period of incarceration during the time of investigation is also to be taken into consideration as per the decision in **ALKOO SADA v. STATE OF BIHAR**, reported in **1998 Cr1.L.J. 4345 (Pat)**, wherein it has been held as under:

"Computation of period - Reckoning of - The period which have already undergone in prison during trial must be set off against the sentence period awarded to accused."

4. The principle of set off, as explained in the decision of the Hon'ble Supreme Court in the case of **State of Maharashtra and another vs. Najakat alia Mubarak Ali**, reported in **2001 (6) SCC 311**, is also relied upon by the learned counsel for the accused, whereby it was held that the period of imprisonment undergone by an accused as an undertrial during investigation, inquiry or trial of a particular case, irrespective of whether it was in connection with that very case or any other case can be set off against the sentence of imprisonment imposed on conviction in that particular case. The decision of this Court dated 21.09.2017 is also relied on, whereunder in H.C.P.(MD)No.1394 of 2017, this Court has ordered that the period of incarceration during the time investigation should be counted while calculating the period of incarceration after conviction.

5.The Additional Public Prosecutor would submit that when the accused is in custody by virtue of a legal Judgment, the Habeas Corpus Petition will not lie and it is not maintainable.

6.As per the submission by the learned Additional Public Prosecutor, the custody of the accused is not an illegal one and therefore, the filing of the petition seeking the relief of Habeas Corpus Petition



is strictly speaking not maintainable. However, the fact remains that the accused is in custody and he is found entitled to the relief sought for. Therefore, instead of driving the accused to file appropriate petition, in the interest of justice, this Court is inclined to treat this petition as a writ of direction.

7. Under such circumstances, even though writ of Habeas Corpus Petition is not maintainable, this Court is inclined to grant the relief. Accordingly, the authorities concerned, who will calculate the period of incarceration for pre-mature relief, is hereby directed to take into account the period 62 days, during which, the accused was in custody during investigation period for calculation to find out the eligible period for consideration for pre-mature release.

8. With the above direction, this Habeas Corpus Petition is disposed of.

Sd/-
Assistant Registrar (CO)

/True Copy/

Sub Assistant Registrar

To:

1. The Superintendent of Prison,
Palayamkottai Central Prison,
Tirunelveli District.
2. The Inspector of Police,
Ervadi Police Station,
Tirunelveli District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.R.ALAGUMANI, ADVOCATE IN SR No. 40168

RJ2/AR
TE/KKR/SAR-3 : 18/01/2018 : 3P/5C

H.C.P. (MD) No.1808 of 2017
03.01.2018